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Environmental Law and Regulation in New York

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BOOK REVIEW

ENVIRONMENTAL LAW AND REGULATION IN NEW YORK

(William R. Ginsberg & Philip Weinberg, Editors)

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After three decades of development as a separate field of practice, environmental law has emerged, in what one might call its "modern era," as a field with profound ramifications for society and one that imposes tremendous demands on its practitioners. Environmental law is now frequently involved not just in the siting and regulation of heavy industry, but in real estate transactions, small and large; residential construction as well as commercial development; real estate tax proceedings; banking law; corporate transactions; securities work; and the operation of a tremendous array of commercial enterprises. Any business that uses or discharges hazardous substances is likely to be regulated in some way.

Hence, in today's legal environment, it is impossible for the general practitioner as well as the specialist to remain ignorant of environmental laws. At the same time it is extremely difficult to stay at the "cutting edge" of all aspects of environmental law, even if that is one's primary area of practice. An attorney cannot rely merely on treatises that explain federal environmental law. Most of the time, the practitioner is dealing with state and local laws, regulations, permit procedures and informal agency practices.

*Environmental Law and Regulation in New York*¹ is an outstanding work. It is neither just an abstract academic review of the many aspects of state environmental law and its origins, nor is it a soon-to-be-obsolete guide to passing nuances of daily practice in

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1. ENVIRONMENTAL LAW AND REGULATION IN NEW YORK (William R. Ginsberg & Philip Weinberg eds., West's N.Y. Prac. Ser. No. 9, 1996) [hereinafter ENVTL. L. & REG. N.Y.].

the field. Most certainly the book explains the "how-tos" of practice in New York State, but it also lays out the historical legal framework, so that the practitioner can navigate with proper bearings. The reader will thus have a good sense of where the law is coming from and — even in uncharted areas — where it is headed.

The book represents the labors of some of the most notable environmental practitioners, regulators, and educators in New York State. The editors have managed to harness the talents of twenty-five knowledgeable and experienced attorneys who, along with the editors, comprehensively address the eighteen categories into which the environmental field has been broken down.

The first thing that impresses the reader about the treatise is its structure and organization, and that obviously must be attributed to the Editors-in-Chief, William R. Ginsberg and Philip Weinberg.

Professor Ginsberg is a graduate of Antioch College and Yale Law School, and is Distinguished Professor of Environmental Law at Hofstra University School of Law. As a practitioner, he is counsel to a New York City law firm and has held numerous governmental posts. He is a former chair of the Environmental Law Section of the New York State Bar Association and presides over several Bar committees related to land use and environmental law.

Professor Philip Weinberg, a graduate of Columbia Law School, currently teaches Environmental Law at St. John's University School of Law. As Assistant Attorney General, he established the Environmental Protection Bureau in the New York State Attorney General's Office, and helped litigate many of the laws and regulations analyzed in the book. Professor Weinberg also writes the practice commentary to McKinney's Environmental Conservation Law² and has co-authored other environmental treatises. He, too, has been Chair of the New York State Bar Association's Environmental Law Section, as well as the Committee on Environmental Law of the Association of the Bar of the City of New York.

One benefit of having such a large number of practitioners author individual chapters, is that the details, nuances and subtleties of practice that are often critical to success on behalf of a client are included in this volume. The individual authors were

2. N.Y. ENVTL. CONSERV. LAW (McKinney 1997 & Supp. 1998).

able to focus on their respective areas of strength; there are no weak chapters in the book.

The text is augmented by several extremely useful ancillary sections, including a glossary that covers roughly 250 of the acronyms that can so often bewilder a novice in the area, tables of statutes, rules, and cases, each of which can immediately direct someone puzzled by a particular legal citation to an in-depth analysis. There is also a fifty-page index to the roughly 1,000 pages of text and the index is well-structured and useful.

The book does not look at New York statutes, regulations and case law in isolation from their federal counterparts. Indeed, what is so appealing about this volume is that in those areas where federal law plays a role, the respective authors have nicely integrated an analysis of the pertinent federal programs into the state practice guidance. Thus, there is extensive discussion of the federal origins of certain state programs, parallel federal statutory enforcement provisions, federal cases that have affected the course of state regulation, comparisons between federal standards and state standards,³ and the important federal programs that must be complied with in addition to state regimes.⁴ In certain areas, the federal regime is clearly dominant, and in such instances, this New York practice treatise spends the appropriate amount of time focusing on the pertinent federal statutes, regulations and case law.⁵ The discussion of federal law in the chapter on wildlife and endangered species protection is especially detailed.⁶

The book starts off with a chapter which, quite appropriately, focuses on state common law principles that continue to evolve and play an important role in environmental litigation today, particularly in the area of public and private nuisance. Even today's spectrum of federal and state environmental statutes and regulations do not provide all of the remedies that common law offers and it is clear that such remedies will continue to be used to redress or prevent certain environmental impacts. Their use is

3. See, e.g., ENVTL. L. & REG. N.Y., *supra* note 1, at 568 (federal soil clean-up standards for PCB spills).

4. See, e.g., *id.* § 9.10.1, at 569 (federal requirements under the Emergency Planning and Community Right To Know Act (EPCRA), 42 U.S.C. §§ 11001-11050 (1995)).

5. See, e.g., *id.* at 699-730 (pesticides and herbicides).

6. *Id.* at 901-22.

all the more likely in the event that individual regulatory agencies do not diligently pursue certain cases.

Chapter 2, "Toxic Tort Law in New York",⁷ comprehensively analyzes theories of liability, compensable injuries, and defenses, including bankruptcy law, and provides guidance on the use of expert witnesses and the analysis of insurance coverage.

Chapter 3, "Administrative Agency Relationships," is a very practical guide to permit hearing processes under the New York State Department of Environmental Conservation (DEC) regulations,⁸ and it includes advice regarding cross-examining experts in such administrative proceedings, as well as important "practical tips on interacting with DEC in the enforcement forum."⁹

Chapter 4 is devoted solely to the State Environmental Quality Review Act (SEQRA),¹⁰ which "requires the environmental review of virtually all discretionary acts taken by State agencies and local governments in New York."¹¹ As noted by the authors, "The statute has application to virtually all other environmental programs in New York, because almost every unit of government must conduct a SEQRA review in conjunction with permits or approvals they are empowered to issue."¹² There are other outstanding treatises that are devoted exclusively to this statute,¹³ but the authors do a remarkable job here in the course of seventy pages.

Chapter 5, "Air Quality," covers the federal Clean Air Act¹⁴ and Article 19 of the New York State Environmental Conservation Law.¹⁵ In addition to New York's regulations, DEC's guidance memoranda are also discussed, along with New York's statutory and regulatory response to the sweeping mandates in the 1990 amendments to the federal act.¹⁶

7. *Id.* at 37-90.

8. N.Y. ENVTL. CONSERV. LAW §§ 1-0101 to 72-0602.

9. ENVTL. L. & REG. N.Y., *supra* note 1, § 3.7.

10. N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117.

11. ENVTL. L. & REG. N.Y., *supra* note 1, at 181.

12. *Id.*

13. *E.g.*, STATE ENVIRONMENTAL QUALITY REVIEW COMPLIANCE: A PRACTICAL APPROACH AT THE LOCAL GOVERNMENT LEVEL (PLI N.Y. L. & Practice Course Handbook No. 53, 1978).

14. 42 U.S.C. §§ 7401-7671(q) (1995).

15. N.Y. ENVTL. CONSERV. LAW art. 19.

16. Clean Air Act Amendments of 1990, Pub. L. 101-549, 104 Stat. 2399 (codified as amended in scattered sections of 42 U.S.C.).

Chapter 6, "Water Quality & the SPDES Program," is largely devoted to the State Pollutant Discharge Elimination System (SPDES) permit regime in New York.¹⁷ The chapter covers the nature and terms of SPDES permits, the permitting processes, effluent limitations and other permit, monitoring and reporting requirements.

Chapter 7, "Water Supply and Stream Protection," discusses the regulation of public water supplies, drinking water quality, and watershed protection, and it also covers "all manner of stream disturbance, including dredging, rip rap, sheet piling, filling, docks and dams."¹⁸

Chapter 8, "Solid Waste Management," includes an overview of the federal/state interrelationship with respect to solid waste, solid waste management policy and planning under New York law, the siting, construction, operation, and closure of solid waste management facilities. The author also addresses special categories of waste, including asbestos, medical waste, construction and demolition debris, waste tires, used oil and household hazardous waste, as well as recycling issues, transportation of waste and enforcement policies of the State.

Chapter 9, "Hazardous Waste," is written by a team of five authors who break the subject into active hazardous waste management and inactive hazardous waste disposal. Once again, the authors begin with an overview of the comprehensive regulatory scheme, including a discussion of the federal framework and objectives, followed by an overview of New York State's Hazardous Waste Program,¹⁹ with an explanation of the differences between the two programs. One hundred seventy pages of the text are devoted to hazardous waste and the regulatory requirements affecting generators; treatment, storage and disposal (TSD) facilities; corrective action requirements in the case of a release of hazardous waste; administrative, civil and criminal enforcement of the regulatory program requirements; the permitting and siting of industrial hazardous waste facilities; requirements for informing communities in which facilities are located; reporting requirements applicable to spills or releases of toxic or hazardous

17. 33 U.S.C. § 1342(b)-(c).

18. ENVTL. L. & REG. N.Y., *supra* note 1, at 318.

19. Industrial Hazardous Waste Management Act of 1978, L. 1979, ch. 282 (codified in N.Y. ENVTL. CONSERV. LAW art. 27).

substances; an explanation of the Inactive Waste Site Program;²⁰ challenges to site listing on the Registry; site remediation; and reuse of inactive hazardous waste sites. This chapter comes replete with charts and tables showing the process for the prosecution of high priority violations, as well as potential criminal violations, and a number of essential forms utilized in the area.

Chapter 10, "Pesticides and Herbicides," covers the registration, distribution, sale and use of pesticides under federal and state law, including pesticide applicator certification, notification, and posting requirements.

Chapter 11, "Wetlands and Coastal Zones," describes the state and federal programs for the regulation of tidal and freshwater wetlands, coastal erosion hazard areas, coastal zone management, and flood hazard areas. Over the course of the chapter, the author, Philip Weinberg, comprehensively addresses the procedure for obtaining permits, the means for obtaining judicial review, enforcement procedures, and the circumstances providing a basis of a claim for a *de facto* taking of property.

In Chapter 12, "Open Space Conservation," Professor Ginsberg analyzes an area in which he personally has had a great deal of experience. Included in the chapter is a discussion of the use of conservation easements on private property under state law, special conservation procedures and considerations in the Catskills and Adirondacks, and the unique "Forever Wild" provision in the New York State Constitution.²¹

Chapter 13, "Agriculture and Forestry," looks at the state programs designed to maintain agricultural and forested lands in production, as opposed to conversion to other uses. It also explains the steps for establishing agricultural districts at the state and local levels, and obtaining state certification of tracts of forest eligible for certain tax relief.

Chapter 14, "Historic Preservation," examines this topic at the federal, state, and local levels.

The legal procedures and requirements for the siting of electric generating facilities, electric transmission lines, and natural gas pipelines are presented in Chapter 15, "Energy Law." Also discussed are the state system for energy planning and the different means for establishing gas and electric rates.

20. N.Y. ENVTL. CONSERV. LAW art. 27, tit. 13.

21. L. 1885, ch. 283, §§ 7-8 (codified at N.Y. CONST. art. 14).

Chapter 16, "Wildlife and Endangered Species Protection", acknowledges that New York law regarding endangered species has "largely followed or reacted to the federal laws."²² Accordingly, the author discusses the federal law in detail as well as the New York State law. As the author notes, an attorney in private practice is likely to encounter such issues 1) as part of a private real estate transaction or proposed development in which the presence of a protected species presents a problem to be addressed; 2) when government activities are undertaken which may adversely affect clients' interests in this field; or 3) in the enforcement context.²³

Chapter 17, "Noise," in keeping with all the preceding chapters, is another excellent, comprehensive review of the subject, starting with the measurement of sound, a review of nuisance actions, noise related landlord/tenant law, local law enforcement, state noise laws, federal noise laws, airport issues, and highway noise.

The book closes with a chapter on "Criminal Enforcement of Environmental Law." This chapter focuses almost exclusively on New York State statutory provisions, with the appropriate references to federal decisions and interpretations. The author covers the unlawful possession, dealing, disposal, and transportation of hazardous wastes and substances; provisions regarding solid and medical waste; water pollution; violations of laws affecting streams and wetlands; air pollution; pesticides; mineral resources; fish and wildlife; and failures to report releases of pollutants. It also includes helpful sections on culpable mental states and criminal liability in a corporate setting.

The breadth of experience and knowledge that these twenty-five authors have brought to the book is exceptional, and the editors have done a brilliant job at structuring this compilation of information and analysis into a useful, efficient volume. There are a number of outstanding and, indeed, essential environmental treatises and research tools which attorneys must have in their libraries if their practice frequently takes them into these areas. However, the one book that you will want within arm's reach is *Environmental Law and Regulation in New York*.

22. ENVTL. L. & REG. N.Y., *supra* note 1, at 901.

23. *See id.* at 902.

