PART I

AN INTRODUCTION TO THE LAW

A useful prelude to a functional understanding of environmental law is an appreciation of the U.S. legal system itself. The materials contained in Chapters 1 through 3 will help you gain that appreciation.

ISBN: 0-558-11029-0

ISBN: 0-558-11029-0

CHAPTER 1

THE AMERICAN LEGAL SYSTEM: THE SOURCE OF ENVIRONMENTAL LAW

SOURCES OF LAW

Particular contexts dictate reactions to environmental threats. Therefore, as a preface to outlining the possible reactions to environmental harm, you must understand our legal system. The first step in this review 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 of these branches 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. In looking for environmental laws, you will find that they may be created by all these branches and, therefore, may be found in all these sources.

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 House and Senate." It is important for you 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 of these groups are highly organized forces that attempt to influence any proposed environmental legislation in Congress. Other groups 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.

ISBN: 0-558-11029-0

TABLE 1-1 Where to Find Environmental Law

Level of Government	*Legislative Laws*	*Executive Orders*	*Common Law/ Judicial Interpretations*	*Administrative Regulations*
Federal	*United States Code* (USC) *United States Code Annotated* (USCA) *United States Statutes at Large*	*Title 3 of the Code of Federal Regulations* *Codification of Presidential Proclamations and Executive Orders*	*United States Reports* (U.S.) *United States Supreme Court Reporter* (S.Ct.) *Federal Reporter* (F., F.2d) *Federal Supplement* (F.Supp.) *Environmental Law Reporter* (ELR) Federal agency reports (titled by agency; e.g., *FCC reports*)	*Code of Federal Regulations* (CFR) *Federal Register*
State	State code or state statutes (e.g., Baldwin's *Ohio Revised Code*)		Regional reporters State reporters	State administrative code or state administrative regulations
Local	Municipal ordinances		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.	Municipality administrative regulations

ISBN: 0-558-1029-0

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 environmentalist community. Established groups, such as the Defenders of Wildlife and the Environmental Defense Fund, 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 protest actions.

Those in the moderate group see themselves as practical and effective. They believe that, especially in recessionary climates, you will be ignored if you do not take economic arguments into account. Those in the more extreme group 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 the 2000 election cycle, environmental groups contributed just over $2 million to candidates.[1] In 1999, spending on lobbying by environmental groups totaled more than $4.5 million.[2] This amount appears huge, but it is small in comparison with the amounts expended by various business sectors. For instance, in 1999, the oil and gas industry spent more than $60 million on its lobbying efforts.[3] Nevertheless, the amount spent by environmental lobbyists alone indicates that the lobbying effort is a significant aspect of the political process.

How much influence do environmental groups have on the federal government? Every other year, *Fortune Magazine* used to rate the most influential lobbyists and publish its "Power 25." The magazine surveyed members of Congress, their staff, and White House officials to determine which groups were most powerful. For 2001, the last year the list was published, the Sierra Club was the only environmental group to make the list, at number 52.[4] In previous years, groups such as the League of Conservation Voters, Natural Resources Defense Council, Environmental Defense Fund, and the National Wildlife Federation made the list.[5]

With the increased use of the Internet, some environmental groups are trying to get ordinary citizens involved in what could be described as "grass roots email lobbying." Groups such as Environmental Defense 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 e-mail your representatives about

ISBN: 0-558-11029-0

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.*

any of various environmental issues. Once you send one message from the site, you will regularly receive e-mail 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 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 more environmental lobbying groups started donating more money to state candidates and ballot issues, reflecting the increasing role in environmental regulation as the federal role is shrinking.

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. The reason our environmental laws are primarily federal is that environmental problems do not recognize state borders and, therefore, necessitate a uniform, nationwide approach.

All laws originate from legislative proposals called bills. A bill is introduced into the House or Senate by a single member or by several members. The bill itself may well have been drafted by a lobbyist. As explained above, most environmental groups have lobbyists who attempt to persuade

ISBN: 0-558-11029-0

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 Council Sierra Club
National Environmental Development Council (a coalition of industries)	Wilderness Society
Utility Air Regulation Group (a coalition of utilities and trade associations)	

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 seeking 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. Table 1-3 lists some of the committees and subcommittees to which environmental legislation may be referred. 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 by 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 House or Senate 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 is going 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. (Most university libraries subscribe to this publication.)

By the time the bill is passed by both the House and the Senate, different versions of the proposed law will usually have been adopted by the two chambers. Therefore, the bill will need to go to a Senate–House Conference Committee, which, after compromise and reconciliation of the two bills, will

ISBN: 0-558-11029-0

TABLE 1-3 Congressional Committees and Subcommittees Influencing Environmental Legislation

Senate	*House*
Agriculture, Nutrition, and Forestry Committee Subcommittee on Forestry, Conservation, and Rural Revitalization	Agriculture Committee Subcommittee on Department Operations
Appropriations Committee Subcommittee on Agriculture, Rural Development, and Related Agencies Subcommittee on Energy and Water Development Subcommittee on Interior Commerce, Science, and Transportation Subcommittee on Oceans and Fisheries	Oversight, Nutrition, and Forestry Committee Subcommittee on Conservation, Credit, Rural Development, and Research
Energy and Natural Resources Committee Subcommittee on Energy Research, Development, Production, and Regulation Subcommittee on Forests and Public Land Management Subcommittee on Water and Power	Appropriations Committee Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Subcommittee on Energy and Water Development Subcommittee on Interior
Environment and Public Works Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety Subcommittee on Fisheries, Wildlife, and Water Subcommittee on Superfund, Waste Control, and Risk Assessment	Energy and Commerce Committee Subcommittee on Energy and Air Quality Subcommittee on Environment and Hazardous Materials Subcommittee on Health
Finance Committee Subcommittee on International Trade	Government Reform Committee Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs
Foreign Relations Committee Subcommittee on International Economic Policy, Export and Trade Promotion	International Relations Committee Resources (formerly known as Interior) Subcommittee on Energy and Mineral Resources Subcommittee on Fisheries Conservation, Wildlife, and Oceans Subcommittee on Forests and Forest Health Subcommittee on Health Subcommittee on National Parks, Recreation, and Public Lands Subcommittee on Water and Power
Health, Education, Labor, and Pensions Committee Subcommittee on Public Health	Science Committee Subcommittee on Research Subcommittee on Energy Subcommittee on Environment
Indian Affairs Committee	Transportation and Infrastructure Committee Subcommittee on Water Resources and Environment Science
Judiciary Committee Subcommittee on Constitution, Federalism, and Property Rights	Small Business Subcommittee on Rural Enterprise, Agriculture, and Technology
	Ways and Means Subcommittee on Trade Subcommittee on Health

ISBN: 0-558-11029-0

produce a single bill to be reported to the full House and Senate for voting. Very 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/scorecardmain.ctm. 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

ISBN: 0-558-11029-0

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 water down the language in the bill and hope that the courts will interpret the law to impose the specifics the drafters had in mind. This strategy can be risky because Congress never knows exactly how the courts will interpret a law. However, in the event that the judiciary interprets the law in a manner not intended by Congress, the legislative body can always amend the law, in effect overruling the judicial interpretation.

When interpreting a law, the judicial branch sees itself as trying to ascertain congressional intent. The court first looks at the "plain language" of the statute; that is, words are given their ordinary meaning. The court then looks at the legislative history to determine the intent of the legislature. This history is found in the hearings held by the subcommittees and committees, as well as any debates on the Senate and House floors. Hearings are published in the *U.S. Congressional News and Administrative Reports* and may be ordered from the Government Printing Office or found in the government document section of most university libraries. Debates about a bill are published in the daily *Congressional Record,* which also may be found in most libraries. When arguing before the court on behalf of their interpretation of the law, lawyers will draw from the *Congressional Record*. Thus, when trying to get a watered-down bill passed, its drafters will often try to insert language into the *Congressional Record* that would be supportive of their preferred interpretation of the law.

Not all judicially created laws are based on statutory or constitutional interpretation. Such laws for which there is no such basis are referred to as common law. Common law emerges from actual court cases. It develops when a problem arises for which there is no applicable statute or constitutional provision. We then have what is known as a case of first impression. Cases of first impression obviously provide judges with the greatest latitude to make law. The judge must create a law to resolve the problem. The rule laid down to resolve this case is called a precedent. If a similar case arises in the future, the courts have a tendency to follow the precedent. Very few environmental laws, however, are created in this manner; most environmental laws are based on statutes.

The rule that the court lays down when interpreting a statute or ascertaining its constitutionality is also known as a precedent. Such precedent will be relied on in the future when other judges are ruling on interpretations of statutes and the Constitution. This process of reliance on precedent is called *stare decisis,* which literally means "let the decision stand."

Not all precedents are equally important. Precedents are binding only on courts on a lower level and in the same system. For example, precedents from the Ohio Supreme Court bind the Ohio appellate and the Ohio trial

ISBN: 0-558-11029-0

courts; they do not bind the Michigan courts. However, an Ohio precedent may be used in a Michigan case as a persuasive device. In other words, lawyers in a Michigan case may point out how Ohio Supreme Court resolved the law and argue that the Ohio court's reasoning was logical and, therefore, should be adopted. Likewise, in the federal system, a Fifth Circuit Court of Appeals decision would not have any precedential effect on another circuit court appeal. However, the precedent would be binding on the district courts within the Fifth Circuit.

Although the process of *stare decisis* seems straightforward, its application actually provides the judge with an opportunity to impose his or her values on the law. Judges have discretion, in part, because no two cases are ever exactly the same. Judges, therefore, will usually be able to distinguish (a legal term) the case at bar from the case that others are arguing should provide the precedent. When distinguishing a case, judges find a difference between the case before them and the precedent-setting case significant enough to allow them to rule differently in the second case. In many cases, one lawyer will be arguing that the case before the court is similar to the potential precedent, and the opposing lawyer will be trying to point out significant differences between the two.

Another factor that makes reliance on precedent less predictable than you might assume is that there are frequently conflicting precedents, especially at the trial and initial appellate levels. Finally, a judge may always simply overrule the clearly applicable precedent. The judge will generally cite some reason for overruling the precedent, such as changes in technology or community values since the precedent was established, but he or she does not need to do so. He or she may simply say that the prior ruling was erroneous and that overturning the precedent is simply a matter of "correcting" the law.

The U.S. Supreme Court and most state supreme courts have what is generally known as the power of judicial review (i.e., the power to determine whether a statute is constitutional). Although not expressly provided for in the Constitution, the Supreme Court established this right in the landmark case of *Marbury v. Madison,* making the Supreme Court the final arbiter of the constitutionality of every law. Judicial review gives the Court ultimate power to restrict the activities of the legislative and executive branches.

Because most environmental law is federal statutory law, and because the U.S. Supreme Court is the final arbiter of the constitutionality of laws, most decisions you will read about in this book will be from the Supreme Court. As you will see, through its case-by-case interpretation of the Constitution and statutes, the Supreme Court has established a line of authoritative cases on various environmental matters.

THE EXECUTIVE BRANCH AS A SOURCE OF LAW

The executive branch includes the president, the president's staff, and the cabinet. The heads of all executive departments (e.g., the secretary of state, the secretary of labor, the secretary of defense, and the secretary of the treasury)

ISBN: 0-558-11029-0

make up the cabinet. The executive office is composed of various bodies, such as the Office of Management and Budget (OMB) and the Office of Personnel Management (OPM). The executive branch is influential in the rule-making processes of both the legislature and the administrative agencies. The president influences Congress by proposing legislation, by publicly supporting or opposing proposed laws, and by using the veto. The OMB's role in influencing administrative regulations through cost–benefit analysis is detailed in Chapter 3. The executive branch exercises direct rule making through its power to make treaties and issue executive orders.

Treaty Making

The president has the power, subject to the advice and consent of the Senate, to make treaties. These treaties become the law of the land based on the supremacy clause of the Constitution (Article XI); they supersede any state law. For instance, when President Reagan entered into the Montreal Protocol, a treaty mandating reductions in the production of chlorofluorocarbons (CFCs) and halons, that treaty became the law of the land, and its provisions superseded any existing federal or state laws inconsistent with the treaty. Thus, the Kentucky legislature could not subsequently pass a law that would allow the unlimited production of those chemicals within the state borders.

Treaty making is one of the few ways that the United States can influence the environmental policies of other nations. Even though treaty making is primarily the job of the executive branch, we cannot overlook the Senate's role. For example, in December 1997, the executive branch negotiated the Kyoto Treaty, aimed at reducing the production of gases believed to cause global warming. As of May 1998, the Kyoto Treaty had been signed by 34 countries. However, in December 2000, the treaty had not even been presented to the Senate for approval, to a large extent, because the executive branch was not confident that it would be able to secure enough votes for ratification. In 2001, a new president took office and declared that the United States no longer intended to be a party to that treaty, and even though there would be no formal "unsigning," the document would not be submitted to Congress during his term as president.

The United States has displayed increased antagonism toward environmental treaties in recent years. The Bush administration's unilateral stance on international issues was loudly demonstrated in 2002 when President Bush announced that he would not attend the Johannesburg World Summit on Sustainable Development. The United States is currently in default of a pledge made at the 1992 Rio Summit to reduce greenhouse gas emission to 1990 levels. Despite this nation's current reluctance to participate in international agreements, environmental problems are increasingly going beyond the scope of national boundaries. Consequently, treaties are becoming more essential in creating effective environmental policy solutions, but the United States is no longer taking a leadership role in this area. Chapter 11 further discusses the use of treaties in the creation of international environmental

ISBN: 0-558-11029-0

law and identifies a number of additional international environmental treaties that the United States has yet to sign and ratify as of 2006.

Executive Orders

Throughout history, the president has made laws by issuing executive orders. For example, President Reagan, by virtue of an executive order, ruled that all executive federal agencies must do a cost–benefit analysis before setting forth a proposed regulation for comment by interested parties. In 1999, President Clinton issued executive order 13123, "Greening the Government through Efficient Energy Management," which promoted energy conservation in federal facilities by mandating a 30 percent reduction in energy use by 2005. The executive order also promotes the use of renewable energy technologies and set the goal of installing 20,000 solar energy systems at federal facilities by 2010. Executive orders made by one president can be superseded by a contrary executive order made by the next president. For example, during his last year in office, President Clinton issued an executive order that made federal contracts difficult to get for companies that violated federal law, including environmental law. However, upon taking office, President George W. Bush reviewed, and rescinded, many of Clinton's executive orders, once again making it easier for federal contracts to be granted to those who are found to repeatedly violate environmental laws. Thus, although an executive order may be a quick way to achieve a goal, the victory may be short lived because the next president may undo the order. (Interested citizens can now easily find executive orders by searching the *Federal Register* Web site http://www.archives.gov/federal_register/executive_orders/executive_orders.html.)

The executive order as a source of law is also used by governors to respond to emergencies and budgeting problems. Often, a governor will call out the National Guard by executive order. In some states, the governor may use these orders to implement particular aspects of the budget process. For example, he or she may order a freeze on hiring in the state university system or order an across-the-board cut in budgets in all state departments when quarterly tax revenues are lower than anticipated.

Signing Statements

During his first 6 years in office, President George W. Bush issued 800 signing statements, which are a way of diluting or changing laws passed by Congress rather than vetoing them. According to his administration, the president has the authority through these statements to "revise, interpret, or disregard legislative measures on national security or constitutional grounds." Although other presidents have used this power on occasion, President Bush has used it more than all other presidents combined. The president's use of this power has been condemed by the American Bar Association, and there has been discussion by some Congresspersons about the need to limit the president's use of this tool, but thus far no legislation has been passed to limit its use.

ISBN: 0-558-11029-0

ADMINISTRATIVE AGENCIES AS A SOURCE OF LAW

Less well known to the general public as a source of law are the federal regulatory agencies, among them the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA). Congress has delegated to these agencies the authority to make rules governing the conduct of business and labor in certain areas. This authority was delegated because it was thought to be in accord with the public interest, convenience, and necessity. There was some concern, however, about the delegation of so much power to bodies with no elected representatives, so their rule-making processes (described in Chapter 3) are especially open to public participation. Proposed rules, as well as the rules finally implemented by an agency, must be published in the *Federal Register,* and the public must be given the opportunity to comment on these proposals.

Because of their substantial impact on the laws of this nation, administrative agencies sometimes represent what many observers have called a fourth branch of government. Because most of the federal environmental laws mandate the creation of many administrative regulations, we describe this fourth branch of government in greater detail in Chapter 3.

CLASSIFICATIONS OF LAW

CASE AND STATUTORY LAW

As noted earlier, laws are classified as either case laws or statutory laws, depending on how they are made. Judges make case laws; legislators make statutory laws. We generally find case law in case reports and statutory laws in codes. Even though this distinction is frequently made, it is important to remember that the two types of law are entwined through the process of statutory interpretation. We really do not know what a statute means until it is interpreted by the courts, whose judges attempt to construe congressional intent. Sometimes, the court's interpretation is not as was intended by Congress. Congress may then respond by amending the statute to make its meaning clear.

PUBLIC AND PRIVATE LAW

Aside from the distinction between statutory laws and case laws, another classification may be helpful in your study of environmental law—the distinction between public law and private law. Public laws are those set up to provide for the public welfare; they are generally applied by administrative agencies. These laws usually regulate classes of people or organizations. Environmental laws are considered public law. Other branches of public law include securities laws, labor laws, and antitrust laws.

On the contrary, private laws generally regulate the conduct between two individual parties. Private laws may sometimes be used in environmental

ISBN: 0-558-11029-0

matters. For example, if a company does not properly test a chemical and, consequently, sells a product that injures a consumer, that consumer may be able to bring a private action for compensation against that company. Such a private action is called a tort or personal injury case. Other private law actions include breach of contract and fraud.

CRIMINAL LAW AND CIVIL LAW

Perhaps an even more important distinction is that between civil and criminal law. This distinction is important because the rules governing each are different, as are the outcomes sought in each case.

Criminal law is made up of federal and state statutes that prohibit wrongs against the state or society in general—conduct such as arson, rape, murder, forgery, robbery, and illegal dumping of hazardous waste. The primary purposes of criminal laws are to punish offenders and to deter them and others from committing similar acts, usually through imprisonment or fines. The prosecutor, the party who initiates a criminal case, is the government, usually represented by a federal district attorney or a state prosecutor. The prosecutor is said to be representing society and the victim against the defendant, who is most likely to be an individual but may also be a corporation.

For purposes of both criminal and civil litigation, a corporation can sue and be sued, just as a person can. Corporations, in the context of litigation, are sometimes referred to as artificial or juristic persons. Of course, a corporation cannot be jailed; if a corporation is found to be guilty, a fine is imposed in lieu of a jail term.

Crimes are generally divided into felonies and misdemeanors, based on the severity of the harm the actions may cause. In most states, the more harmful felonies (e.g., rape, arson, and criminal fraud) are commonly punishable by incarceration in a state penitentiary and/or by fines. The less harmful misdemeanors (e.g., shoplifting) are crimes usually punishable by shorter periods of imprisonment in a county or city jail, as well as by smaller fines. However, what may be a misdemeanor in one state could be a felony in another.

Civil law is usually defined as the body of laws regulating relations between individuals or between individuals and corporations. In a civil matter, the party analogous to the prosecutor is the plaintiff. The plaintiff is usually seeking either compensation or equitable relief (an order for specific performance or an injunction). There is no division in civil law comparable to that between felonies and misdemeanors in the criminal system. In the civil system, laws are divided by subject matter, with the most common civil matters being tort cases and contract cases. Other substantive areas of civil law include domestic relations (family law), bankruptcy, agency law, property, business organizations, sales, secured transactions, and commercial paper.

Most people consider being convicted of a crime much more serious than being found guilty of violating a civil law. There is much greater "societal scorn" heaped on the criminal. Also, only criminal law threatens

ISBN: 0-558-11029-0

the defendant with the loss of liberty. For those reasons, the defendant in a criminal case is given much greater procedural protection. First, although almost anyone can file a civil action against another person, before a criminal defendant can be tried for a serious federal crime, an indictment must be handed down against him or her. Most states also require an indictment by a grand jury when a defendant is charged with a felony. To get an indictment, the prosecutor must convince the grand jury—generally composed of 15–23 citizens—that the prosecution has enough evidence to justify bringing the potential criminal defendant to trial.

When a defendant is charged with a misdemeanor, a local judge or magistrate will fulfill a role comparable to that of a grand jury. This initial step provides a safeguard against political prosecution. It is necessary because even when one is ultimately found not guilty, the act of being tried for a crime still tarnishes the defendant's reputation, so it is desirable to make the trial of an innocent party as rare as possible.

Another difference between criminal law and civil law lies in the burden of proof placed on the party bringing the action. In both cases, the party filing the action must prove his or her case. However, a person filing a civil case must prove that the defendant violated the law by a preponderance of evidence—proving that it is more likely than not that the defendant committed the act. If the defendant is charged with a crime, however, the prosecution must prove the defendant's guilt beyond a reasonable doubt, a much more stringent standard. Some people think of the difference as being the need to prove a civil case by 51 percent and a criminal case by 99.9 percent.

Environmental Criminal Prosecutions

Our primary concern with criminal law lies in the fact that violations of many environmental statutes constitute criminal offenses. As we examine specific environmental statutes, note that the same act often gives rise to both criminal and civil penalties. Criminal penalties are often imposed when an act is considered as willful or knowing violation. The most publicized trend in criminal actions today is the increasing use of imprisonment of corporate violators, including those who violate criminal provisions of environmental laws. Since new federal sentencing guidelines took effect in 1987, incarceration has increased, and plea bargains involving probation and community service have been less frequent. The EPA makes incarceration an important part of the criminal enforcement program. The stigma associated with incarceration serves as a greater deterrent than a fine that can be passed along as the cost of doing business. The prison sentence must be served by the violator. Also, when a company criminally violates an environmental law, an additional punishment may be the suspension of all of its government contracts.

The first major increase in the use of criminal sanctions to enforce environmental laws occurred in 1982, when the Department of Justice (DOJ) created a separate Environmental Crimes Unit in its Land and Natural

ISBN: 0-558-11029-0

Resources Division, and the EPA established an office for Criminal Investigations. Since 1982, there has been a steady increase in the use of criminal sanctions. In 1990, the EPA referred a record 56 cases to the Justice Department for criminal prosecution, surpassing the previous year's high of 50. A record 100 defendants were charged with crimes in 1990, and 55 were convicted and sentenced to 75.3 years.

In 1994, the EPA took another major step toward increasing its ability to compel observance of the law by reorganizing its enforcement and compliance programs and creating the Office of Enforcement and Compliance Assurance, with an emphasis on targeting serious violations.

According to a report issued by the EPA in 2001, in 1997 a record 278 cases were referred to the Justice Department, with 322 defendants charged with environmental crimes. A total of 195.9 years of prison were imposed on the convicted defendants, and criminal fines of $169.3 million were imposed.[6] (See Figure 1-1 for a 13-year statistical comparison of criminal prosecutions.) The large increases in the criminal program are at least partly due to the Pollution Prosecution Act of 1990, which increased the number of criminal investigators to 200. Referrals have not continued to increase under the current Bush Administration, however. According to a 2003 EPA report, in 2001, there were 256 cases referred to the Justice Department (less than those in 1997), although there were 477 defendants charged (over 150 more than those in 1997) for 256 years of prison and $95 million in fines.

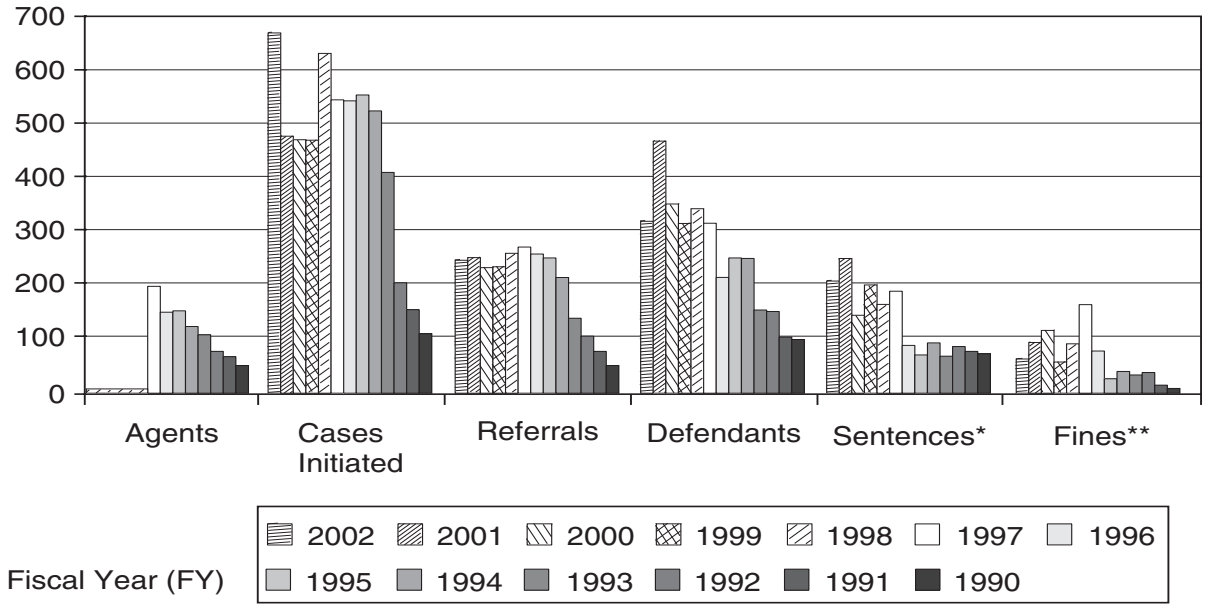
However, in the FY 2005 Annual Report, the Office of Compliance and Enforcement made changes to previously reported data, and also slightly modified the information they provided in their annual report, making it difficult to really make comparisons between enforcement before and after the year 2000. According to the most recent report prepared by the Office of Enforcement and Compliance Assurance, 320 defendants were charged environmental crimes and sentenced to 186 years. Fines and restitution totaled $100,000.[7]

In one of the toughest criminal sentences handed down in an environmental case, a Pennsylvania waste-pit owner, William Fiore, was sentenced to serve 6–12 years in a state prison for deliberately piping 1.2 million gallons of toxic leachate into the Youghiogheny River near Pittsburgh. The largest criminal penalty ever assessed an individual for violating an environmental law was given in 1990 to a trader on Wall Street. He was fined $2 million for filling wetlands without a permit.[8] The biggest criminal fine ever imposed on a corporation was the $22 million Exxon Valdez fine.[9] Similarly, in 1996 when Iroquois Pipeline pled guilty to degrading wetlands and streams while constructing a natural gas pipeline, it was assessed $22 million in fines and penalties.[10] Table 1-4 reveals some of the significant prison sentences, as well as fines, given in recent environmental cases.

Thus, since the early 1990s, the EPA has demonstrated a belief that criminal penalties have an important role in environmental enforcement. This view seems consistent with the public view but not with that of corporate

ISBN: 0-558-11029-0

FIGURE 1-1 Office of Criminal Enforcement 13-Year Statistical Comparison



	Agents	Cases Initiated	Referrals	Defendants	Sentences*	Fines**
FY 1990	51	112	56	100	75.3	5.5
FY 1991	62	150	81	104	80.3	14.1
FY 1992	72	203	107	150	94.6	37.9
FY 1993	110	410	140	161	74.3	29.7
FY 1994	123	525	220	250	99.0	36.8
FY 1995	153	562	256	245	74.0	23.2
FY 1996	151	548	262	221	93.0	76.7
FY 1997	199	551	278	322	195.9	169.3
FY 1998	N/A	636	266	350	173.0	92.8
FY 1999	N/A	475	241	322	208.3	61.6
FY 2000	N/A	477	236	360	146.0	122.0
FY 2001	N/A	482	256	477	256	95
FY 2002	N/A	674***	250	325	215	62

* Years of incarceration
** Millions of dollars
*** FY 2002 Includes 190 counter-terrorism investigation initiatives.

Source: http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy02accomplishment.pdf (September 8, 2003) "EPA Criminal Enforcement: Major Outputs: FY 1998 to FY 2002."

executives. A poll reported in the *Wall Street Journal* on March 11, 1992, revealed that 75 percent of the general public believed that executives should be held personally liable for their environmental crimes, but only 49 percent of 500 executives of large corporations agreed.[11] A majority of the public rated environmental crime as worse than price-fixing and insider trading, whereas 80 percent of corporate executives thought that the latter two were more serious crimes.

ISBN: 0-558-11029-0

TABLE 1-4 Significant Individual Fines, Prison Sentences, and Corporation Fines Handed Down in Environmental Cases

Fines Handed Down to Individuals in Environmental Cases

Name	*Violation*	*Date*	*Fine*
Robert Renes, vice president of Marman USA, Inc.	Forged EPA seals on false certificates of registration for pesticides his company sold abroad	1996	$150,000
Leslie Wallin, president of Eklof Marine Corporation	Charged for an oil spill off Rhode Island coast because tugs and barge were not properly equipped to safely navigate storm waters	1997	$100,000
Guy Hoy III, owner of Hoy's Marine	Discharged sandblasting residue and paint into waterways after repeated warnings to cease the harmful practice	2002	$70,000 in restitution & $27,000 in state fines
Ben Shafsky, assistant operations manager for Doyon Drilling Corporation	Violated the Oil Pollution Act (OPA) by injecting paint thinner, paint, oil, and solvents down the out rim of oil-producing wells on Endicott Island and concealing the illegal disposal of hazardous waste	1998	$25,000
Allan Sinclair, former drilling rig supervisor	Violated the OPA by mistakenly concealing the illegal disposal of hazardous waste and failing to notify federal officials about the crime	1998	$25,000
Gary Seymour	Violated FIFRA by placing pesticide on a deer carcass for the purpose of killing coyotes	2002	$23,100
Benjamin Grafton, employee of Arizona Chemical Company, Inc.	Violated the Clean Water Act (CWA) by tampering with a water-monitoring method	1997	$20,000
Benny Joe Surratt, employee of Arizona Chemical Company, Inc.	Violated CWA by tampering with a water-monitoring method	1997	$20,000

(continued)

ISBN: 0-558-11029-0

TABLE 1-4 *(cont.)*

Fines Handed Down to Individuals in Environmental Cases

Name	*Violation*	*Date*	*Fine*
Ray McCune, president and owner of Reclaim Barrel Supply Company and Allstate Container Company	Illegally stored hazardous waste in two facilities	1996	$20,000
Dana Dulohery, former plant manager at a Louisiana-Pacific Corporation manufacturing company	Violated the Clean Air Act by tampering with air emission control equipment and conspired to falsify emission report data	1998	$15,000

Prison Sentences Handed Down in Environmental Cases

Name	*Violation*	*Date*	*Prison Sentence*
Carl Eugene Hines, owner of H&J Auto and Salvage	Illegally disposed hazardous wastes and charged with other drug, firearms, and witness intimidation crimes	1998	480 months
Daniel Martin, worked at H&J Auto and Salvage	Transported hazardous waste without a manifest, illegally stored hazardous waste, and committed drug crimes	1998	240 months
Allan Elias, owner of Evergreen Resources	Knowingly exposing his employees to cyanide gas without proper safety precautions and lying to the government	2000	204 months
Gary Benkovitz, owner of Bay Drum and Steel	Intentionally dumped toxic waste into Tampa's sewer system and waterways	1999	156 months
Donald R. Budd, owner of Texas Environmental Services	Conspired to commit and committed mail fraud on behalf of Texas Environmental Services, a laboratory he owned, by providing false wastewater and drinking water reports	1997	72 months
Johnnie James Williams, owner and operator of W&R Drum, a drum recycling facility	Illegally stored and disposed of hazardous waste in violation of RCRA in a neighborhood that has environmental justice issues	1997	41 months

ISBN: 0-558-11029-0

TABLE 1-4 *(cont.)*

Prison Sentences Handed Down in Environmental Cases

Name	*Violation*	*Date*	*Prison Sentence*
Raymond Feldman, owner of Ray's Automotive	Unlawfully disposed containers of ignitable, lead-bearing hazardous paint wastes in violation of RCRA and conspired to unlawfully transport and dispose of these drums of waste	1997	37 months
Mark D. Henry, director and treasurer of Bee de Waste Oil	Convicted on two counts of wire fraud, two counts of mail fraud, one count of conspiracy to violate RCRA. Schemed to defraud approximately 75 companies trying to comply with environmental regulations. Accepted 28,000 tons of soil contaminated with hazardous waste, claiming it would be recycled	1996	37 months
Jeffery Jackson, plant manager, and Micheal Peters, environmental manager, at Hunstman Chemical Plant	Both were found guilty of violating regulations under the Clean Air Act for the discharge of dangerous levels of benzene	2002	36 months & a $50,000 fine each
Billy Joe Jones, former operator of wastewater treatment facility	Violated the CWA by knowingly allowing 65,000 gallons of raw sewage into the Ohio River	1997	27 months
Billy Jack Orange, worker at H&J Auto and Salvage	Conspired to illegally transport and store hazardous wastes	1998	27 months
Lee Poole, uncertified pesticide applicator	Illegally applied the restricted use pesticide, methyl parathion, to homes	1998	24 months
James Goldman, vice president of Tin Products	Discharged toxic waste water in violation of the Clean Water Act causing serious harm to aquatic life and the shut down of a water treatment plant	2003	18 months

(continued)

ISBN: 0-558-11029-0

TABLE 1–4 *(cont.)*

Prison Sentences Handed Down in Environmental Cases

Name	*Violation*	*Date*	*Prison Sentence*
Roberto Ramilo	Tampered with samples and falsified information to conceal the fact that his water treatment equipment failed to meet safe drinking water standards	2003	15 months

Recent Criminal Fines Handed Down to Corporations in Environmental Cases

Name	*Violation*	*Date*	*Fine*
Refrigeration USA Corporation	129 felony counts	1997	over $37 million
Summitville Consolidated Mining Company Incorporated	Convicted of 40 counts of violating the CWA by making false statements, failing to report, and making unauthorized discharges into water	1996	$20 million
Royal Caribbean Cruise Lines	Admitted to routinely dumping waste oil and other pollutants, such as hazardous chemicals from photo processing equipment, dry cleaning shops, and printing presses, from its cruise ships; kept dummy logs, lied to coast guard about it, and tried to cover up the incidents	1999	$18 million in two cases
ASARCO Inc.	Violated CWA by illegally discharging industrial wastewater without a permit and violated RCRA by illegally storing, treating, and disposing of certain hazardous wastes	1998	$6.38 million
Hess Oil Virgin Islands Corporation	Illegally transported hazardous waste. Falsely declared that over 1,000 drums containing hazardous waste contained nonhazardous waste	1996	$5.3 million
Eklof Marine Corporation	Charged for a spill off the coast of Rhode Island. Tugs and barges were not properly equipped to safely navigate stormy waters. Spilled 826,000 gallons of home heating oil	1998	$3.5 million federal fine $3.5 million from Rhode Island Superior Court

ISBN: 0-558-11029-0

TABLE 1-4 *(cont.)*

Recent Criminal Fines Handed Down to Corporations in Environmental Cases

Name	*Violation*	*Date*	*Fine*
Tanknology-NDE, International, Inc.	Fined for 10 felony counts of presenting false claims to federal agencies about underground storage tank testing services performed	2002	$1 million criminal fine & $1.29 million in restitution
Masami Cattle Ranch	Charged for violating the Clean water Act after admitting to dumping cattle waste and dead cattle carcasses into local waterways	2002	$1.7 million
Sunoco	Charged for violating the Clean Water Act and damaging natural resources	2005	Settled for $3.6 million

A single act may lead to both criminal penalties and civil liability. For example, if a businessperson willfully violates the Resource Conservation and Recovery Act (RCRA), both the person and the corporation may be subject to criminal penalties in the form of fines. In addition to criminal penalties, civil penalties may be assessed, and parties who were personally injured by the violations may also bring private civil damage suits. Many people, however, believe that the imposition of criminal penalties is more effective in deterring noncompliance.

Enforcement since 1997 has oscillated, with fewer cases initiated and referred in 1999 and 2000, but with large sentences being handed down. The largest prison sentence for an environmental crime was handed down in 1999 and upheld on appeal in 2001. In that case, Allen Elias was sentenced to 17 years in prison for knowingly exposing a worker to hazardous waste. Criminal fines were low in 1999, but they nearly doubled in 2000, although fines in both years remained at the levels set in 1997. Environmental enforcement, however, often varies with the number of people assigned to conduct inspections and enforce environmental laws. Consequently, the year 2003 saw a decrease in environment enforcement as the Bush Administration cut the number of EPA enforcement personnel by more than 12 percent, from 528 to 464, since the President took office in 2001.[12] The year 1999 was a record year for the EPA in terms of civil enforcement, with the imposition of $141 million in civil judicial penalties. The next closest year was 2001 at $101 million in civil penalties and $25 million in administrative penalties. In 2002, only $55.5 million in civil penalties were issued.

In 2001, the EPA ordered General Electric (GE) Company to pay $500 million to remove 150,000 of the 1.3 million pounds of toxic polychlorinated biphenyls (PCBs) it had dumped into the Hudson River over a 30-year

ISBN: 0-558-11029-0

period, which ended with a Congressional ban in 1977. In 1984, PCBs were discovered in the riverbed, placing a 197-mile stretch of the river on the federal Superfund list. After years of debate, GE agreed to dredge 40 miles of the river, removing 2.65 million cubic yards of contaminated sediment, making the dredging operation one of the largest in the nation's history. The dredging is scheduled to begin in 2006 after a 3-year planning period. In addition, GE will pay $28 million in partial reimbursement of the EPA's past and future cost involved in the cleanup.[13]

The improved enforcement record of the early 1990s may be attributed to two factors. First, the administrator of the EPA, William Reilly, was determined to improve enforcement. Second, the EPA's enforcement budget was greatly increased in the early 1990s. It is important to remember, however, that no matter what the enforcement level, we are not necessarily anywhere close to prosecuting most violators of environmental regulations. In January 1996, President Clinton accepted a short-term budget bill that funded the EPA as a whole at 22 percent below the agency's 1995 funding. However, EPA funding started to increase again in 1997. That year the EPA received approximately $6.7 billion compared to the 1996 allocation of $5.7 billion. Funding increased again in 1998, when the budget was $7.36 billion. However, the EPA's budget since 1998 has been relatively stable, at around $7 billion. The proposed budget for the EPA for 2007 was $7.32 billion, a slight decrease from the previous year. Table 1-5 lists the EPA's vacillating overall budget.

TABLE 1-5 Overall EPA Budget

Fiscal Year	*Budget (in billions of dollars)*
1990	5.5
1991	6.1
1992	6.6
1993	6.9
1994	6.6
1995	7.2
1996	5.7
1997	6.7
1998	7.4
1999	7.6
2000	7.8
2001	7.8
2002	8.1
2003	7.6
2004	8.4
2005	8.0
2006	7.6
2007 (requested)	7.3

ISBN: 0-558-11029-0

One problem with looking at these figures, however, is that it is difficult to really know how much of the EPA's budget is actually being focused on what we have traditionally defined as environmental matters, because some of the agency's budget is now being funneled into antiterrorism activities.

An important criminal law case that has helped to make criminal sanctions more of a deterrent than they otherwise might have been is the 1975 U.S. Supreme Court case of *United States v. Park.*[14] That case laid down the rule that a corporate officer can be held criminally liable for failure to correct a regulatory violation, even when that officer directed a lower-level employee to take corrective action. The test for liability in that case was that criminal liability would be imposed when a person, by virtue of his or her position in a corporation, had the responsibility and authority either to prevent the violation or to promptly correct it and failed to do so. The defendant in such a case cannot avoid liability by claiming ignorance. If the person delegates responsibility, he or she is legally accountable for the actions or inaction of delegates.

Even when a statute requires knowledge to constitute a criminal violation, the concept of knowledge may be interpreted very broadly, with presumed knowledge considered adequate under some statutes. For example, the RCRA impose criminal liability on any person who knowingly transmits hazardous waste to a facility not permitted for that purpose. In the 1986 case of *United States v. Hayes International Corporation,*[15] a defendant had arranged to have a private hauler dispose of waste the company had generated and was led to believe that the waste was being recycled. Under RCRA, if waste is being recycled, the hauler does not need a permit. In this case, the hauler was not recycling the waste and did not have the appropriate permit. Despite the company's lack of actual knowledge that the hauler did not have a permit, both the company and its contracting officer were found guilty of violating the act. The Eleventh Circuit Court of Appeals upheld the convictions. The court created a presumption of knowledge on the part of those handling hazardous waste and said that such presumed knowledge could be used to prove circumstantially a knowing violation of the act.

Responding to Increased Enforcement

Firms are increasingly recognizing the potential for criminal liabilities being imposed on them. Because it is now clear that ignorance of neither the facts nor the law is an excuse, corporations are encouraging employees to take steps to protect themselves and their companies from liability. These steps should have been taken anyway, but often only the threat of prosecution motivates people.

First, employees in responsible positions are being encouraged to know the law. Second, when an official delegates a task mandated by an environmental regulation, he or she is advised to accompany that delegation with strict supervision to be sure that compliance occurs. In prudent corporations, all environmental policies of the company are put in writing, as are all communications with regulatory agencies, especially when an agency is waiving a regulatory requirement. Individuals who disagree with directives

ISBN: 0-558-11029-0

with respect to environmental policies are encouraged to make their objections known in writing to top corporate officials, who are encouraged to investigate such claims quickly. Prudent companies are also more carefully investigating firms that they hire to do tasks that must be done in compliance with federal environmental regulations.

Finally, firms are increasingly making use of environmental auditing, which is defined by the EPA as "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."[16] The environmental audit is seen by its advocates as a means to verify environmental compliance, in addition to being an invaluable tool for assisting management in cutting costs, assessing risk, planning for growth, increasing environmental awareness in the firm, enhancing the firm's image with the public, and reducing fines and enforcement actions. Table 1-6 sets forth the elements the agency believes are necessary for a successful auditing program.

One of the stronger advocates of environmental audits is the EPA. To encourage the use of such audits and "self-policing" on the part of corporations, the administrator of the EPA issued the agency's "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," commonly called the Audit Policy.[17] Under this policy, issued in 1995 and revised in 2000, if a firm can demonstrate that it discovered a violation and moved to correct it, the firm will not be subject to the gravity portion of any civil penalty. Under the EPA's Policy on Civil Penalties, the gravity portion is an amount of money added to the fine that ensures that the violator derives no economic benefit from the violation; it "ensure[s] that the violator is economically worse off than if it had obeyed the law."[18] To qualify for this penalty reduction, the violator must meet nine conditions.

First, the corporation must have discovered the violation either through a voluntary environmental audit or as a result of due diligence in the corporation's compliance monitoring systems, which the EPA defines as

TABLE 1-6 Elements of a Successful Environmental Auditing Program

- Explicit senior management support for environmental auditing and the willingness to follow up on the findings
- An environmental auditing function independent of audited activities
- Adequate auditor training and staffing
- Explicit audit program, objectives, scope, resources, and frequency
- A process that collects, analyzes, interprets, and documents information sufficient to achieve audit objectives
- A process that includes specific procedures to promptly prepare candid, clear, and appropriate written reports on audit findings, corrective actions, and schedules for implementation
- A process that includes quality assurance procedures to verify the accuracy and thoroughness of such audits

ISBN: 0-558-11029-0

systematic efforts to prevent, detect, and correct violations. Voluntary audits and due diligence do not include monitoring, sampling, or auditing that are required by a law, regulation, permit, judicial or administrative order, or consent agreement. Second, the corporation must voluntarily report the violation, fully and in writing, to federal, state, and local officials within 10 days of its discovery, unless it is an unusually complex violation. Third, the corporation must promptly disclose the violation. Prompt disclosure is defined as notification to the EPA within 21 days after a violation is discovered. For multiple facilities, the length of time for disclosure may be increased. Fourth, the corporation must discover the violation independently, before monitoring by the EPA, or another government agency would have found the violation. Fifth, the corporation must remedy the violation within 60 days of its discovery. Sixth, the corporation must work to prevent recurring violations. Seventh, the corporation cannot have had the same or a similar violation within the past 3 years. Eighth, the violation must not have resulted in serious harm to the environment or imminent and substantial danger to public health or the environment. Finally, the corporation must cooperate with the EPA and not hide or destroy any evidence.

If a firm meets all of the above conditions, the EPA will waive the gravity portion of the firm's civil penalty. If the firm meets all the conditions except the first, systematic discovery of violations, the firm will be eligible for a 75 percent reduction of the gravity portion. As well, the EPA may recommend against criminal prosecution for a firm that meets the nine criteria. A firm that receives a reduction based on this policy may be required to describe its due diligence practices publicly. Also, if a company must enter into a written agreement, administrative consent order, or judicial consent order resulting from the violation, those documents must be made public.

A firm that is serious about conducting an environmental audit can receive help from the EPA through its Web site. Protocols for audits to discover violations of the major environmental laws can be found at http://cfpub.epa.gov/compliance/resources/policies/incentives/auditing/, the EPA page for Compliance Incentives and Auditing.

At least 185 companies have disclosed violations at more than 457 facilities under the agency's audit policy on civil penalties. The EPA plans to study the effects of the policy and make public its review. Initial response from the environmental community to the final policy was generally favorable; response from corporate counsel was more mixed. A lawyer for the Corporate Environment Enforcement Council commended the EPA for changes it had made from an interim policy that he thought would "offer responsible companies a reliable break in penalties without letting scofflaws off the hook,"[19] but he still had some major reservations. His main criticism, shared by many industry representatives, was that the policy did not provide an absolute privilege for environmental audits, a privilege that would have kept any agency or private party from being able to obtain the audit and use it against the corporation in a legal action.

ISBN: 0-558-11029-0

In fact, a major issue debated during the 1990s was whether these audits should be considered privileged information. Those in favor of an audit privilege argue that it is in everyone's best interest for firms to do environmental audits. After all, if firms do not know that they are in violation, how are they going to correct the violation? Yet if the management of a company knows that a violation uncovered during an audit may be used against the firm, the firm would be discouraged from doing the audit in the first place.

Initially, corporations turned to the courts to create an environmental audit privilege. Such efforts, however, have met with very little success, so corporations are now turning to both the state and the federal legislatures. By January 1998, legislation establishing an environmental audit privilege had been passed in 24 states. The bills vary somewhat, but Virginia's is an example of the type of audit privilege legislation that is supported by corporate representatives.

The Virginia statute provides that information collected, generated, and developed during the course of an environmental audit is privileged from disclosure under ordinary circumstances.[20] The information is protected regardless of whether the audit is prepared by corporate employees or an independent contractor hired by the owner/operator of the firm, and no one who helps in the preparation of the audit document can be compelled to testify about its contents or preparation.[21]

There are four exceptional circumstances under which the privilege will not be upheld:

1. When information is uncovered that demonstrates a clear, imminent, and substantial danger to public health or the environment
2. When information contained in the audit is already required to be disclosed by law
3. When information contained in the audit was prepared independently of the voluntary environmental audit
4. When the audit documents, or portions thereof, were compiled in bad faith[22]

If none of the foregoing circumstances exist, all the firm must do to assert the privilege is to prove that the audit (1) was conducted by or at the behest of the facility owner or operator, (2) was voluntary, and (3) was designed to identify areas of environmental noncompliance with the law or identify opportunities for improved efficiency or pollution prevention.[23]

Of course, state audit privileges do not apply to federal enforcement action brought in federal court or citizens' suits under federal statutes. They apply only to state actions brought in state courts. Industry representatives are, therefore, also lobbying to gain passage of a federal environmental audit privilege. A typical audit protection law introduced into, but not passed by, Congress was a 1995 House bill that would have protected companies from any administrative, civil, or criminal penalties for a violation that was discovered during an audit if the violation had been voluntarily

ISBN: 0-558-11029-0

disclosed to the EPA or another regulatory body.[24] This privilege could have been used only by firms that had not committed serious environmental violations during the 3 years before the audit.[25] In 2000, the EPA repeated its firm opposition to audit privileges in its revised Audit Policy.

CONSTITUTIONAL PRINCIPLES UNDERLYING THE AMERICAN LEGAL SYSTEM

No discussion of the American legal system would be complete without a discussion of the constitutional principles on which this system is based. The Constitution, as originally drafted, was a conservative document. Most of those who attended the Constitutional Convention were wealthy men, who understandably desired to protect their own interests. Because most of the drafters owned property, protection of private property was a major objective. Protection of private property interests, in turn, means the protection of business owners' interests.

The framers of the Constitution were also strongly influenced by philosopher John Locke, who saw government as a social compact by which people, living in a state of nature, agreed to form a government that would make rules by which all would abide. To prevent this government from being oppressive, individuals, according to Locke, had to retain certain rights. These inalienable rights included the right to the pursuit of life, liberty, and property. The U.S. Constitution was perceived as the embodiment of our social compact.

Although it is generally true that business and private property interests have consequently been well served by many of the provisions of the Constitution, there have been exceptions. As the political makeup of justices on the U.S. Supreme Court changes, interpretation of the Constitution also changes. The concepts and constitutional provisions discussed briefly in the following sections focus on those that have had the greatest impact on the scope of congressional authority to regulate private property interests and on laws designed to protect the environment.

FEDERALISM

Underlying the system of government established by the Constitution is the principle of federalism, which means that the authority to govern is divided between two sovereigns, or supreme lawmakers. In the United States, these two sovereigns are the state and federal governments. One characteristic of federalism is its allocation of the power to control local matters to the local governments. This characteristic is embodied in the Constitution. Under the Constitution, all powers not given exclusively to the federal government or taken from the states are reserved to the states. The federal government has only those powers granted to it in the Constitution. Therefore, whenever

ISBN: 0-558-11029-0

federal legislation affecting the environment is passed, the question of the source of authority for that regulation always arises. As will be revealed shortly, the commerce clause is the predominant source of authority for the federal regulation of business and, thus, the source of authority for most environmental legislation.

In some areas, the state and federal governments have concurrent authority; that is, both governments have the power to regulate the matter in question. This situation arises when authority to regulate in an area has been expressly, but not exclusively, given to the federal government by the Constitution. In such cases, the states may regulate in the area as long as the state regulation does not conflict with any federal regulation of the same subject matter. A conflict arises when a regulated party cannot comply with both the state and the federal laws at the same time. When the state law is more restrictive, and so compliance with the state law automatically constitutes compliance with the federal law, the state law may still be valid. For example, as discussed in subsequent chapters, in many areas of environmental regulation, states may impose much more stringent pollution-control standards than those imposed by federal law. However, states cannot pass less restrictive laws.

The outcome of direct conflicts between state and federal laws is dictated by the supremacy clause, found in Article VI of the Constitution. This clause provides that the Constitution, laws, and treaties of the United States constitute the supreme law of the land, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." This principle is known as the principle of federal supremacy: Any state or local law that directly conflicts with the federal Constitution, laws, or treaties is void. Especially important for environmental law is the inclusion of rules established by federal administrative agencies as federal law.

FEDERAL PREEMPTION

The supremacy clause is also the basis for the doctrine of federal preemption. This doctrine is used to strike down a state law that does not directly conflict with a federal law but attempts to regulate an area in which federal legislation is so pervasive that it is evident that Congress wanted only federal regulation in that general area. It is often said in these cases that federal law "preempts the field."

Cases of federal preemption are especially likely to arise in matters pertaining to interstate commerce, in which a local regulation imposes a substantial burden on the flow of interstate commerce through a particular state. This situation is discussed in greater detail in the next section. The law of federal preemption is one in which there are no broad principles to be applied; the court simply looks at each individual case to determine whether Congress intended to preempt the subject matter in question from state regulation.

ISBN: 0-558-11029-0

THE COMMERCE CLAUSE

The primary powers of Congress are listed in Article I of the Constitution. Before proceeding, it is important to recognize that Congress has only limited legislative power. Congress possesses only that legislative power granted to it by the Constitution. Thus, all acts of Congress not specifically authorized by the Constitution or necessary to accomplish an authorized end are invalid.

Commerce refers to trade or the exchange of goods or services. The commerce clause provides the authority for Congress to pass most of the federal environmental regulations. This clause empowers the legislature to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Depending on the ideological makeup of the Supreme Court, of course, interpretations of the specific boundaries of this clause vary.

Throughout history, interpretation of the commerce clause has varied greatly. Today the commerce clause is broadly interpreted. Any activity, even if purely intrastate, can be regulated by the federal government if it substantially affects interstate commerce. The effect may be direct or indirect. Thus, the federal government can regulate the price of milk that is both processed and sold in the same state. Intrastate milk competes with interstate milk; thus, the price of intrastate milk has an impact on the price of the interstate milk, thereby affecting interstate commerce.

Although many would argue that this broad interpretation of the federal government's ability to regulate Congress is so well established as to be unassailable, others still challenge some federal regulations on the grounds that such regulation is an attempt to affect private matters rather than interstate commerce. An example of such a challenge in the environmental arena is provided by the case of *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*[26] The *Hodel* case arose after Congress passed a statute establishing a number of requirements for strip mining, the most controversial being a provision that any land used for strip mining be returned to approximately its original state. The mining association argued that the principal purpose of the act was to regulate the use of private land, a matter that falls within the state's police power; thus, the act was not regulating interstate commerce.

In setting forth its rule, the Supreme Court reiterated its broad interpretation of the commerce clause with respect to environmental matters, saying,

> The court must defer to a congressional finding that a regulated activity affects interstate commerce if there is any rational basis for such a finding . . . even activity that is purely intrastate in character may be regulated by Congress where the activity, combined with like conduct by others in similar situations, affects commerce among the States or within foreign nations.

ISBN: 0-558-11029-0

In the *Hodel* case, the Court applied this test to the facts and found that Congress had a rational basis for determining that strip mining affects interstate commerce because Congress had relied heavily on the impact of mining on water pollution. The Court pointed out the need for national standards in light of the difficulties states had encountered when attempting to regulate the problem. The Court also stated that characterization of a regulated activity as local was irrelevant if the purpose is to protect interstate commerce from adverse effects.

Until recently, most environmental regulation by the federal government, like the foregoing, has been presumed to be constitutional. In determining whether Congress has the authority to enact legislation under the commerce clause, the Supreme Court asks whether there is any rational basis for Congress to find that the activity to be regulated affects interstate commerce. If so, the Court asks whether there is any reasonable connection between the ends asserted and the regulatory scheme selected to achieve those ends. If both questions can be answered affirmatively, the legislation stands.

The 1995 case of *United States v. Lopez,*[27] however, marked the beginning of significant change in the Supreme Court's interpretation of the Commerce Clause, a change that some fear may lead to the high court's ultimately striking down some longstanding federal statutes that protect the environment. These fears have increased since the most recent appointment to the Supreme Court of Chief Justice Roberts, who has a reputation for favoring a more narrow interpretation of Congressional power under the Commerce Clause.

In the *Lopez* case, the Court ruled that Congress had exceeded its Commerce Clause authority when it passed the Gun-Free School Zone Act, a law banning the possession of guns within 1,000 feet of any school. In its ruling, the Court said that Congress could not regulate in an area that had "nothing to do with commerce, or any sort of economic enterprise."[28] The court also noted that the regulation in question must have a *significant* impact on interstate commerce.

In the 2000 case of *Brzonkala v. Morrison,*[29] the court continued its movement toward restricting Congressional authority under the Commerce Clause by striking down the Federal Violence Against Women Act, although Congress had compiled a significant amount of data illustrating the harmful effects of violence against women on the economy. As the dissent in this case noted, "it is clear that some congressional conclusions about obviously substantial, cumulative effects on commerce are being assigned lesser values than the once-stable doctrine would assign them. These devaluations are accomplished not by any express repudiation of the substantial effects test or its application through the aggregation of individual conduct, but by supplanting rational basis scrutiny with a new criterion of review."[30]

The new, more limited view of federal authority under the Commerce first affected environmental protection in the so-called *Migratory Bird Rule* case,[31] in which the high court restricted the ability of the Army Corps of Engineers (COE) to regulate wetlands that had no connection to interstate

ISBN: 0-558-11029-0

waterways but were used as resting grounds for migratory birds. Before this case, these wetlands were seen as falling under the Clean Water Act (CWA) because of the impact on tourism of the migrating birds stopping at these wetlands. Although this activity had been significant enough to justify regulating these wetlands for decades, the justices sitting on the high court in 2000 chose to overturn years of protection for those wetlands. This case is discussed in greater detail in Chapter 10.

Since the *Migratory Birds* decision, two new justices were named to the U.S. Supreme Court, both of whom seem to have a more restrictive view of Congressional authority. In the 2006 case of *Rapanos v. United States,*[32] discussed in Chapter 10, the high court further restricted the federal government's ability to regulate wetlands. What is perhaps more troubling to some environmentalists is not just this case but the fact that one of the new justices, Chief Justice Roberts, when he was a court of appeals justice, voted to hear a case questioned the constitutionality of the Endangered Species Act.[33] Thus, some environmentalists fear that the high court may no longer be willing to uphold as constitutional a number of environmental laws that have been in existence for decades.

The Restrictive Effect of the Commerce Clause

In addition to being seen as a source of power for the federal government, the commerce clause is also interpreted as an implicit restriction on the states' authority to regulate matters affecting interstate commerce. After all, under the doctrine of federal preemption, if the federal government is supposed to regulate matters affecting interstate commerce, then the states should not regulate these matters. Thus, it follows that states may not regulate interstate commerce.

This restriction has a history of changing interpretations so complex as to be beyond the scope of this book. Instead, we will focus on how the clause is being interpreted today. In brief, it is a violation of the commerce clause for a state to pass a law that on its face discriminates against interstate commerce. If, however, the legislation involves the state's engaging in a proprietary action (an action whereby the state is not functioning as a government but is acting more in the role of a business), the legislation will be upheld. If a statute does not appear on its face to be discriminatory but has discriminatory effects on interstate commerce, a test is applied, balancing the impact of the state's regulation on interstate commerce with the state's justification.

The issue of whether a state regulation is a violation of the commerce clause arises frequently in disputes surrounding the regulation of waste. States are searching for ways to restrict the importation of out-of-state waste without violating the commerce clause and are generally not succeeding. The earliest such case that went to the U.S. Supreme Court was *City of Philadelphia v. New Jersey.*[34] In that 1978 case, a New Jersey statute had prohibited the importation of solid or liquid waste generated outside the state to be buried in a landfill in the state. The Court said that the state was

ISBN: 0-558-11029-0

attempting to slow or stop the flow of commerce for protectionist reasons, an action that is clearly in violation of the commerce clause; therefore, the state law was unconstitutional and must be struck down.

Other states attempted to learn from New Jersey's experience. Ohio's legislature recognized that a statute discriminatory on its face could still be upheld if (1) the law has a legitimate purpose, (2) the statute serves that purpose, and (3) there is no nondiscriminatory alternative that would serve the same purpose. The legislature tried to pass a law that would meet that exception. The Ohio statute imposed higher taxes on out-of-state waste. Ohio had three justifications: (1) the sheer volume of waste flowing into the state, (2) the higher costs of out-of-state waste inspection, and (3) the increased threat of hazardous material entering Ohio and the consequent difficulty of policing its transportation. In striking down the law, the lower court said that protecting the environment was no justification unless something other than the source was the reason for the different treatment. The Court found the latter two justifications to be unsupported. The case was appealed in 1991, and the decision was upheld in 1992.

Michigan also tried to circumvent the restrictive impact of the commerce clause. Its law, however, fared much better than Ohio's in the lower court. Michigan's Solid Waste Management Act gave each Michigan county the right to accept or reject waste from any outside source. Because the waste was classified by county and, thus, inter- and intrastate waste were treated the same way, the lower court found no problem with the law. However, the U.S. Supreme Court did not agree.

Michigan's law, along with an Alabama law that imposed a $72-per-ton tax on out-of-state toxic waste shipped to Emelle, Alabama, commercial site, was struck down by the Supreme Court in the summer of 1992. The Court set forth in the Michigan case that states could not adopt "protectionist" measures to stop waste being generated in other states from being shipped to their dump sites. Even legitimate goals such as protecting health and the environment could not be accomplished by economic protectionism.

In the 8–1 ruling in *Chemical Waste Management, Inc. v. Hunt,* the High Court stated that Alabama could impose a special fee on the disposal of all hazardous material, not just out-of-state material, if indeed its goal was to reduce the volume of waste entering the Emelle facility. For the law to stand, the Court said that Alabama would have needed to show some distinction between hazardous waste generated inside and that generated outside the state. In the 7–2 Michigan decision, the Court likewise said that its ruling would have been different if the imported waste raised health or other concerns not presented by in-state waste. Chief Justice Rehnquist filed dissenting opinions in both cases and was joined by Justice Blackmun in his Michigan dissent. In the Alabama case, Rehnquist wrote that a state ought to be able to "take actions legitimately directed at the preservation of the state's natural resources, even if those actions incidentally work to disadvantage some out-of-state waste generators."[35]

ISBN: 0-558-11029-0

Although most states are struggling to find a way to draft a constitutional law allowing them to keep hazardous waste out of their state, Rhode Island is trying do just the opposite: it is trying to keep commercial trash inside the state. Rhode Island's Central Landfill cannot, by law, charge the state's municipalities more than $14 a ton to receive residential trash. Because that amount does not cover disposal costs, the landfill charges up to $59 per ton for commercial trash.

The high prices made Central Landfill noncompetitive with dumps in neighboring states, which was a boon to local trucking firms, because they were now hauling tons of wastes to landfills in neighboring states. Consequently, the state's Solid Waste Management Corporation decreed that all the state's commercial trash had to go to a state-licensed disposal site—Central Landfill. A trucking firm, claiming the regulation was ruining its business, sued the state on the ground that the regulation violated the commerce clause. The district court judge agreed and issued an injunction in the summer of 1991.

Because trash disposal is such a major problem, and cases seeming to support a position that state restrictions on out-of-state waste disposal violate the commerce clause, Congress is coming under increasing pressure to pass some form of legislation that would override at least part of the Supreme Court's recent ruling and allow states to restrict the importation of waste. Indeed, Justice O'Connor specifically recognized that if Congress enacted legislation allowing for flow-control ordinances, the Court would be bound by the legislation.[36] Measures that would allow states to restrict interstate transport of nonhazardous waste have been introduced in both the House and the Senate but, thus far, have not been passed.

Like many cases before it, in the case of *Huish Detergents, Inc. v. Warren County, KY,*[37] the county ordinance requiring all waste processing to take place in a county facility was found to be discriminatory against interstate flow of waste and, thus, a violation of the commerce clause. Because the county was mandating that all trash collection be done by one private firm and that the garbage be deposited in state, Huish was unable to contract a firm to take their waste out of state. This action, the Court ruled, is a violation of the Commerce Clause.

However, in *Houlton Citizen's Coalition v. Town of Houlton,*[38] the Court upheld a plan limiting waste disposal to within the town borders because of a flow-control ordinance and bidding, thus avoiding a per se violation of the Commerce Clause. The bidding process was deemed completive, and the burden imposed on interstate commerce was not excessive in relation to the local benefits. It is the flow-control ordinance, however, that did the most to escape violation of the Commerce Clause.

THE FOURTH AMENDMENT

The Fourth Amendment protects the right of individuals to be secure in their persons, their homes, and their personal property. It prohibits the government

ISBN: 0-558-11029-0

from conducting unreasonable searches of individuals and seizing their property to use as evidence against them. If such an unreasonable search and seizure occurs, the evidence obtained cannot be used in a trial.

An unreasonable search and seizure is one conducted without government officials having first obtained a warrant from the court. The warrant must specify the items sought as well as the persons and places to be searched. Government officials are able to obtain such a warrant only when they can show probable cause to believe that the search will turn up the specified evidence of criminal activity. Supreme Court decisions, however, have recently narrowed the protections of the Fourth Amendment by providing for circumstances in which no search warrant is needed. Improvements in technology have also caused problems in the application of the Fourth Amendment because it is now simpler to eavesdrop on people and to engage in other covert activities.

The Fourth Amendment applies to corporations as well as to individuals. Fourth Amendment issues often arise when legislation authorizes warrantless searches by administrative agencies. For example, the EPA would prefer pollution-control regulations that allow them to conduct a surprise search when a firm is suspected of violating pollution limits. To the agency's dismay, the courts generally will not allow such warrantless searches. However, the standards for securing an administrative search warrant in such cases are much less stringent than those in a criminal action. In general, an administrative warrant requires that the searcher has a neutral enforcement plan that assures the court that selective enforcement will not occur.

THE FIFTH AND FOURTEENTH AMENDMENTS

The Due Process Clause

The Fifth and Fourteenth Amendments are often spoken together because both contain what is known as the due process clause—the provision that no person shall be deprived of his or her right to life, liberty, or property without due process of law. The Fifth Amendment is a prohibition on the federal government; the Fourteenth Amendment restricts states. There are two types of due process: procedural and substantive. Originally, due process was interpreted only procedurally. It required that a person whose life, liberty, or property would be taken by a criminal conviction be given a fair trial; that is, he or she was entitled to notice the alleged crime and the opportunity to confront his or her accusers before an impartial tribunal. The application of procedural due process soon spread beyond criminal matters, especially after passage of the Fourteenth Amendment.

Today, the due process clause has been applied to such diverse situations as the termination of welfare benefits, the discharge of a public employee from his or her job, and the suspension of a student from school. It should be noted, however, that the range of situations to which the due process clause applies is not being continually increased. In fact, after a

ISBN: 0-558-11029-0

broad expansion of the circumstances to which this clause applied, the courts began restricting the application of this clause during the 1970s, and they are continuing to do so. The courts restrict the clause's application by narrowing the interpretation of property and liberty. This narrowed interpretation is especially common in interpreting the due process clause as it applies to state governments under the Fourteenth Amendment.

The question of what safeguards are required by procedural due process is not easily answered. The procedures that the government must follow when there may be a taking of an individual's life, liberty, or property vary according to the nature of the taking. In general, as the magnitude of the potential deprivation increases, the extent of the procedures required also increases. For example, a student being suspended from public school for 3 days would be entitled to fewer procedural guarantees than one being expelled for a year.

The concept of substantive due process refers to the basic fairness of laws that may deprive an individual of his or her liberty or property. In other words, when a law that will restrict individuals' liberty or use of their property is passed, the government must have a proper purpose for the restriction; otherwise, it violates substantive due process. What constitutes a proper governmental purpose is, of course, subject to interpretation by the courts. Originally, proper purpose was limited to items within the traditional scope of police power (i.e., regulations that benefit the public health, safety, and welfare). The term welfare has been broadly interpreted; in some cases, it even includes such things as esthetics.

In applying the concept of substantive due process, we usually say that the government cannot act arbitrarily and capriciously. When substantive due process is analyzed, one asks whether the deprivation by the government involves the deprivation of a fundamental right. If so, the government cannot act unless it has a compelling reason to do so, and there is no less restrictive means for satisfying this compelling interest. A violation has occurred if there is an alternative way to achieve the same end that causes less deprivation. If the deprivation is for other than a fundamental right, the government action must be rationally related to a legitimate state end. In other words, the state end was an exercise of police power, and the means will logically lead to the state's specified end.

The Takings Clause

The Fifth Amendment further provides that if the government takes private property for public use, it must pay the owner just compensation. The language of the Fifth Amendment states, "nor shall private property be taken for public use without just compensation." Although the Fourteenth Amendment does not contain such a clause, the Supreme Court has interpreted the Fourteenth as incorporating this clause through its due process clause. Unlike the privilege against self-incrimination, which does not apply to corporations, both the due process clause and the provision for just

ISBN: 0-558-11029-0

compensation are applicable to corporations. The latter provision is of great importance in numerous environmental cases, where representatives of the corporation frequently argue that the environmental regulations are so onerous as to constitute a taking of their land, for which compensation should be awarded.

In cases in which a party argues that regulations are so restrictive of private use as to constitute a taking of his or her private property for public use, the government will argue that the regulations are simply an exercise of its "police power," its power to protect the welfare of the citizens. In general, the courts look at the diminution of the value of the property caused by the regulation and require compensation only when there has been a drastic reduction in the economic value of the property. In 1987, a 5–4 majority of the U.S. Supreme Court ruled that a state could impose restrictions on land use without having to compensate the owner for the land's reduced commercial value when the state "intends to prevent serious public harm."[39]

This issue of when a regulation constitutes a taking has been increasingly debated during the 1990s as both the state and the federal governments passed more regulations protecting wetlands that were often held as private property. The most significant case on this issue was argued before the U.S. Supreme Court on March 2, 1992. *Lucas v. South Carolina Coastal Council*[40] involved a dispute between a beachfront property owner and the state of South Carolina over a law prohibiting permanent construction on any eroding beach. Lucas had bought two beachfront lots for $975,000 in 1986, before the passage of the law in question. Lucas, who had not yet begun construction on his property when the law was passed, lost the right to use his property for condominiums, so he challenged the law as constituting a taking without just compensation. The state court agreed with Lucas that the regulation denied him full value of his property and thus constituted a taking, so it awarded him $1.2 million in damages. The South Carolina Supreme Court, citing the U.S. Supreme Court precedents, disagreed and overturned the lower court's decision.

Lucas appealed the decision to the U.S. Supreme Court, which handed down its opinion on June 29, 1992. This opinion reversed the state supreme court ruling in a 6–3 decision. The Court held that a state regulation that deprives a private property owner of all economically beneficial uses of property, except those uses that would not have been permitted under background principles of state property and nuisance law, constitutes a taking of private property for which the Fifth Amendment's takings clause requires payment. The Court stated that the South Carolina court erred in applying the principle that the takings clause does not require compensation when the regulation at issue is designed to prevent "harmful or noxious uses" of property.

Obviously, this decision was met with concern on the part of environmentalists, who fear that this ruling may lead to significant restraint on the part of state governments, which may fear that passing laws to protect state coastlines may now cost them millions of dollars. Even before a decision was

ISBN: 0-558-11029-0

handed down, however, the debate triggered legislative activity. A law that would require agencies to "assess" and "minimize" the potential for taking private property whenever a regulation is issued was proposed almost immediately. Another legislative proposal would have required federal agencies to compensate owners of wetlands when use of their property was restricted. Many environmentalists are understandably concerned about such proposals whenever they arise.

From the perspective of the "Property Firsters," or private property rights advocates, *Lucas* was a watershed case. *Lucas,* along with *Whitney v. United States*[41] (in which a federal court found that the federal Surface Mining and Reclamation Act constituted a taking with respect to one mining company whose land had become completely useless as a result of the act), restored to prominence the takings clause that had been relatively dormant for the previous 50 years. Strengthened by these victories, the property rights movement has been gaining momentum. A large number of property rights organizations are springing up all across the country, and many of the groups are forming informal alliances. Combining the old wings of the 1970s Sagebrush Rebellion in the West, miners, loggers, ranchers, and energy companies, with farmers and private property owners in the East and South, these groups are joining forces to attack what they see as government overreaching: wetland preservation, endangered species protection, public park and greenway expansions, scenic river corridors, land-use planning, and zoning laws and growth management plans.[42]

Table 1-7 lists some of these groups. One of the most influential organizations in the property rights movement is the Pacific Legal Foundation, the

TABLE 1-7 Property Rights Advocacy Groups

Alliance for America	A loose confederation of more than 600 property rights organizations that communicate through a fax network and host an annual "Flying for Freedom" lobbying excursion to Washington, D.C.
Environmental Conservation Organization	A coalition of organizations and individuals in America and 14 foreign countries that publishes a magazine, hosts conferences, and maintains a computer network for its membership
Virginia for Property Rights	A clearinghouse for Virginians seeking information on property rights issues
Oregonians in Action	An education center focusing on land use regulation and property rights that expanded to include a legal center
Pacific Legal Foundation	A nonprofit public interest firm that works to protect private property rights and limit government
Foundation for Research on Economics and the Environment (FREE)	A group that wants to advance and develop environmental policies featuring private property rights

ISBN: 0-558-11029-0

first nonprofit, public interest law firm devoted to litigating in defense of "individual and economic freedoms" on a national level. Since its founding in 1973, this firm has participated in over 100 cases. Perhaps its most significant victory was *Dolan v. Tigard,*[43] a victory for the property rights movement handed down in 1994.

The city of Tigard, Oregon, had approved Dolan's application to expand her store and pave her parking lot subject to the condition that she dedicate a portion of her property for (1) a public greenway to minimize the flooding that would otherwise be likely to result from her construction and (2) a pedestrian/bicycle pathway to decrease congestion in the business district where her store was expanding. Although the Land Board of Appeals, the State Court of Appeals, and the State Supreme Court all affirmed the decision of the city, which had found that the land dedication requirements were reasonably related to her proposed construction and, therefore, not a taking, the U.S. Supreme Court disagreed. The court said that for a requirement like the one at issue to be valid, the requirement must have some reasonable relationship or nexus to the property's use, which was the standard used by the lower courts. However, in this case, what constituted sufficient evidence of that relationship for the lower courts was not sufficient for the Supreme Court.

Subsequently, property rights advocates celebrated the Supreme Court's ruling in *Palazzolo v. Rhode Island.*[44] Most of Palazzolo's property constitutes a flood-prone salt marsh protected by the State's Coastal Resources Management Program as a "coastal wetland." The State's protective regulations, which greatly limit development, existed before Palazzolo's acquisition of the property. Yet, despite having knowledge of restrictive regulations before acquiring the property, Palazzolo claimed that the State's wetland regulations constituted a taking of his property without compensation, in violation of the takings clause. The Rhode Island Supreme Court ruled that Palazzolo takings claim was not ripe and had no right to challenge regulations that predated his ownership of the property. However, the Supreme Court overturned the state court because it had erred "in ruling that acquisition of title after the effective date of the regulations barred the takings claim." The Supreme Court's ruling is significant in that it may greatly increase the number of regulatory takings claims, reducing the effectiveness of environmental regulations.

Clearly, this case was a significant victory for property rights advocates because it sends a message that the courts are now going to be looking much more closely at zoning and land use decisions than they traditionally have. Equally clear is the intent of the property rights advocates to continue to try to make gains in the courts as well as in the state and federal legislatures. They are increasingly finding friends in the legislature, as evidenced by the large number of property rights bills proposed during recent congressional terms.

A 2006 takings case that was a judicial defeat for the property rights movement may actually end up furthering their aims because the ruling has stimulated a spate of legislative proposals that may ultimately end up

ISBN: 0-558-11029-0

lessening states' willingness to impose restrictions on land use. The case was *Kelo v. New London,*[45] a case in which the high court upheld the state's taking of several private homes for a private development on grounds that the development would serve the "public purpose," that is, "public use," of creating jobs and generating tax revenue. While upholding a broad definition of public use might seem positive for environmental protection, the overall impact of the decision was to make the general public view regulation of private property as onerous and unfair. And it led to proposals in 2006 in at least six states of property rights laws that could hinder state regulation of private property for environmental protection purposes, even though the public would hardly be aware that they would be affecting environmental regulation by passing the bills.

For example, some laws provide that the government must compensate property owners for any lost property value or any potentially lost income resulting from any restrictions placed on the land. Others provide that payment for property taken under eminent domain must be determined by the highest possible use of the land. Such laws would dramatically increase the cost to states and municipalities of passing environmental regulations. It remains to be seen whether these bills will pass, and if they do, whether they will be upheld by the courts, and whether other states will follow them.

The Fourteenth Amendment contains another clause that has been gaining importance in the environmental arena since 1979: the equal protection clause. This clause provides that no state "shall deny to any person within its jurisdiction the equal protection of its laws." These words create the constitutional basis for concerns about environmental racism that are increasingly being raised by civil rights activists.

Although many claim that the movement against environmental racism began to coalesce approximately 10 years ago in South Carolina, when church-led black residents organized to protest the siting of a toxic landfill in their neighborhood, the movement started to achieve significant prominence in 1992.[46] During February of that year, the public became aware of an increasing array of statistics that appear to show that minorities receive less protection from environmental laws than whites do.

A study of EPA records by the *National Law Journal* revealed that there was a 506 percent disparity in fines assessed under the RCRA (the law regulating hazardous dumps) in predominantly black versus predominantly white neighborhoods. The average fine in white neighborhoods was $335,556, whereas the average fine in black neighborhoods was $55,318. A former EPA attorney said he believed that statistic was the most telling with respect to environmental racism.[47]

There were also much lower fines for cases alleging multiple environmental law violations in black neighborhoods. Average fines for such violations were 306 percent higher in white neighborhoods during the previous 7 years.[48] Moreover, penalties for violations of the CWA were 28 percent lower in minority communities, whereas fines for violating the Safe

ISBN: 0-558-11029-0

Drinking Water Act and the Clean Air Act (CAA) were lower by 15 percent and 8 percent, respectively.[49]

Final evidence came from the Superfund program, which cleans up hazardous waste sites. It took an average of 20 percent more time for a dump site in a minority neighborhood to be placed on the list for cleanup than one in a white neighborhood. Actual cleanup efforts also took longer to complete in minority neighborhoods. Finally, the cleanup of sites in minority neighborhoods was more often what many perceived as a less effective "containment" action, which consisted of walling off the site. In white neighborhoods, the site was more likely to receive "permanent" treatment, such as removing the hazardous waste or treating it to eliminate the toxins.[50] Of course, some argue that the accusations of environmental racism are unfair. For example, one of the factors that the law says must be considered in assessing the size of a penalty is the financial condition of the violating facility. Often the facilities in minority neighborhoods are also in economically depressed areas, so their penalties would be lower.[51] Others claim there is no evidence for this rationale.

Close to the time of the *National Law Journal*'s story, EPA Administrator William K. Reilly created the EPA Environmental Equity Workgroup to assess evidence, indicating that minority and poor communities were at greater risk of exposure to environmental contamination than was the population at large. The workgroup was also charged with auditing the EPA's programs for any disparate impact on persons of certain races or income levels. The workgroup's report, Environmental Equity: Reducing Risk for All Communities,[52] found that although minority and low-income populations had above average exposure to some forms of environmental pollution, poverty in some instances was more determinative of the level of risk than was race. On the basis of these recommendations, in July 1992, Administrator Reilly established the EPA's Office of Environmental Equity to handle environmental justice matters and to provide oversight to the EPA in general.

On February 11, 1994, President Clinton signed into law Executive Order 12898, titled "Federal Actions to Address Environmental Justice and Minority Populations in Low-Income Populations." The order required all federal agencies to develop individual strategies to prevent environmental hazards from having disproportionately negative effects on minority and low-income populations by making environmental justice a part of decision making in every aspect of agency operations. After this order was issued, environmental justice policies were established in each federal agency. Agencies were to put pressure on recipients of federal money to evaluate the impact of their project on minority and low-income populations. According to subsequent EPA regulations, recipients of EPA financial assistance are required to agree annually in writing to comply with Title VI, which prohibits discrimination based on race, sex, national origin, color, and religion, thereby making considerations of environmental justice an accepted part of the planning and development process.

ISBN: 0-558-11029-0

Shortly after Carol Browner took office as the EPA Administrator, she made environmental equity an agency priority. In November 1993, the EPA announced the establishment of the 25-member National Environmental Justice Advisory Counsel (NEJAC) to advise the EPA administrator on environmental justice matters and to promote communication concerning environmental justice issues. Community organizations, government, industry, academic institutions, and other groups would be represented on NEJAC. In 1993, the EPA established a small grants program to provide up to $10,000 to affected neighborhood groups or Native American tribes for environmental justice programs.

A report prepared by NEJAC and issued by the EPA at the end of 2000 attempted to assess the progress of the federal government in integrating environmental justice into its policies, programs, and activities consistent with existing laws and Executive Order 12898. The assessment was based on a survey of heads of federal agencies and environmental justice stakeholders.[53] The outcome was mixed.

All agreed that the strength of the order was that it focused attention on environmental justice and validated the concerns of the affected communities.[54] A major weakness was the lack of funds to implement environmental justice programs.[55] The biggest complaint, however, was that the order lacked any "teeth"; therefore, agencies were inconsistent in their interpretation and application of the order. Implementation of it was piecemeal and haphazard; there was no pressure to implement the order. Another related complaint was that there was no mechanism for tracking the implementation of the order.[56]

Unfortunately, things have only gotten worse since that report was issued. According to a report by the EPA's inspector general, made public in September 2006, senior EPA officials have not required regional offices and department heads to conduct environmental justice reviews despite a requirement for such reviews under Executive Order 12898. According to a survey by the IG's office, around 60 percent of the respondents—regional offices and program departments—had not conducted the reviews and 87 percent said they had not been asked to do.

The EPA's most recent statement about environmental justice, along with all official guidance's and policies about this topic, may be found at http://www.epa.gov/compliance/resources/policies/ej/index.html.

A CONSTITUTIONAL RIGHT TO ENVIRONMENTAL PROTECTION?

Because as a nation we have a tendency to look to the Constitution to protect those rights most fundamental to us, it is only natural that when concern for protecting the environment began to take the form of a national movement, people looked to the Constitution for a guarantee of a clean environment. Some have argued that the Constitution should be amended

ISBN: 0-558-11029-0

to include a constitutional right to a clean environment. Some legislators, in arguing for passage of the first major environmental statute, the National Environmental Policy Act (NEPA), argued that a constitutional right to environmental quality in fact existed;[57] their claim, however, was not widely accepted. Some environmentalists had hoped to use the Ninth Amendment, broadly interpreted, to expand the right to privacy to include a right to a clean, unspoiled environment.

Tanner et al. v. Armco Steel et al.,[58] a 1972 case in which such a claim was made, was unsuccessful. Still others have tried to argue that every time a governmental entity grants a permit to a polluting firm, that action constitutes state action, thereby making it possible for the action to be subject to claims of a violation of due process or an unconstitutional taking. The Supreme Court's reluctance to recognize such a right probably can be explained by two factors. First, there is nothing explicit in the Constitution or in its early interpretations to indicate that the drafters had any intention of protecting the environment. Second, from a practical perspective, it would be extraordinarily difficult for the courts to define the boundaries of such a right. Protecting the environment appears to be an area better left to legislators and administrative agencies.

In light of the failed attempts to obtain judicial recognition of a constitutional right to a clean environment, at least one environmental group, the National Wildlife Federation, is attempting to generate support for a constitutional amendment that would guarantee a clean environment for future generations. Although its proposed amendment is not yet in final form, the basic rights of each individual to be protected would include the right to clean air, pure water, productive soil, and the conservation of natural, scenic, historical, recreational, esthetic, and economic values of America's natural resources. The amendment would prohibit any public or private entity from impairing these rights and place the responsibility for preserving and enforcing these rights on the federal and state governments.

The Public Trust Doctrine

The idea of the government as a trustee for environmental quality is not an idea that environmentalists pulled from nowhere. The public trust doctrine is deeply imbedded in American law; it was forgotten for years but reborn in the 1970s. The concept traces its roots back to early Roman law, in which the doctrine of public trust developed around the idea that certain common properties, such as the air, seashores, and rivers, were held in trust by the government for the free and unimpeded use of the public.[59] This doctrine was subsequently applied in England to give ownership of public lands to the king but required that his subjects be given access to waterways for such purposes as fishing and trade.

On a limited scale, this doctrine has been followed in the United States, primarily for rivers, shore lands, and natural areas, although its adoption has

ISBN: 0-558-11029-0

been on a somewhat piecemeal basis. The Northwest Ordinance of 1787, for example, stated that "the navigable waters leading into the Mississippi . . . shall be common highways and forever free . . . to the citizens of the United States." The leading case establishing this doctrine is the 1892 U.S. Supreme Court opinion in *Illinois Central Railroad Co. v. Illinois*.[60] In 1869, the Illinois legislature passed a statute granting more than 1,000 acres of valuable land, including submerged lands under Lake Michigan and the shoreline along the city of Chicago's central city business district, to the Illinois Central Railroad Company. Four years later, the state passed another statute repealing this grant. It then filed an action to establish title to that property in the state's name.

The U.S. Supreme Court affirmed the state's title to the land, and in so doing explained the concept of holding title under the public trust doctrine:

> It is a title that is held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein, freed from the obstruction or interference of private parties. . . . The control of the state for purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.[61]

This precedent-setting case demonstrates the clearest application of the public trust doctrine: a situation in which title to public lands is about to be transferred to a private entity. More difficult cases arise when control of the land is being diverted to a different governmental entity that intends to put the land that is held in public trust to a more questionable public use, or, perhaps in partnership with a private entity, to develop and exploit the land for its economic value.

One example arose in Illinois in 1970 when the Chicago Park District proposed, among other endeavors, the transfer of 3.839 acres of city parkland to the Chicago Public Building Commission for the construction of a new school. Area property owners sued, arguing that the public trust doctrine required the state to retain the land in its use as parkland. The Illinois Supreme Court, in *Paepke v. Building Commission,* disagreed, stating: "The mere dedication by the sovereign of lands to public park use does not give private property owners . . . the right to have the use continue unchanged. . . ."[62]

The Illinois court noted the conflict between those who wanted to preserve the parks in their pristine state and those administrators who, "under the pressures of the changing needs of an increasingly complex society, find it necessary, in good faith, and for the public good, to encroach to some extent upon lands heretofore inviolate to change," and held that the resolution of such conflicts is a matter properly given to the legislature and not the courts. In this case, the court found that the

ISBN: 0-558-11029-0

legislative authorization in question was sufficiently broad and comprehensive to allow the transfer.

In coming to its conclusion, the Illinois court cited with approval the approach developed by the Supreme Court of Wisconsin, in cases applying the doctrine to navigable waterways and submerged lands. The criterion was developed in two Wisconsin Supreme Court decisions.[63] Both cases applied to navigable waters and submerged lands. The state approved proposed diversions in the use of public trust lands under conditions that demonstrated that

1. Public bodies would control the use of the area in question
2. The area would be devoted to public purposes and open to the public
3. The diminution of the area of original use would be small compared with the entire area
4. None of the public uses of the original area would be destroyed or greatly impaired
5. The disappointment of those wanting to use the area designated for a new use for former purposes was negligible when compared with the greater convenience afforded those members of the public using the new facility

While noting that these standards were not controlling, the Wisconsin court found them to be a useful guide for situations similar to the immediate case.

A third type of case in which the public trust doctrine may come into play is one in which lands held in trust are threatened by proposed actions of the government. These cases often involve water pollution problems created by the government or developers. Most recently, the doctrine has been applied in cases involving oil spills.

As you might infer from the foregoing discussion, the public trust doctrine is an important one in terms of public rights and responsibilities with respect to natural resources, even though it does not rise to the level of a constitutional protection. Questions as to its scope, balancing the interests of the competing segments of the public, and the extent to which the qualities of the trusted property are to be preserved against short-term use, however, still remain. We shall discuss this important doctrine later in the book.

After reviewing how our legal system is structured, you begin to realize how complex a task it is to establish a comprehensive system of laws to regulate the environment. Because the United States is organized in accordance with the basic principles of federalism, we have, in essence, two parallel systems of government: a state system and a federal system. The two systems are organized similarly, with legislative, judicial, and executive branches that are primarily responsible for, respectively, creating, interpreting, and enforcing the laws that govern our nation. A so-called fourth branch of government, administrative agencies, combines all those governmental functions and is now fully functioning at both the state and the local levels. Administrative agencies are especially important in making and enforcing environmental regulations.

ISBN: 0-558-11029-0

The laws these governments make are both civil and criminal. Both are important in preserving the environment. These two parallel governmental systems often have overlapping responsibilities as dictated by the U.S. Constitution. But because the Constitution is a broadly worded document, subject to interpretation by the U.S. Supreme Court, it is not always clear where the lines of authority between the state and the federal governments are drawn. The commerce clause gives the U.S. Congress the authority to pass environmental regulations, whereas the states rely on the police power that they retain under the Constitution to pass such laws. Where there is potential for conflict, the courts must intervene and draw boundaries, relying on interpretations of the supremacy clause and applying the doctrine of federal preemption.

The Constitution also protects individual rights. Often, in environmental matters, individuals will argue that the government's attempts to regulate or protect the environment have gone too far and have infringed on constitutional freedoms. Cases in which such claims have arisen in the environmental area include those questioning the need for search warrants and those questioning whether a regulation is so onerous as to constitute a taking.

Although this chapter has focused on the structure and lawmaking function of the government, the judicial function of our system merits special consideration. Thus, Chapter 2 takes an in-depth look at exactly how our legal system handles conflicts.

Questions for Review and Discussion

1. Explain how statutory laws are created.
2. What does stare decisis mean?
3. Differentiate civil law from criminal law.
4. Explain the significance of the decisions in *United States v. Parks* and *United States v. Hayes International Corporation.*
5. What can corporate officials do to decrease their chances of being held criminally liable for violating environmental laws?
6. What is the relationship between the commerce clause and environmental law?
7. How does the Fourth Amendment affect enforcement of environmental regulations?
8. When does a regulation constitute an unconstitutional taking?

For Further Reading

Baker, Debra, and Bill Cason. 1997. "Getting Busy: Corporate Issues in the Early Stages of Criminal Environmental Investigation." *Journal of Corporate Law 22*: 411.

Broderick, Gregory T. 2005. " From Migratory Birds to Migratory Molecules: The Continuing Battle Over the Scope of Federal Jurisdiction Under the Clean Water Act." *Columbia Journal of Environmental Law 30*: 473.

ISBN: 0-558-11029-0

Byrne, Peter. 1995. "Ten Arguments for the Abolition of the Regulatory Takings Doctrine." *Ecology Law Quarterly 22*: 89.

Coyle, Sean. 2004. *Philosophical Foundations of Environmental Law: Property, Rights, and Nature.* Oxford, UK: Hart Publishing.

Dorsey, Michael. 1998. "Race, Poverty, and Environment." *Legal Studies Forum 22*: 501.

Ely, James W., Jr. 2005. "Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners," 2004–2005 Cato Sup. Ct. Rev. 39.

Green, Thomas. 2003. "Environmental Crimes Update: Enforcement Under the Bush Administration." *Champion 27* (August): 16.

Houck, Oliver A. 2005. *Environmental Law Stories.* New York: Foundation Press.

Lazarus, Richard. 2004. *The Making of Environmental Law.* Chicago: University of Chicago Press.

Liles, Brett D. 2006. "Reconsidering Poletown: In the Wake of Kelo, States Should Move to Restore Private Property Rights," *Arizona Law Review 48*: 369.

Martinez, Peter, Damon L. Worden, Luke M. Jones, and Jason S. Juceam. 2006. "Environmental Crimes," *American Criminal Law Review 43* (Spring): 381.

Murray, Paula C. 1995. "Dolan v. City of Tigard: Another Wrinkle on the Takings Doctrine," *Real Estate Law Journal 23* (Winter): 275.

Murray, Paula C. 1995. "The Environmental Self-Audit Privilege: Growing Movement in the States Nixed by EPA," *Real Estate Law Journal 24*: 169.

Murray, Paula C., and David B. Spence. 2003. "Fair Weather Federalism and America's Waste Disposal Crisis," *Harvard Environmental Law Review 27*: 71.

Oswald, Lynda J. 1995. "Cornering the Quark, Investment-Backed Expectations and Economically Viable Uses in Takings Analysis," *Washington Law Review 70*: 91.

Sabath, Mark. 2004. "The Perils of the Property Rights Initiative: Taking Stock of Nevada County's Measure D," *Harvard Environmental Law Review 28*: 249.

2005. Symposium: The Role of State Attorneys General in National Environmental Policy: Global Warming Panel, Part II, *Columbia Journal of Environmental Law 30*: 351.

Yeager, Peter. 1991. *The Limits of Law: Public Regulation of Private Pollution.* New York: Cambridge University Press.

On the Internet

http://thomas.loc.gov

A source for pending legislation, bill status, and directory information about members of the House and Senate

http://www.webdirectory.com/Pollution

Web directory of environmental organizations

http://www.fs.fed.us/land/envjust.html

A place to find the executive order on environmental justice

http://www.epa.gov/compliance/

Office of Compliance and Enforcement Assurance

http://sedac.ciesin.columbia.edu:9080/entri/index.jsp

Search and locate environmental treaties

http://www.lcv.org

Home page for the League of Conservation Voters, where you can access the league's "report card" on the President's and Congress' treatment of the environment.

ISBN: 0-558-11029-0

http://projects.washingtonpost.com/congress/?referrer=email&referrer=email&referrer=email

The US Congress Votes database, showing every vote by Congress, searchable by Congress or individual member.

http://www.senate.gov/

Web site of the Senate

http://clerk.house.gov/

Web site of the clerk of the House of Representatives

http://www.motherjones.com/news/featurex/2003/09/we_531_04.html

The Ungreening of America, a report on how the Bush Administration's policies have reduced environmental protections

Notes

1. Center for Responsive Politics. "Environment: Long-Term Contribution Trends." *http://www.opensecrets.org/industries/indus.asp* (July 17, 2001).
2. Center for Responsive Politics. "Lobbyist Spending: Environment." *http://www.opensecrets.org/lobbyists/indusclient.asp?code=Q11&year=1999* (July 17, 2001).
3. Center for Responsive Politics. "Lobbyist Spending: Energy/Nat Resource." *http://www.opensecrets.org/lobbyists/indus.asp?Ind=E&year=1999* (July 17, 2001).
4. Jeffrey H. Birnbaum. 2001. "Fat and Happy in D.C." *Fortune* 143 (May 28): 94–100.
5. Jeffrey H. Birnbaum. 1999. "Washington's Power 25." *Fortune* 136 (December 8): 144–152.
6. EPA Office of Enforcement and Compliance Assurance, *Enforcement and Compliance Assurance Accomplishment Report FY 1997. http://es.epa.gov/oeca/97accomp.pdf* (July 17, 2001): 2–4.
7. US EPA, *Compliance and Enforcement Annual Results: FY2005 Numbers at a Glance. http://www.epa.gov/compliance/resources/reports/endofyear/eoy2005/2005numbers.html* (October 1, 2006).
8. Paul W. Valentine. 1990. "Trading Whiz Fined for Wetland Damage; $2 Million Md. Judgment May Be Record." *Washington Post* (May 26): A1.
9. EPA Office of Enforcement and Compliance Assurance, *Enforcement and Compliance Assurance Accomplishment Report FY 1996. http://es.epa.gov/oeca/96accomp.pdf* (July 17, 2001): 2–3.
10. Ibid.
11. David Stipp. 1992. "Execs Get Little Sympathy for Crimes Against Nature." *Wall Street Journal* (March 11): B1.
12. Amanda Griscom. 2003. "The Rollback Machine." *Grist Magazine* (September 4).
13. Eric Pianin and Michael Powell. 2001. "General Electric Ordered to Pay for Cleanup of Hudson; EPA Mandates $500 Million Dredging" *Washington Post* (December 5): A02.
14. 421 U.S. 658 (1975).
15. 786 F2d 1499 (1986).
16. EPA. "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," May 11, 2000. *http://es.epa.gov/oeca/finalpolstate.pdf* (July 16, 2001).
17. Ibid.
18. EPA. 1984. "Policy on Civil Penalties." *Environmental Law Reporter* 17 (February 16): 35083.

ISBN: 0-558-11029-0

19. "Enforcement: Final Policy on Penalty Reductions Expanded to Include Due Diligence Systems." *Chemical Law Reporter* 19 (December 22, 1995): 1176.
20. Va. Code Annotated S. 1001–1198(B).
21. Ibid.
22. Ibid.
23. Ibid.
24. "More States Adopt Audit Privilege Laws; EPA Calls Federal Legislation Ill-Advised." *Environmental Law Reporter* (March 10, 1995): 2186.
25. Ibid.
26. 452 U.S. 264 (1981).
27. 514 U.S. 549 (1995).
28. Ibid.
29. *Bronzkala v. Morrison,* 529 U.S. 598 (2000).
30. Ibid.
31. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,* 120 S.Ct. 2711, 2000.
32. *Rappanos v. United States,* 2006 U.S. LEXIS 4887 (2006).
33. *RanchoViejo LLC v. Norton,* 334 F.3d 1138, 1160 (D.C. Cir. 2003, Justice Roberts, dissenting).
34. 437 U.S. 617 (1978).
35. 12 S.Ct. 2009 at 2017 (1992).
36. 511 U.S. 383, 410 (1994).
37. 214 F.3d 707 (6th Cir. 2000).
38. 175 F.3d 178 (1st Cir. 1999).
39. *Keystone Bituminous Coal Association et. al. v. DeBenedictus,* 480 U.S. 572 (1987).
40. 112 U.S. 286 (1992).
41. 926 F.2d 1169 (1991).
42. Nancie G. Marzulla. 1995. "The Property Rights Movement: How It Began and Where It's Headed." *Land Rights,* ed. Bruce Yandle, 1–19. Lanham, MD: Rowman and Littlefield.
43. 114 S.Ct. 2309 (1994).
44. *Palazzolo v. Rhode Island* 121 S.Ct. 2448 (2001).
45. 126 S.Ct. 326 (2005).
46. Marianne Lavelle and Marcia Coyle. 1992. "Unequal Protection: The Racial Divide in Environmental Law." *National Law Journal* (September): 52.
47. Ibid.
48. Ibid.
49. Ibid.
50. Ibid.
51. William K. Reilly. 1993. "EPA's Reilly Replies to 'Unequal Treatment.'" *National Law Journal* (January 25): 16.
52. EPA Environmental Equity Workgroup. 1992. *Environmental Equity: Reducing Risk for all Communities.* Washington, D.C.: USEPA Policy, Planning and Evaluation.
53. Grover Hankins. 2000. "Pre-Meeting Report: What Progress Has the Federal Government Made in Integrating Environmental Justice into its Policies, Programs, and Activities Consistent with Existing Laws and Executive Order 12898?" *http://es.epa.gov/oeca/main/ej/nejac/pdf/11_30_premeeting.pdf* (July 16, 2001).
54. Ibid.
55. Ibid.
56. Ibid.
57. *Congressional Record* (December 20, 1969): 40, 417.
58. 340 F.Supp. 532 (1972).
59. Joseph Sax. 1970. *Defending the Environment: A Strategy for Public Action,* 163. New York: Alfred A. Knopf.
60. 146 U.S. 387 (1892).
61. Ibid at 452.
62. 263 N.E. 2d 11 (1970).
63. *City of Madison v. State,* 83 N.W. 2d 674 (1957) and *State v. Public Service Commission,* 81 N.W. 2d 71 (1957).

ISBN: 0-558-11029-0

- When you read an article or essay in which someone is trying to convince you to take a particular position on an environmental issue, you should identify the argument presented in the passage. An argument consists of a conclusion and reasons to support that conclusion. The conclusion is the action that the author is trying to convince you to take. The reasons offer support for the conclusion; they explain why we should agree with the author's conclusion. What is the argument (the conclusion and the reasons) presented in the following editorial?
- When people write or speak, they are often unclear or ambiguous. Furthermore, they sometimes make mistakes in their reasoning. Your job, as a reader or listener, is to actively search for instances in which the writer or speaker uses ambiguous language or makes mistakes in reasoning. You must read and listen very carefully. The author in the following EPA article confused two very different terms and is using them interchangeably. Identify these terms and explain why they are not synonyms and how their misuse affects the reasoning.

THE CONTRADICTORY BEHAVIOR OF THE EPA

The EPA claims that it does not have enough agents to adequately enforce regulations. Consequently, one would think that the EPA would support any law that would make their job easier. Yet, the EPA is adamantly opposed to one idea that would surely alleviate their responsibilities—environmental self-audit privileges. Environmental self-audits reduce the amount of work that the EPA must do. Thus, the self-audits are one way for the EPA to save both time and money. The EPA seems to be figuratively cutting off its own foot by preventing companies from conducting environmental self-audits.

Companies that report violations are often unfairly penalized. For example, the Brewer Company recently conducted a voluntary investigation of air emissions at its largest factory. When the company realized that its emissions were higher than EPA guidelines, they decided to report the emission violations and tried to correct the problem by getting permits for their factory. Their admission resulted in a fine of more than $2 million.

The reaction from the business community has been predictable. In a survey of over 500 companies, approximately 50 percent have been reluctant to conduct voluntary audits because they are afraid they will be penalized for the violations. However, in states with the self-audit privilege, companies are not as afraid and thus are much more willing to work with regulatory authorities to prevent and correct environmental problems.

If the EPA truly wants to encourage businesses to pay attention to the environment, they must allow these businesses to conduct environmental self-audits. Write to your congressman to encourage him or her to support the bill that allows businesses to conduct self-audits. If the EPA is not doing its job of protecting the environment, perhaps the legislature will pick up the EPA's slack.

ISBN: 0-558-11029-0