

Contents

List of Figures	xiii
List of Exercises	xv
List of Problems	xvii
Glossary of Abbreviations	xix
Introduction	xxiii
Chapter I • Environmental Compliance	3
A. Introduction: The Lawyer's Role in Environmental Compliance	3
B. Ensuring Compliance	4
1. Complying with the Clean Air Act's Prevention of Significant Deterioration Program	7
a. Statutes: The United States Code Annotated	10
b. Legislative History: The U.S. Code Congressional and Administrative News	16
c. Regulations: The Code of Federal Regulations	18
d. Case Law	30
<i>Alabama Power Co. v. Costle</i>	30
e. Regulatory Preambles: The Federal Register	36
f. Agency Guidance Documents	46
2. Complying with the Clean Air Act's New Source Performance Standard Program	57
<i>ASARCO Inc. v. U.S. Environmental Protection Agency</i>	59

C. Legal Ethics When Counseling Clients	67
Russell, Dernbach, and Bogoshian, <i>The Lawyer's Duty of Competence in a Climate Imperiled World</i>	68
American Bar Association, Model Rules of Professional Conduct (2024)	73
Chapter II • Environmental Enforcement	81
A. Introduction: The Lawyer's Role in Environmental Enforcement	81
B. Agency Enforcement	85
1. The Federal-State Relationship <i>Harmon Industries, Inc. v. Carol M. Browner, Admin., U.S. EPA</i>	87 90
2. The Enforcement Process	97
a. Self-Reporting Obligations	97
b. Self-Audits and Environmental Management	100
c. Inspections	103
<i>V-1 Oil Company v. State of Wyoming, Department of Environmental Quality</i>	106
d. Types of Enforcement Actions	113
3. Administrative Practice	121
C. Sources of Law	123
1. Enforcement Response Policies	123
a. Base Penalty	125
b. Adjustment Factors	127
c. Per-Day Penalties	127
d. Environmentally Beneficial Expenditures (EBE) or Supplemental Environmental Projects (SEPs)	127
e. Binding Effect of Policy	130
2. Case Law	131
a. Unpublished Opinions	131
b. Administrative Opinions	132
D. Practice Considerations	135
1. Enforcement Issues	135
a. Defenses <i>Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, et al.</i>	135 139
<i>Sackett v. Environmental Protection Agency</i>	144
b. Penalty Amounts	150

Chapter III • Citizen Suit Enforcement	161
A. Information Gathering	162
B. Litigation Issues	171
1. Pre-Suit Notice	171
2. Pretrial Publicity	173
3. Diligent Prosecution	175
<i>South River Watershed Alliance, Inc., v. DeKalb County, Georgia</i>	178
4. Standing	187
5. "In Violation"/Mootness Issue	189
<i>Steel Company v. Citizens for a Better Environment</i>	190
6. Mootness	198
7. Potential Recovery	200
<i>Sierra Club, Inc. v. Electronic Controls Design, Inc.</i>	202
8. Suits against the EPA or State Agency	206
Chapter IV • Environmental Litigation	209
A. Introduction: The Lawyer's Role in Environmental Litigation	209
1. Administrative Procedure	212
2. Statutory Issues	215
3. Discovery	218
4. Attorney's Fees	221
B. Practice Issues in Superfund Litigation	223
1. The Superfund Remediation Process	224
a. Removal Action	225
b. Site Investigation	226
c. Information Gathering	226
d. Hazard Ranking System (HRS)	227
e. National Priorities List	227
f. Remedial Investigation/Feasibility Study	228
g. Record of Decision	228
h. Remedial Design/ Remedial Action (RD/RA)	229
2. The Superfund Liability Scheme	230
<i>The Shenandoah Superfund Site</i>	232
3. Superfund Litigation Issues	243
a. Section 107 Liability	243
<i>United States v. Alcan Aluminum Corp.</i>	244
b. Joint and Several Liability	249

<i>Burlington Northern and Santa Fe Railway Company, et al. v. United States et al.</i>	250
c. Consistency with the NCP	259
<i>United States v. Chapman</i>	260
d. Insurance Coverage for Cleanup Costs	265
e. Choice of Remedy	267
f. 107(b) Defenses	270
g. Statute of Limitations	271
Jerry L. Anderson, <i>The Hazardous Waste Land</i>	273
C. Substantive Litigation Issues	277
1. Successor Liability	277
2. Municipal Solid Waste	280
3. Interim Landowner Liability	283
4. Innocent Landowner	285
5. Individual Liability	287
6. Section 106 Penalties	289
D. Superfund Cost Allocation	290
E. Settlement	292
Chapter V • Environmental Policy	299
A. Introduction: The Lawyer's Role in Environmental Policy	299
B. The Federal Rulemaking Process	300
1. Administrative Procedure Act Requirements	301
a. The Notice of Proposed Rulemaking	301
b. Public Comment on the Proposed Rule	302
c. The Final Rule	303
2. Prior to the Proposal	304
3. Statute-Specific Procedures	305
C. The Lawyer's Involvement in the Rulemaking Process	306
1. Initiating Rulemaking	306
a. Suing the Agency to Enforce Statutory Deadlines	306
b. Petitioning the Agency for the Issuance of a Rule	307
c. Suing the Agency to Enforce Notice and Comment Rulemaking Requirements	308
<i>General Electric Power Company v. Environmental Protection Agency</i>	312
<i>Sierra Club v. Environmental Protection Agency</i>	316
<i>Waste Management, Inc. v. U.S. Environmental Protection Agency</i>	322

<i>Batterton v. Marshall</i>	327
2. Participating in the Rulemaking Process	331
3. Challenging a Final Rule in Court	335
D. Introduction to the Environmental Justice Movement	337
1. Facts about the Discriminatory Siting of Facilities	337
2. Federal Actions to Promote Environmental Justice	339
3. Federal Environmental Justice Litigation	340
4. State Actions to Promote Environmental Justice	341
<i>Proposed Environmental Justice Rules</i>	343
Chapter VI • Permitting and Settlements	357
A. Introduction: The Lawyer's Role in Permitting	357
B. The Permitting Process	360
1. Application Preparation and Submittal	360
2. Issuance of Draft Permit and Public Comment	362
3. Issuance of Final Permit and Appeals	362
4. Permit Compliance and Enforcement	363
C. Other Permitting Issues	364
1. Individual and General Permits	364
2. Federally Enforceable and State Enforceable Permit Conditions	365
3. The Permit "Shield"	365
D. Permitting a Complex Real Estate Development	367
1. The Regal Hotel and Marina	368
2. Transom's Pier and Army Corps Permitting	369
3. Environmental Impact Review of the Army Corps Permit	374
4. Judicial Review of the Army Corps Permit	381
E. Settling Environmental Disputes Involving Permits	385
Appendix • In the Matter of GEC Precision Corporation	393
Index	403