

AMERICAN EDEN: UNDERSTANDING ENVIRONMENTAL LAW FROM ITS ROOTS

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INTERCONTINENTAL NEW ORLEANS; NEW ORLEANS, LA

I. INTRODUCTION: WHAT IS ENVIRONMENTAL LAW?

- The use of public authority to protect the natural environment and human health from the impacts of pollution and development.

II. WHERE DOES ENVIRONMENTAL LAW COME FROM?

- What does environmental law have to do with Jesus Christ and His Church?
- When we turn our attention to the definition of the Christian relationship with the natural world, we are stepping right into the middle of grave and proper theological ideas.
- Wendell Berry – “ Our destruction of nature is not just bad stewardship, or stupid economics, or a betrayal of family responsibility; it is the most horrid blasphemy.”
- St. Thomas Aquinas – “Any error about creation also leads to an error about God.”
- The foundation of natural law.
- If we do not properly understand creation, we will not properly understand the nature and character of the we worship and claim to serve. Our understanding of God is at stake.
- Romans 8 – the earth is groaning.
- Romans 1
- A look into lessons from Genesis:
 - Dominion and imago Dei
 - The command to creatures – Genesis 1:22 and 1:28
 - Psalm 72 – the rule of a just king leads to shalom; peacemakers
 - Revelation 21:1-22:5
- Job 38:1 – 42:6
- Colossians 1
- Psalm 148
- Psalm 104, 96
- A look into Biblical environmental laws
 - Deuteronomy 22:6-7
 - Genesis 6-9 – Noah and God’s covenant
- The God who creates is the God who redeems.

III. THE DEVELOPMENT OF ENVIRONMENTAL LAW IN WESTERN CIVILIZATION.

- A look into the thoughts of Henry David Thoreau, John Muir, Gifford Pinchot, Aldo Leopold
- The battle between the preservationist and conservationist movements.
- Rachel Carson – Silent Spring and the Development of environmental law
- The ecological complaint against Christianity – dualism and Lynn White.

IV. THE BASICS OF ENVIRONMENTAL LAW IN THE UNITED STATES.

- The United States has power to create environmental laws when the authority for these laws is rooted in a constitutional provision. Though the Constitution does not explicitly mention environmental protection, it contains several provisions which Congress can rely on as a foundation for passing environmental statutes: the Commerce Clause, the Spending Clause, the Property Clause, and the Necessary and Proper Clause together with the Treaty Clause.
 - **The Property Clause** – *“Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.”*
 - **The Spending Clause** – *“Congress shall have the power to lay and collect taxes ... to pay the debts and provide for the common defence and general welfare of the United States.”*
 - **Treaty/Necessary and Proper Clause**
 - The President may make treaties that are approved by the Senate
 - Congress may make all laws necessary and proper for carrying into execution all other powers vested by the Constitution
 - “Other powers” includes Treaties
 - **The Commerce Clause** – “[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”
- Federal environmental laws apply to the states by virtue of being passed by Congress pursuant to one of the aforementioned constitutionally enumerated powers.
- Furthermore, under the Supremacy Clause in Article Six of the Constitution, laws passed by Congress are the “supreme Law of the Land.” Thus, in applying these federal environmental laws to the states, these laws preempt any potentially conflicting state laws regarding the protection of the environment.

1. CERCLA

- The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) – 42 U.S.C. § 9601 *et seq.*
- Signed into law by President Jimmy Carter on December 11, 1980.
- Major Amendments included:
 - The Superfund Amendments and Reauthorization Act (“SARA”) (1986)

- The Small Business Liability Relief and Brownfields Revitalization Act (“Brownfields Amendments”) (2002).
- CERCLA is not a regulatory/permitting program like the CWA, the CAA, and RCRA.
- CERCLA is a **remediation** program designed to address contamination and apportion liability for environmental cleanups.
- CERCLA is **retrospective** in application.
- **Superfund**
 - “Superfund” is an informal name for EPA’s CERCLA program.
 - It is sometimes used to refer to the funds appropriated to EPA for the CERCLA programs.
 - EPA can draw upon these funds to pay for cleanups.
- **4 Options Under CERCLA**
 - Option #1: Use the Superfund to investigate a site, clean it up, and pursue Potentially Responsible Parties (“PRPs”) for reimbursement of costs.
 - Option #2: Pursue litigation to compel PRPs to investigate and clean up a site.
 - Option #3: Issue an administrative order requiring PRPs to investigate and clean up a site.
 - Option #4: Negotiate a settlement whereby PRPs agree to investigate and clean up a site.
 - These are listed in reverse order of popularity.
- **The National Priorities List (NPL)**
 - The “National Priorities List” or “NPL” is a list of the most contaminated sites in the country.
 - EPA generally uses the NPL to determine where and how to dedicate its limited Superfund/CERCLA funding.
 - EPA is not mandated to take action on a site simply because it is placed on the NPL.
 - There are currently 1,335 sites on the NPL.
- **When does CERCLA apply?**
 - CERCLA applies if:
 - There is a “release” or a substantial threat of a “release”
 - Of a “hazardous substance”
 - From a “facility”
- **Hazardous Substances**
 - What is a “release?”
 - “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment” – 42 U.S.C. § 11049(8).
 - This definition is broad enough to encompass any uncontrolled movement in the environment.
 - What is a “threatened release?”
 - Difficult to define.

- Could simply be the presence of hazardous substances and an unwillingness to assert control.
 - What is a Hazardous Substance?
 - Toxic pollutants or hazardous substances designated pursuant to the CWA.
 - Listed or characteristic wastes under RCRA.
 - Hazardous air pollutants (HAPs) under the CAA.
 - Imminently hazardous chemical substances or mixtures with respect to which EPA has taken action under the Toxic Substances Control Act (TSCA).
 - Any substance designated as a hazardous substance by EPA for purposes of CERCLA.
- **Facility**
 - What is a “facility?”
 - “Any site or area where a hazardous substance has ... come to be located” – 42 U.S.C. § 9601(14).
 - This is another very broad definition that could include almost anything
- **Petroleum Exclusion**
 - The definition of “hazardous substance” excludes “petroleum, including crude oil and any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance” – 42 U.S.C. § 9601(14)
 - Substances added during refining do not remove petroleum products from the exclusion
 - Oil contaminated with other hazardous substances through use can be subject to CERCLA
- **4 Classes of PRPs Under § 107**
 - The present owner and operator of the site
 - Anyone who owned or operated the site at a time when hazardous substances were disposed there
 - Anyone who arranged for disposal or treatment of the hazardous substances at the site
 - Any transporters who selected the site
- **CERCLA Defenses**
 - CERCLA’s strict liability scheme created opportunities for the clean up of contaminated properties
 - But: it also created significant risks and costs associated with acquiring and redeveloping brownfields
 - Some of these problems include:
 - Use of “greenfields” instead of “brownfields”
 - Urban decay
 - Loss of tax base
 - Loss of jobs
 - Flight to the suburbs

- Environmental justice issues
- As a result, Congress created certain CERCLA defenses to mitigate this problem
- Section 107(b) defenses
 - The traditional “Third Party” defense
 - The “Innocent Landowner” defense
 - The “Bona Fide Prospective Purchaser” (BFPP) defense
- We will focus on the BFPP defense here.
- **The Bona Fide Prospective Purchaser Defense**
 - In the 2002 Brownfields Amendments, Congress created the “Bona Fide Prospective Purchaser” or “BFPP” defense to provide liability protections for purchasers of brownfields.
 - BFPP Requirements
 - Conduct “All Appropriate Inquiries” prior to purchase by arranging for a Phase I Environmental Site Assessment that complies with federal regulations
 - Exercise “due care” with regard to any hazardous substances found, including “reasonable steps” to stop continuing releases, prevent threatened releases, or limit exposure to existing releases
 - If these conditions are met, the BFPP has no liability under CERCLA
 - It has now become routine for purchasers to obtain a Phase I report and earn BFPP status prior to acquiring any real estate.
- **Hazardous Waste**
 - The term “hazardous waste” means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infection characteristics may—
 - (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
 - (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed. – 42 U.S.C. § 6903(5).
- **Summing Up**
 - To be subject to RCRA, the waste must constitute “hazardous waste”
 - “Hazardous waste” is a subset of “solid waste”
 - So, the substance must be both a hazardous waste and a solid waste.
 - Hazardous waste” is a subset of “solid waste

2. RCRA

- **What to do with Garbage?**
 - Pre-1700s: waste was negligible and people mostly did not live in large cities
 - 1700s-1800s: waste dumped in the streets or burned
 - 1895: New York establishes the first municipal garbage management system
 - Through the 1930s: Most cities have municipal garbage handling systems
 - Early Methods of disposal

- Open Dumping
 - Unlined, unsafe, unsanitary, pests, diseases
 - Dumping into rivers and the oceans
 - Open burning of garbage
- 1950s: the sanitary landfill
 - Layers of garbage and dirt
 - Covered with soil at the end of each day
 - Increased production and disposal of toxic chemicals
- 1960s-1970s
 - Solid Waste Disposal Act of 1965
 - RCRA (1976)
 - Safer, cleaner methods of landfilling began
- **Solid Waste Disposal Act of 1965**
 - Signed into law by President Lyndon Johnson
 - Minimum safety controls for local landfills
 - Framework for state regulation
 - Research
 - Investigations
 - Surveys
 - Studies
 - Largely ineffectual
- **The Resource Conservation and Recovery Act**
 - Amended the SWDA of 1965
 - Passed in 1976 and signed by President Gerald Ford
 - Fundamentally changed waste handling in the U.S.
 - Known simply as RCRA
- The Resource Conservation and Recovery Act of 1976:
 - Adds Subtitle C: hazardous waste management
 - Adds Subtitle D: solid waste facilities that do not handle hazardous waste
- **Hazardous Waste**
 - The term “hazardous waste” means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infection characteristics may—
 - (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
 - (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed. – 42 U.S.C. § 6903(5).
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3. The Clean Water Act

- 1948 Federal Water Pollution Control Act
 - Amended five times before 1972
 - Did little to prevent or reduce water pollution
- “Federal Water Pollution Control Act Amendments of 1972”
 - a/k/a “The Clean Water Act”
- President Nixon vetoed the CWA bill due to its anticipated costs (\$24 billion)
- Congress overrode the veto
 - Senate 52-12
 - House 247-23
- Nixon tried to impound the funds but was overruled by the Supreme Court
- CWA goal: end water pollution by 1985
- *“The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”*
- **NPDES**
 - The National Pollutant Discharge Elimination System (NPDES) is the heart of the CWA.
 - Very generally, the CWA prohibits the discharge of pollutants into waterways without an NPDES permit.
 - NPDES permits generally contain:
 - Technology-based requirements.
 - Water quality-based requirements.
 - If necessary.
 - CWA Section 402:
 - Authorizes EPA or the States to issue NPDES permits containing relevant limitations for discharging pollutants into waterways.
 - CWA Section 404:
 - Authorizes the USACE or the States to allow the discharge of dredged or fill material into waterways.
 - USACE had been assigned the mission of regulating discharges into certain waters since the Rivers and Harbors Appropriation Act of 1899.
 - “The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” —33 U.S.C. § 1344(a)
- **CWA Jurisdiction**
 - Section 502(12): Defines “discharge of a pollutant” as the:
 - **Addition of a pollutant**
 - **To navigable waters**
 - **From a point source**
 - Examples:
 - Industrial facilities that use water for cooling or processing.
 - Sewage treatment plants.
- **Navigable Waters**

- The scope of the term “navigable waters” has been the subject of extensive debate and litigation
- 33 U.S.C. § 1362(7): “Navigable waters” are “the waters of the United States”
 - a/k/a “WOTUS”
 - a/k/a “jurisdictional waters”
- NOTE: if discharges are not governed by EPA because the receiving waters are waters of the state rather than WOTUS, they are regulated by the states.
- **County of Maui, Hawaii v. Hawaii Wildlife Fund**
 - Effluent discharges into groundwater in County of Maui.
 - Issue: Whether this is considered a discharge into navigable waters.
 - Held: The Clean Water Act requires a permit when there is a direct discharge, or a functional equivalent of a direct discharge, of pollutants from a point source into navigable waters. Justice Stephen Breyer authored the opinion for the 6-3 majority.
- **What is a “Pollutant?”**
 - “The term “pollutant” means **dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.** – 33 USC 1362(6).
 - **How Much Must Be Added?**
 - How much of the substance must be added to constitute a “pollutant”?
 - What if it is a *de minimus* amount?

4. The Clean Air Act

- The Clean Air Act of 1970
 - December 31, 1970: Clean Air Act of 1970 became law
 - Replaced earlier federal laws mostly focused on research
 - 1967 act was the first attempt at regulating emissions but largely left those controls to the states—it failed
 - The 1970 CAA was the first law establishing federal standards for air pollution emissions along with an enforcement scheme
 - Two general types of pollutants
 - Hazardous Air Pollutants (HAPS)
 - Criteria Pollutants
- **Hazardous Air Pollutants**
 - A/K/A “air toxics” or “toxic air pollutants”
 - Uncommon
 - Harmful in small quantities
 - Known to cause cancer or other serious health problems
 - EPA publishes a list of 187 HAPs
 - Examples:
 - Benzene (found in gasoline)

- Perchloroethylene (dry cleaning fluid)
 - Methylene chloride (solvent and paint stripper)
- **Criteria Pollutants**
 - Common
 - Harmful in large quantities
 - 6 pollutants related to burning fossil fuels
 - ground level ozone (O₃)
 - particulate matter (PM)
 - carbon monoxide (CO)
 - lead (Pb)
 - sulfur dioxide (SO₂)
 - nitrogen oxide (NO₂)
- **Regulating Criteria Pollutants**
 - #1: The CAA required EPA to establish National Ambient Air Quality Standards (NAAQS) for criteria pollutants
 - #2: States are to create State Implementation Plans (SIPs) to provide regulatory controls to establish and maintain EPA's standards
 - #3: the CAA establishes technology or process standards to control air pollution at its source
 - Stationary sources
 - Mobile sources
 - Areas that meet NAAQS are "in attainment"
 - Areas that do not meet NAAQS are "nonattainment"
 - Areas for which insufficient data exists are "unclassifiable" and treated as if they are "in attainment"
- **NESHAPs**
 - In the 1990 CAA amendments, Congress established a technology-based regime for regulating HAPs
 - Strict requirements
 - Short compliance deadlines
 - An initial list of 189 HAPs (currently 187)
 - These are called the National Emissions Standards for Hazardous Air Pollutants or "NESHAPs"
 - "Major Sources" of HAPs are subject to NESHAPs
 - A facility is a Major Source if it is a stationary source located in a contiguous area and under common control that emits:
 - 10 tpy of any single HAP
 - 25 tpy of any combination of HAPs
 - Stationary source: any building, structure, facility or installation which emits or may emit any air pollutant
 - Major Sources must comply with Maximum Achievable Control Technology (MACT) standards
- **Cases: Greenhouse Gas Regulation**

- *Massachusetts v. EPA* (2008)
 - The CAA allows EPA to regulate greenhouse gas emissions from new motor vehicles if it makes the “judgment” that such emissions contribute to climate change
 - Greenhouse gases are “pollutants” under the Clean Air Act’s general definition
 - Obama EPA: let’s regulate greenhouses gases under the PSD program
 - Problem: with the statutory minimums of 100 tpy and 250 tpy millions of facilities would need permits
- *Utility Air Regulatory Group v. EPA* (2014)
- Timeline
 - *Massachusetts v. EPA* (2007)
 - Election of Barack Obama (2008)
 - Utility Air Regulatory Group (2014)
 - Clean Power Plan of 2015
 - Court challenges ensued claiming that the rule went beyond the authority granted by the CAA
 - In 2016, the Supreme Court stayed the rule in advance of a hearing on the merits
- Election of Donald Trump (2016)
 - 2017 Executive Order requiring a review of the Clean Power Plan
 - June 19, 2019: CPP formally replaced the CPP with the Affordable Clean Energy (ACE) Rule
 - Lawsuits followed
 - DC Circuit Court heard arguments last week
- Volkswagen Defeat Device Litigation
 - VW sold 590,000 diesel vehicles in the US from 2009 to 2016 with a “defeat device” that allowed the vehicles to cheat emissions tests and violate the Clean Air Act
 - Volkswagen settled claims brought by CARB and U.S. EPA for these violations

5. NEPA

- The National Environmental Policy Act (or “NEPA”) was first imagined by U.S. Senator Henry “Scoop” Jackson in 1968
- Jackson was a Democrat Senator from the State of Washington from 1953 to 1983
- JFK’s first choice as a running mate in 1960
- An early proponent of environmentalism
- Passed unanimously in the U.S. Senate in July 1969
- Another version passed by a vote of 372-15 in the U.S. House the following day
- After conference committee work, both houses agreed to a compromise bill in December 1969
- Signed by President Richard M. Nixon on January 1, 1970

- **What is NEPA?**
 - The United States' first broad-based environmental statute
 - Called the "Magna Carta" of U.S. environmental laws
 - **Establishes national policy on environmental issues**
 - Congress must use all practicable means and measures to protect the environment
 - NEPA establishes the Counsel on Environmental Quality ("CEQ") to:
 - Study environmental issues and trends
 - Coordinate NEPA activities of federal agencies
 - Promulgate NEPA regulations
 - **But the core of NEPA is the requirement of an environmental impact statement**
 - **42 USC § 4332**
 - [A]ll agencies of the Federal Government shall--
 - (C) include in every recommendation or report on proposals for legislation **and other major Federal actions significantly affecting the quality of the human environment**, a detailed statement by the responsible official on—
 - (i) the **environmental impact of the proposed action**,
 - (ii) any **adverse environmental effects** which cannot be avoided should the proposal be implemented,
 - (iii) **alternatives** to the proposed action,
 - (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
 - (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
- Does NEPA require federal agencies to avoid environmental impacts?
 - No!
- Does NEPA require federal agencies to choose the least "environmentally impactful" actions?
 - No!
- Does NEPA mandate any particular decisions or courses of action?
 - No!
- **NEPA is only a set of procedural requirements that dictate no specific determinations**
- NEPA Concerns
 - *"The impact of S. 1075, if it becomes law, I am convinced, would be so wide sweeping as to involve every branch of the Government, every committee of the Congress, every agency, and every program of the Nation" -Rep. William Harsha (R-Ohio)*

V. **HOW DOES THIS APPLY TO ME? SPOTTING ENVIRONMENTAL PITFALLS IN EVERYDAY MATTERS.**

- Real Estate
 - Purchasing properties with unknown contamination
 - LUSTs – leaking underground storage tanks

- Dry cleaners
 - The innocent landowner defense and the Bona fide prospective purchaser defense to CERCLA liability
 - Wetlands – state and federal permitting for developments
- Wills and Trusts
 - The issue of inheriting contaminated property—what to do beforehand.
- Business
 - M&A transactions and environmental due diligence
- Finance
 - Lending and the implications of environmental permitting and NEPA on transactions.
- Tax
 - Environmental tax incentives.
- Criminal Law
 - Defending environmental crimes.
- Employment law
 - Scope of the employees duties; trainings and certifications.