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Cases and Materials on Environmental Law and Policy, by Eva H. Hanks, A. Dan Tarlock, and John L. Hanks

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The literature of environmental policy and law has grown prodigiously during its rapid emergence beginning in the late 1960's. Judge Harold Leventhal has described the emergence of this field of law as "the law ablaze." Some of the growth has been more apparent than real, for it has been a restructuring of previously existing law relating to the conventional fields of conservation of natural resources, wildlife management, urban and regional planning, and public health. The environment has emerged as a new organizing concept, restructuring the old issues into new configurations. But new elements have also been added.

Among these new elements in the law are those concerned with growth—growth of population in general, growth of particular communities, economic growth, and growth of particular industries such as those producing inorganic energy or food. Another novel element is the translation of the concept of economic externalities into law. This innovation has arisen as an aspect of pollution control and has affected judgments regarding the reasonableness of economic burdens placed on private industry by pollution control laws. Since January 1, 1970 the National Environmental Policy Act of 1969 (NEPA) has been signed, and both the Clean Air Act Amendments of 1970 and the Federal Water Pollution Control Act Amendments of 1972 have been adopted. Each of these statutes, particularly NEPA, established new norms for

2 Note Timothy Atkeson's observation: "Areas previously considered as unrelated aspects of administrative, constitutional, international, public health, tort, property, tax or natural resources law are being reexamined in the resolution of environmental issues." ENVIRONMENTAL LAW INSTITUTE, FEDERAL ENVIRONMENTAL LAW 5 (E. Dolgin & T. Guilbert eds. 1974).
environment-related acts of government and industry and affected the structure of intergovernmental relationships.

Since the publication in 1970 of a symposium edited by Malcolm Baldwin and James K. Page, Jr., a literature of environmental policy and law has rapidly emerged, based upon new and reinterpreted statutes, federal and state, and upon cases in the courts and before administrative boards and appellate bodies. This law is now being summarized and analyzed in volumes such as the Hanks-Tarlock volume. Recent summations of environmental law, most designed for law students, include two large volumes of documentary material, cases and commentary by Arnold W. Reitze, Jr.; a two-volume casebook by Victor J. Yannacone, Jr. and Bernard S. Cohen; a volume of essays on federal environmental law edited by Erica L. Dolgin and Thomas G. P. Guilbert; and the very comprehensive casebook by Oscar S. Gray. Each of these books presents environmental law from a distinctive point of view. The Hanks-Tarlock volume, like the others in the field, is a compilation of the work of diverse scholars, administrators, and jurists, but the selection reflects the compilers' understanding and weighing of the relevant literature.

The volume is divided into five parts: Perspectives (conceptual background), Population, Judicial Review of Complex Decisionmaking, Land and Resources Management and Control, and Pollution Control. Thus, the organizing principle is both procedural and substantive. Its scope is less comprehensive than that of the Reitze or Gray volumes and does not provide the in-depth analysis of Dolgin and Guilbert, particularly in relation to administrative law and procedure (the latter is also given more emphasis by Reitze). But its casebook function is to bring together the basic materials on environmental law, and it does this very adequately with a form designed for use in the classroom and for reference by practitioners in those areas which it treats, such as population, land use, and pollution control. Given the broad and indeterminate scope of the field, the book cannot be fairly faulted for leaving uncovered some aspects of environmental law, such as radiation, wildlife, and transportation.

Like Reitze, but to a much greater extent, the authors emphasize

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8 1 & 2 V. YANNACONC, JR. & B. COHEN, ENVIRONMENTAL RIGHTS AND REMEDIES (1972).
9 Dolgin & Guilbert, supra note 2.
10 O. GRAY, CASES AND MATERIALS ON ENVIRONMENTAL LAW (2d ed. 1973).
population at the beginning of their volume. Their sections on Perspectives and on Population provide the basic setting for the balance of the volume, but in keeping with the character of the book, these sections provide a selective cross section of opinion rather than a comprehensive statement of a particular viewpoint, such as that represented in the First and Second Reports to the Club of Rome.\textsuperscript{11} For a casebook representative of the current, unsettled state of law and opinion, their treatment is probably appropriate, certainly prudent. But the book leaves with the instructor the responsibility for estimating the relative significance of trends and the responsibility for exploring the relationship between social beliefs and behavior in relation to the human environment on the one hand and law on the other.

Among the comprehensive casebooks, Hanks-Tarlock appears to have the most distinct focus on the issues of growth and complexity. The authors have used economic thought and perspectives to illuminate environmental issues. But the economic perspective, although necessary to an adequate overview of environmental law, may not be sufficient. It is in their emphasis on assessing legal principles from the vantage point of economics that this reviewer finds himself in partial disagreement with the authors.

The methods and findings of the natural sciences with respect to the biosphere and the relationship between man and the environment are more relevant to that reality which environmental law must ultimately confront than are the theories of economists. Moreover, the natural sciences afford a sharper disciplinary contrast than economics. (Fortunately, the contrasting assumptions of economics and science are juxtaposed in the initial chapter of the casebook.) Law and economics are, metaphorically, children of the same parent "moral philosophy." The tests of truth implicit in the writings of Rawls\textsuperscript{12} and Kaysen,\textsuperscript{13} included in the casebook, are those of secular theology. In contrast, truth as perceived by Ehrlich and Holdren,\textsuperscript{14} and Hardin\textsuperscript{15} is only coincidentally related to conditions described by legalists and philosophers as equitable and just. The economics of nature, called ecology, is governed by "laws" of a character unlike those made by politicians and judges. There is no

\textsuperscript{11} D. MEADOWS, THE LIMITS TO GROWTH (1972) [Report I]; M. MASAROVIC & E. PESTEL, MANKIND AT THE TURNING POINT (1974) [Report II].
\textsuperscript{13} Kaysen, The Computer that Printed Out W*O*L*F, 50 FOREIGN AFFAIRS 660 (1972), reprinted at 18.
\textsuperscript{14} Ehrlich & Holdren, Book Review, 14 ENVIRONMENT 24 (1972), reprinted at 43.
\textsuperscript{15} Hardin, The Tragedy of the Commons, 162 SCIENCE 1243 (1968), reprinted at 75.
plea bargaining with nature, and competitive exclusion operates without remedy or remorse.

The tendency of the law to confine its purview to practical (i.e., feasible) matters is what so often makes the law appear irrational to the scientist; it seems little more than a convenient social fiction when tested by reference to scientific findings. It is this reviewer's hope that if, and when, the Hanks-Tarlock casebook is revised or extended, the law-science interface will equal or, preferably, exceed that relating to economics. Scientific information and opinion have assumed a place in environmental law and litigation of increasing importance. The problems that specialized scientific and technological information present to the judiciary have suggested the possibility of special environmental law courts and the use of scientists as aides to the court or special referee.16

II

The selection of criteria for determining factual truth is always a major factor in the interpretation of law. This is especially so in situations where a new body of law and policy emerges based on assumptions at variance with those which have traditionally been accepted. Environmental legislation is an example of just such a situation based as it is on scientific evidence rather than on traditional concepts of justice, rights, and equity. Science has been invoked in legislation pertaining to air and water pollution, pesticides, nuclear radiation, and ecosystem protection. There are, moreover, assumptions in much of this legislation that reflect a new ordering of values and priorities in American life. NEPA is the most obvious case in point, but there are other examples in both federal and state law: e.g., legislation to protect the coastal zone from uncontrolled development; designation of wilderness areas, and wild and scenic rivers; and laws regulating the taking of wildlife and the restoration of strip-mined lands. Judicial difficulty arises when courts attempt to strike a balance among values based upon differing and often incompatible modes of thought.

The root of the judicial problem, identified by Professor Tarlock in his well-known essay17 on the implications of the Calvert Cliffs case,18 reprinted in the casebook, is the lack of consensus on the values and

16 Cf. Leventhal, supra note 1, at 517.
18 Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), reprinted at 266.
priorities that should guide the application of environmental law. The law is thus handicapped by the retarded development of policy consensus. The extent to which ecologically sustainable environmental relationships of human society can be reconciled with concepts of civil and economic rights cannot now be credibly predicted. But if nature and not man has the final word in environmental affairs, human welfare will be best served by seeking and respecting the true meaning of natural processes and systems and reexamining these values and assumptions that may ultimately prove universally destructive regardless of short-term or particular advantage.

In summation, environmental law has appeared as an expression of man's changing perception of his circumstances and possible future. But the change is in process and, within modern society, there are strong and even dominating commitments to prescientific assumptions and beliefs. Under these conditions the state of the law will be what it now is, inconsistent, incomplete, and often unpredictable in its interpretation and its effects. To remedy these conditions may be more a task of political science and jurisprudence than of law in its more specific, positive sense.

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