Foreword

Many lawyers—and probably a large majority of those who call themselves litigators—believe that that there is nothing special about environmental litigation. Litigators are quick studies, and by all appearances, mastering the complexities of an environmental case is not inherently more difficult than mastering the complexities of a securities case or a patent infringement case. Candidly, there is more than a kernel of truth to this view. Most environmental litigation lawsuits are litigated in the same courts as other lawsuits, and they are litigated pursuant to the same rules of civil and/or criminal procedure.

At the same time, however, lawyers who practice environmental litigation with some frequency recognize that the practice is indeed “special.” First, the litigation challenges presented by an environmental case frequently are idiosyncratic if not unique. For example, although criminal defense lawyers sometimes defend an accused who has made statements the Government introduces to prove guilt, lawyers defending criminal matters in the environmental field routinely defend persons who were required to provide the Government with all of the facts on which its case is built and even were required to certify those incriminating facts as “true and accurate.” Similarly, toxic tort lawyers frequently find themselves litigating “science” questions for which our common-law jury system is ill-equipped. Cutting-edge epidemiology is hard enough for lawyers to understand without the burden of explaining it to laypersons through an expert and in compliance with the formal rules of evidence.

Second, although the courts have been a forum for social change many times in our nation’s history, at this particular time no other litigation discipline presents the same “big social questions” as environmental litigation. For example, in the last several years, environmental issues have filled the Supreme Court’s docket as never before. And even in the absence of comprehensive federal regulations—or, just as likely, because of the absence—global climate change issues are playing themselves out daily on both the front pages of newspapers and in scores of courtrooms throughout the country.

Third, the scope of what qualifies as “environmental litigation” is huge. There are literally dozens of federal statutes, scores of state statutes, hundreds of common-law rules, and thousands of pages of regulations to be accounted
for. And upon all of these substantive areas is imposed the background litigation framework, which in the environmental arena can be federal or state court, arbitrations, administrative hearings, and more. If environmental litigation is a specialty, it is one that nevertheless encompasses an incredible array of substantive expertise.

This book was conceived as a broad, but not comprehensive, guide for environmental litigators—we know how “special” we are. But at the same time, the book extends an open invitation to all lawyers who find themselves litigating environmental matters every now and again or even those lawyers who have a need to evaluate how citizen suits or global warming litigation might impact a client’s project.

The book assumes familiarity with the environmental laws generally, as well as with litigation procedures and techniques. The focus of the book is on how environmental issues are addressed and resolved through litigation. Although statutes and regulatory programs are frequently cited, the book is deliberately organized around environmental topics—e.g., civil enforcement, criminal enforcement, citizen suits, etc.—not specific statutes or regulations.

Last, it should be apparent to those who read the “About the Authors” section that the background and experience of the authors vary widely. The book deliberately attempts to draw from the ranks of academics, the government (or at least former government lawyers), and private practice to represent a range of views. Accordingly, even more so than usual in books of this type, the views in the chapters are the views of the authors in their individual capacities. They do not necessarily represent the views of the law firms and universities that employ the authors, nor do they necessarily represent the views of the editor or the ABA.

This book does not provide legal advice and should not be relied upon by any reader to answer particular legal questions for particular clients.

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