EVOLUTION OF ENVIRONMENTAL LAW

Gregor I. McGregor, Esq.

©2010

McGregor & Associates

Attorneys at Law, P.C.

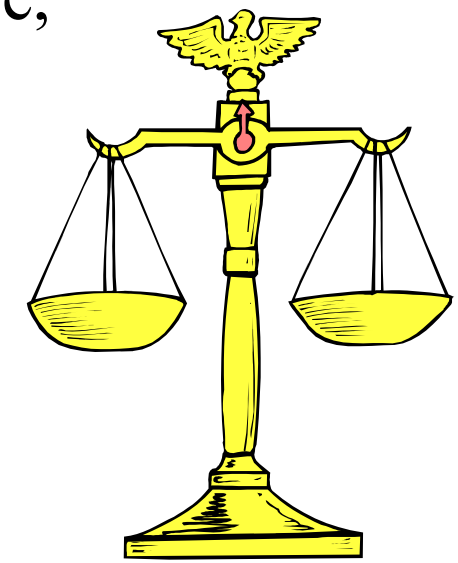
McGregor & Associates
15 Court Square, Suite 500
Boston MA 02108
Tel: 617-338-6464
Fax: 617-338-0737

www.mcgregorlaw.com

CAUTIONARY NOTES

- Environmental law is not found in just one book on the shelf of a law library—it permeates all areas of law and practice.

- Environmental law affects all aspects of land use, business decisions, real estate, and government.



- Agencies, developers, industries, and even individual landowners must keep on top of environmental laws and regulations if only to prevent their activities from causing adverse effects on the environment which could result in legal violations, enforcement and liabilities.

PROBLEMS IN UNDERSTANDING

The specialized nature of the fields of environmental science and environmental law has produced serious problems in studying and understanding them. They are taught in different educational institutions, using different sources and methods, creating different world views, and leading to different careers One discipline can ignore the other or treat it as an afterthought. The inherent complexities of constructs like environmental law and ecosystem science has led to a variety of conceptual frameworks just to understand the overlaps and relationships. These frameworks such as large scale modeling, risk assessment, resource approaches, public policies, and legal principles are themselves complex, abstract and abstruse.

SHORT HISTORY

1950s: Common Law Cases

1960s: Research and Funding

- Federal grants to states and municipalities
- States decide how clean to be

1970s: Permitting and Standards

- Public concerns: oil spills, rivers catching fire, cancer clusters
- Federal legislation on clean air, water, waste
- Environmental Impact Statements
- Agencies implementing comprehensive regulations

1980s: Carrots and Sticks

- Environmental laws became broad and strong
- Hazardous substances made subject to strict, joint and several, retroactive liability for costs of remediating contamination

1990s: Interdisciplinary and Multimedia

- Growth of environmental law slowed—new approaches emerged
- "Rethinking" or "reinventing" environmental regulations

2000s: Climate Change and Biodiversity

- Connecting environmental, land use, energy, and transportation considerations
- Independent actions by cities and towns using taxing, spending, and police power

ENVIRONMENTAL LAW STAGES

Richard O. Brooks in *Law and Ecology* (2002) revised William Futrell's classic history in *Environmental Law From Resources to Recovery (1993*) to list theses stages:

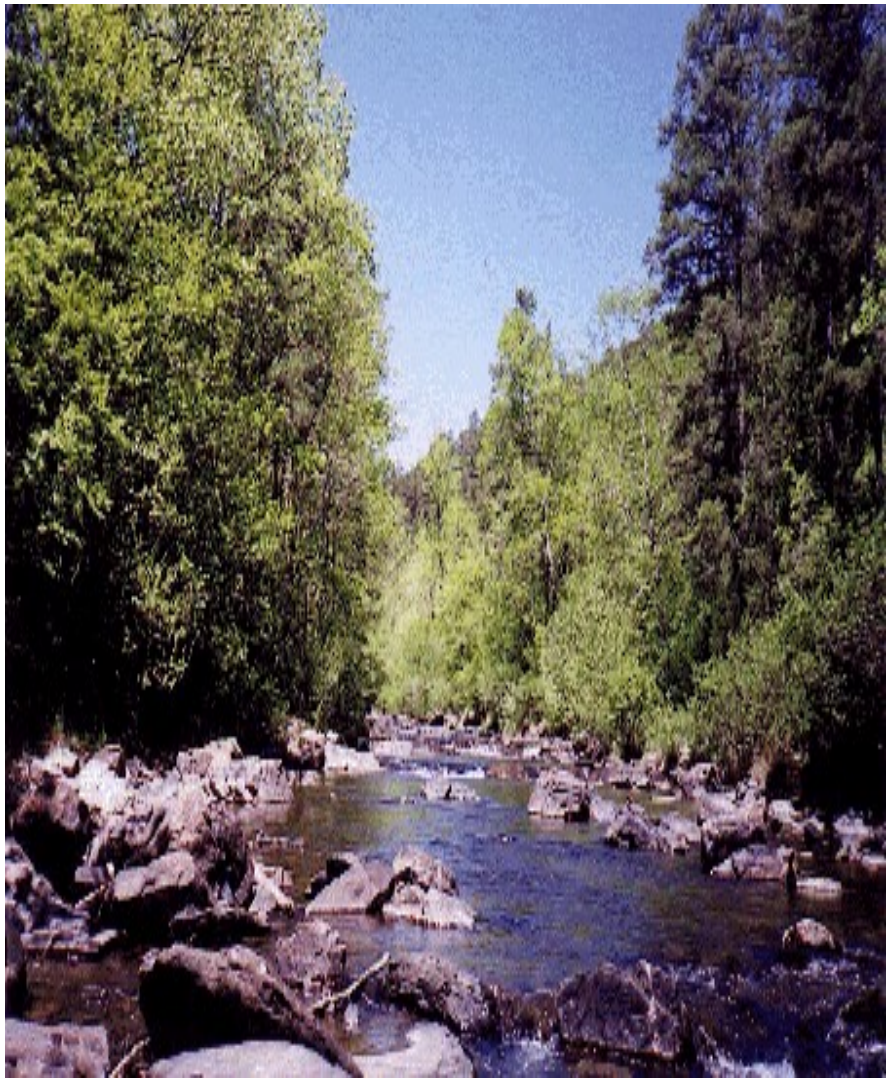
Common law response to industrialism and urbanization 1850-1970
§ Constitutional and administrative agency legal foundations 1900-1950
§ Modern environmental law outline emerges 1960-1970
§ Population policy develops parallel but separate 1965-1976
§ Earth Day 1970
§ Media-based and ecology-oriented rules, and the Public Trust 1970-1972
§ The Energy Crisis 1973-1980
§ Greening of natural resources law 1974-1977
§ Refocus on waste and hazardous pollutants 1974-present
§ The Season of Spoils (the Reagan era) 1980-1988
§ Globalization of environmental law 1980-present
§ Ecology, environmental management, and conservation biology 1990-2000
§ Ecosystemic environmental law regime The

PROGRESS SINCE EARTH DAY 1970

- Air pollution emissions down
- Major dischargers regulated
- Cleaner waterways nationwide
- Solid and hazardous waste managed
- Better drinking water supplies
- Toxic dump cleanups completed
- Public education and participation
- Environmental impact analysis
- Rise of environmental businesses
- Environmental issues in politics
- The environment as news

MORE PROGRESS SINCE EARTH DAY

- Stronger, permanent state programs with statutory basis, comprehensive regulations, and reliable budgets
- Rise of municipal land use and environmental requirements
- Increased recycling and conservation by public and private sectors
- Open space acquisition
- Strong public support
- Growth of NGOs



TYPICAL ENVIRONMENTAL STATUTE

The typical environmental statute, on the usual model, whether federal, state or local, contains a statement of findings and purposes (in the body, a preamble, or separate motion or other legislative history), assertion of jurisdiction (geographic, or subject matter, and agency, board or other authority), definitions of key terms, authority to promulgate regulations, substantive criteria (for jurisdiction, decision making, or rulemaking), mechanisms for implementation (permits, prohibitions, reviews, disclosures, design specifications, performance standards, or other), administration details and directives, enforcement procedures and penalties, and internal and court appeals.

TRENDS IN APPROACHES

- Common law principles → Commerce Clause and Police Power statutes
- Proven harms abated → Preventative regulatory rules
- Simple, self-enforcing standards → Complex permitting and analysis
- State and local programs only → Federalization of environmental law

TRENDS IN FOCUS

- Command and control → Technology-based regulation
- Government enforcement → NGO, landowner, citizens group and corporate litigation
- Broad jurisdiction and discretion → Action-forcing deadlines and abatement schedules
- Pollution control → Land use management and growth control

TRENDS IN ADMINISTRATION

- Focus on large industrial dischargers → Cumulative impacts of many small public and private sources
- Plants and facilities → Personal and business practices
- Emissions and releases → Chronic, low-level exposures
- After-the-fact regulation → Registration, design, source reduction and material substitution

ENVIRONMENTAL LAW CATEGORIES

Environmental laws of whatever origin, intent, topic, and legal basis, can be organized by different principles. They focus on media (air, land, water), place (worker safety, parks, preserves), remedy (restoration, cleanup), cultural resources (historic, archeology, Native American), pollutants (toxics, wastes, pesticides), ecosystems (wetlands, coastal management), species (animals, plants, insects), decision-making (environmental impact statements, public hearings, data disclosures), problem causation (population, density), activity promotion (recycling and reuse), product safety (consumer protection, genetic engineering), and land use and development (zoning, subdivisions, growth control).

AREAS OF ENVIRONMENTAL LAW

- Air Pollution
- Billboards and Signs
- Brownfields
- Civil Rights
- Coastal Zone Management
- Conservation
- Corporate Liability
- Docks and Piers
- Drinking Water and Wells
- Easements and Restrictions
- Environmental Impact Statements (EISs)

MORE ENVIRONMENTAL LAWS

- Emergency Management
- Eminent Domain
- Endangered Species
- Energy
- Enforcement
- Environmental Audits
- Environmental Justice
- Erosion
- Farmland and Agriculture
- Fishing and Hunting
- Floodplains
- Forests and Trees
- Ground Water
- Growth Control
- Hazardous Waste Cleanups
- Hazardous Waste Management
- Historic Sites and Structures
- Housing
- Indoor Pollution
- Insurance Law

STILL MORE ENVIRONMENTAL LAWS

- International
- Lakes and Ponds
- Land Use
- Mining
- Municipal Law
- Noise
- Odor
- Open Space
- Parks
- Permitting
- Personal Injury
- Pesticides
- Planning
- Property
- Public Health
- Public Lands

EVEN MORE ENVIRONMENTAL LAWS

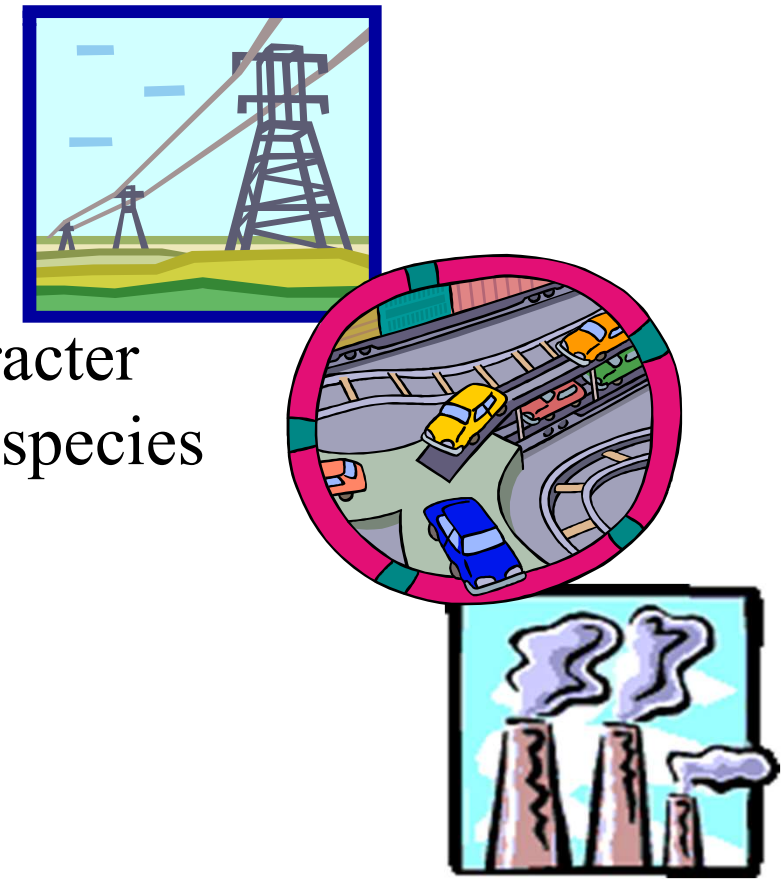
- Radiation
- Recreation Vehicles
- Real Estate
- Regulatory Takings
- Right-To-Know/Open Meeting Law
- Sand and Gravel/Earth Removal
- Scenic Roads
- Scenic Rivers
- Sewage and Septic Systems
- Sick Buildings
- Solid Waste
- Stormwater
- Streets and Highways
- Subdivisions
- Taxation
- Telecommunication
- Tidelands
- Toxic Torts

AND SOME MORE ENVIRONMENTAL LAWS

- Transportation
- Underground Tanks
- Water Pollution
- Water Withdrawal
- Wetlands
- Waterways
- Wildlife
- Worker Safety
- Zoning

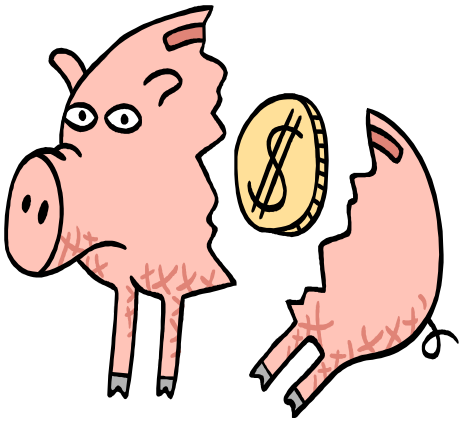
CHALLENGES REMAINING

- Energy consumption up
- Miles driven up
- Millions live with unhealthy air
- Loss of open space/community character
- Loss of wildlife habitat/endangered species
- More toxics in water supplies
- Impacts of infrastructure decisions
- Consumer decisions still unwise



MORE CHALLENGES REMAINING

- Many waterways unsafe to fish and swim
- Many industrial and municipal sewage plants violate permits
- Superfund trust fund bankrupt
- Deferred maintenance of parks and forests
- Children less time outdoors
- Climate change/sea level rise
- Global environmental degradation
- US leadership and credibility



INADEQUATE LEGAL REGIME

Ten years into the century it is apparent that traditional legal foundations and legal mechanisms will not be adequate.

The classic environmental legal categories, with reactive legislation responding to advances of science and proven public need, are not up to the modern task of comprehensive, integrated interdisciplinary resource allocation and management, environmental protection and restoration, public health and safety as well as welfare, property regulation and acquisition, and finely tuned, flexible economic incentives, disincentives, and reforms, let alone sophisticated ecosystem management, biodiversity protection, and sustainability.

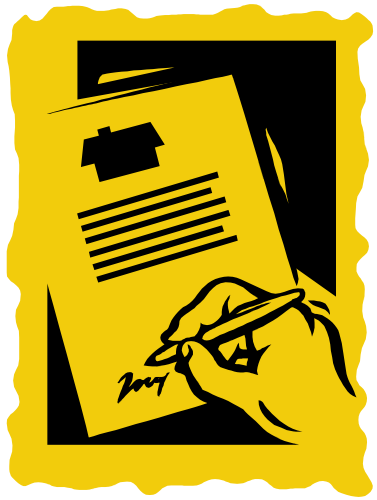
PROBLEMS CUT ACROSS LEGAL AREAS

New laws are needed for new challenges and opportunities that cut across scientific and policy disciplines, municipal, state, and national borders, local, state, county and federal levels of government, traditional approaches and understandings, business, governmental and private sectors, and all social and economic strata.

At stake are the natural environment, human health, quality of life, community character, and economic health.

THE NEAR FUTURE: SETTING REGULATORY PRIORITIES

- "Worst-first" focus and resetting priorities
- Comparison of quantitative risks of options
- Cost-benefit analysis for all decision-making
- Targeting problems as well as opportunities
- Best mix of regulatory and economic tools
- Regulation, incentives and cooperative efforts
- Results-oriented evaluation of programs
- Fairer and more efficient regulation
- Comprehensive, coordinated decisions
- Streamlined procedures for permits and appeals



THE MIDDLE FUTURE: HARNESSING MARKET FORCES

- Reduce unnecessary regulatory burdens
- Make compliance more affordable
- Emissions cap-and-trade programs
- Integrate environmental and energy programs
- Educational outreach to industry sectors
- Allow business choices of technology
- Economic incentives to improvement
- A “level playing field” for all regulated
- Using government purchasing powers
- Government adopts business models

THE DISTANT FUTURE: ECOSYSTEM MANAGEMENT

- More than a catch-phrase, ecosystem management is a concept that underlies several decades of scientific study.
- Ecosystem management could be the next legal advance after Superfund, Brownfields, Storm Water, Sprawl and Smart Growth.
- Ecosystem management law is only just developing. As the ABA observes, "at this stage of its development…it is mainly concerned with protecting more or less intact ecosystems from disruptions caused by people and restoring ecosystems that have been damaged. Future focus will be on overall environmental health, ecosystem health being the measure." Look to climate change as the area of next application.
- Eventually there will be both procedural and substantive standards for ecosystem management, utilizing traditional and modern bases of legal authority, governing both government and business decision-making. The scope will be local, regional, national and global, and soon.

PEARLS OF WISDOM

- Environmental law is organic.
- The best attorneys, engineers, scientists planners, and other environmental professionals advise their clients to be proactive rather than reactive. Be a player rather than watch the game.
- Address the law as it is now and as it is moving. Anticipate.
- Understand the meaning of the law and its policy goals.
- Meet the law as well as emerging best practices.
- See the future of the law in evolving science.
- The key to winning environmental controversies or accomplishing environmental goals is to utilize all that law, science and policy can provide (and politics, too).


©Annette Bottaro-Walklet