

# Preface

Many lawyers—and probably a large majority of those who call themselves “litigators”—believe 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. And, 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 the government’s 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 and toxicology 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 couple of decades, environmental issues have filled the Supreme Court’s docket. And global climate change issues continue to play themselves out daily on both the front pages of newspapers and in scores of courtrooms throughout the country, including recently in public nuisance litigation.

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 affect a client.

The book assumes familiarity with environmental laws generally, as well as familiarity 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 deliberately is organized around environmental *topics*—civil enforcement, criminal enforcement, citizen suits, and so on—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 varies widely. The book deliberately attempted to draw from the ranks of academics, the government (or at least *former* government lawyers), and private practice in order 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 by whom the authors are employed, nor do they necessarily represent the views of the editors or the American Bar Association.

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

Kegan A. Brown and Andrea M. Hogan, Editors