

BOOK REVIEW

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INTRODUCTION TO U. S. ENVIRONMENTAL LAWS. BY EDWARD E. SHEA.
OCEANA PUBLICATIONS, INC., 1995: PP. 106. \$45.00

Having taught and lectured on environmental law in Europe for a number of years, I have noticed a lack of materials designed to introduce foreigners to American environmental law. Occasionally, I have recommended West's *Environmental Law in a Nutshell* (*Nutshell*) by Roger W. Findley and Daniel A. Farber.¹ The *Nutshell* is an excellent introductory book for American law students, but commends itself less to foreign jurists because it presents environmental law from a judge's standpoint. Reminiscent of constitutional law casebooks that begin with *Marbury v. Madison*,² Findley and Farber devote the critical first twenty pages of their small volume (335 pages) to judicial review. Rather than citing and elaborating statutes and regulations, the *Nutshell* cites and quotes from judicial decisions. The discussion of case holdings and nuances in Chapter Two on federalism and the environment are ineffective because they may confuse foreign audiences and those untrained in the common law.

It is from this vantage point that Edward E. Shea's book, *Introduction to U.S. Environmental Laws*,³ peaked my interest. The advertising circular from Oceana Publications promised that the book would provide "information of critical importance to domestic and international lawyers."⁴ The circular boasted that the book will

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1. ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW IN A NUTSHELL (4th ed. 1996).

2. 5 U. S. (1 Cranch) 137 (1803).

3. EDWARD E. SHEA, INTRODUCTION TO U. S. ENVIRONMENTAL LAWS (1995).

4. OCEANA PUBLICATIONS, INC., ENVIRONMENTAL LAW (1996) (advertising EDWARD E. SHEA, INTRODUCTION TO U.S. ENVIRONMENTAL LAWS (1995)).

teach the reader “the basics of U.S. environmental laws and how they operate.”⁵ This, then, is a very little book (only 106 pages) with a very big job.

In reviewing *Introduction to U.S. Environmental Laws*, I critique the book’s chapters, address inaccurate statements, and identify areas of environmental law that deserve mention. Finally, I expose the major shortcoming of the book: the lack of a coherent structure.

The book discloses that the author, Mr. Edward Shea, is a partner in the law firm of Windels, Marx, Davies & Ives in New York City and is responsible for the firm’s environmental practice.⁶ He has held executive positions with the GAF Corporation and Reichhold Chemicals, Inc.,⁷ and is also the Corporate Secretary of Peridot Chemicals Group.⁸ Mr. Shea has published several books on business topics;⁹ his articles¹⁰ and book¹¹ on lead-based paint probably explain the dedication of an entire chapter (Chapter Sixteen) to laws concerning lead.

Introduction to U. S. Environmental Laws divides into fifteen chapters. A number of the individual chapters in Mr. Shea’s book are quite good. The chapter on the Clean Air Act (Chapter Four) is terse and pithy, as is the chapter on the Clean Water Act (Chapter Five). The chapters on the Resource Conservation and Recovery Act (RCRA) (Chapter Six) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (Chapter Seven) are also very good. In contrast, the chapter on the National Environmental Policy Act of 1969 (NEPA) (Chapter Three) is too skimpy. Errors creep into the discussion. For example, NEPA was

5. *Id.*

6. See SHEA, *supra* note 3, at *About the Author*.

7. *See id.*

8. *See id.*

9. *See, e.g.,* THE ACQUISITIONS YEARBOOK: 1992/1993 (Edward E. Shea ed., 1992); CHARLES A. SCHARF ET AL., ACQUISITIONS, MERGERS, SALES, BUYOUTS, AND TAKEOVERS: A HANDBOOK WITH FORMS (4th ed. 1991).

10. *See* Edward E. Shea & Thomas J. Milligan, *An Overview of the Lead-Based Paint Laws*, ENVTL. MGMT. REV. (1994); Edward E. Shea, *A Proposed Rule under the Residential Lead-Based Paint Hazard Reduction Act*, NAT’L L. J., Dec. 26 1994- Jan. 5, 1995, at B5.

11. *See* EDWARD E. SHEA, LEAD REGULATION HANDBOOK (1996).

passed by Congress in 1969 and took effect on January 1, 1970.¹² Mr. Shea writes that it was “adopted” in 1970.¹³ He also writes: “NEPA does not apply if an agency finds that a proposed action is not major or has no significant impact on the environment.”¹⁴ This sentence is misleading. While NEPA does apply in this instance, the preparation of an environmental impact report is not necessary.¹⁵

The discussion on the limitations imposed by the U.S. Constitution (Chapter Twenty-two) is also inadequate. Most of the chapter centers around state laws that impermissibly burden interstate commerce. Mr. Shea fails to mention the constitutional limitations on the federal government, such as the ambit of the Commerce Clause,¹⁶ which are discussed prominently in Chapter Two of the *Nutshell*.¹⁷ Chapter Twenty-two also suffers from poor proofreading. Mr. Shea writes that the dedication requirement at issue in *Dolan v. City of Tigard*¹⁸ was “an environmental requirement.”¹⁹ On the contrary, *Dolan* belongs to the law of land use, which is not covered in Mr. Shea’s book. Additionally, the requirement of a dedication is not “environmental” as Mr. Shea suggests in his book. Another proofreading fault appears in the paragraph discussing *Dolan* where two other cases²⁰ discussed by Mr. Shea are improperly cited.

Mr. Shea occasionally asserts unsupported opinions in his book. For example, at one point he writes:

12. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321-4370d (1994)).

13. SHEA, *supra* note 3, at 3.

14. *Id.* at 4.

15. See 42 U.S.C. § 4332 (“The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act . . .”).

16. See U. S. CONST. art. I, § 8, cl. 3. The importance of this issue is underscored by the Supreme Court decision in *Lopez v. United States*, 115 S. Ct. 1624 (1995), the first decision the Court ruled a federal law unconstitutional on Commerce Clause grounds since *Railroad Retirement Bd. v. Alton Ry.*, 295 U.S. 330 (1935).

17. See FINDLEY & FARBER, *supra* note 1, at 59-64.

18. 114 S. Ct. 2309 (1994).

19. SHEA, *supra* note 3, at 100.

20. See *Bowles v. United States*, 31 Fed. Cl. 37 (1994); *Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994).

The safety record for industrial use of radioactive materials has been far better than the record of other major industrial and governmental operations of similar size and complexity. However, public perception of the hazards of radioactive materials has been affected by their early use in weapons and by political controversy.²¹

This bald assumption of opinion is unsupported by citation to authority or even argument. The safety record of the atomic industry can be favorably compared to that, for instance, of the hydroelectric industry. A factual basis for the "public perception of the hazards of radioactive materials" was dramatically provided by Chernobyl.²² The author is obviously aware of the Chernobyl disaster, for he mentions the incident, although he incorrectly places it in Russia.²³

Mr. Shea also fails to fully consider the danger of potential nuclear calamities. The *World Factbook 1993* of the Central Intelligence Agency²⁴ specifies one calamity in waiting arising from radioactive wastes dumped into an open reservoir in Estonia only a few dozen meters from the Baltic Sea.²⁵ In the 1992 National Report of Estonia to the United Nations Conference on Environment and Development,²⁶ officials related:

In Sillamäe, radioactive waste of the chemical and metal production plant, which formerly belonged to the Soviet military industrial complex (and has earlier been dealing with concentration of Uranium), has been dumped in a tailing which lies on the coast of the Gulf of Finland. The tailing includes an estimated 1200 tons of Uranium, 750 tons of Thorium; the activity of Radium exceeds 7 kCi. Radioactively polluted areas cover over 100 ha, having impact on the

21. SHEA, *supra* note 3, at 93.

22. On April 26, 1986, a Chernobyl nuclear reactor, located approximately 70 miles from Kiev, exploded and released a cloud of radioactivity into the air. See Bob Sylvia, *It's Long Way From Kiev to Bryte*, SACRAMENTO BEE, Dec. 17, 1989, at D1. Approximately 70% of the radioactive fallout that resulted from the Ukrainian explosion landed in nearby Belarus. The explosion caused 26 immediate deaths. See Sharon Sheridan, *Bitter Water, Blessed Hope*, STAR-LEDGER, May 30, 1996, at 006.

23. See SHEA, *supra* note 3, at 53.

24. CENTRAL INTELLIGENCE AGENCY, *THE WORLD FACTBOOK* 121 (1993).

25. See *id.*

26. MINISTRY OF THE ENVIRONMENT, REPUBLIC OF ESTONIA, NATIONAL REPORT OF ESTONIA TO UNCED 1992 28 (1992) (prepared for the United Nations Conference on Environment and Development which met in June of 1992).

health of local inhabitants. Since the yearly amount of precipitation considerably exceeds evaporation, the washed-out toxic compounds can reach both the groundwater and the sea. Risk assessment needs to be carried out and a safe solution found for the conservation of the tailing.²⁷

Even though Chernobyl and Sillamäe are not located on American soil, they present real hazards, not merely “political controversy.”²⁸

On the other side of the environmental fence, Mr. Shea writes: “The most important result of the environmental laws may be the requirement that foresight be applied to the environment.”²⁹ Here, he alludes to the “precautionary principle,”³⁰ which deserves elaboration. The precautionary principle is important considering the uncertainty surrounding most environmental issues, especially in the setting of standards. Some would go so far as to say that no measure should be undertaken unless one can prove that no significant environmental harm will result. In the civil law of Germany, the application of this principle results in shifting the burden of proof in environmental cases: the party who changes the

27. *Id.*

28. SHEA, *supra* note 3, at 93.

29. *Id.* at 104.

30. The “precautionary approach” (or principle) was adopted as Principle 15 in the United Nations Conference on Environment and Development. See Conference on Environment and Development: Rio Declaration on Environment and Development, June 3-14, 1992, 31 I.L.M. 874, 879 (adopted on June 14, 1992) (stating that “[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities”).

According to the precautionary principle, environmental policy should stay one step ahead of the problems of environmental degradation by building a margin of safety into all decisionmaking. Potential environmental degradation should be anticipated and prevented, and the causes of existing environmental degradation be attacked. See *id.* Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. See *id.* Indeed, if adverse environmental effects cannot be totally avoided, then they should be mitigated to the extent reasonably feasible. Special attention should be paid to the cumulative impact of activities whose individual environmental impact may be slight. The most important tool for implementation of this ethic is environmental planning and, specifically, assessment of expected environmental effects by a report such as an environmental impact statement and land use plan. See *id.*

environmental status quo has the burden of establishing the lack of proximate cause.³¹

In Chapter One (Overview), the reader learns that the major environmental laws in the United States are federal. Local governments are said to have laws that “supplement” federal and state laws.³² Without explicitly saying so, the author has excluded from the coverage of his book the vast areas of land use controls and of nature conservation in parks, nature protection areas,³³ and related classifications of land. These exclusions are justifiable in a book this brief. However, readers should be informed of these exclusions.

Most chapters in Mr. Shea’s book summarize one federal environmental law. These laws include: NEPA (Chapter Three), the Clean Air Act (Chapter Four), the Clean Water Act (Chapter Five), RCRA (Chapter Six), CERCLA (Chapter Seven), the Emergency Planning and Community Right-to-Know Act (EPCRA) (Chapter Eight), the Toxic Substances Control Act (Chapter Nine), the Safe Drinking Water Act (Chapter Eleven), the Federal Insecticide, Fungicide and Rodenticide Act (Chapter Twelve), the Hazardous Materials Transportation Act (Chapter Thirteen), the Marine Protection, Research and Sanctuaries Act (Chapter Fourteen), the Occupational Safety and Health Act (Chapter Fifteen), and the Oil Pollution Act (Chapter Seventeen). Unfortunately, these enactments are not grouped in any perceivable order. Indeed, the explication of the major federal laws is interrupted by chapters entitled Laws Relating to Asbestos Containing Materials (Chapter Ten) and Laws Relating to Lead (Chapter Sixteen), both which deal in part with state law.

This *mélange* of legislation highlights the central disappointment of the book: its failure to deliver the systematic structure it promises. The book merely summarizes and occasionally comments upon each of the major federal laws listed in compendia such as the Bureau of National Affairs’ *U.S.*

31. See REINER SCHMIDT & HELMUT MÜLLER, *EINFÜHRUNG IN DAS UMWELTRECHT* 4 (3d ed. 1992).

32. See SHEA, *supra* note 3, at 1.

33. Nature protection areas are covered in the last chapter of the *Nutshell*. See FINDLEY & FARBER, *supra* note 1, at 255.

Environmental Laws.³⁴ Ideally, the introduction should define what the author means by “environment”³⁵ and should discuss the basic structure of environmental law. As presently (dis)organized, the book suggests that environmental law is an unstructured chaos of federal, state, and local regulation.

To remedy this shortcoming, I suggest the following structure: the discipline of environmental law should be distinguished from land use law. Land use law complements city and regional planning, which regulates the uses of property in relation to other property within the jurisdiction of a particular agency. Nature protection legislation should be treated separately within environmental law. Nature protection laws protect and enhance the world of nature excluding mankind (like land forms, flora, and fauna). Most scholars include nature protection within the scope of environmental law.³⁶ In his book, Mr. Shea follows the scholarly pattern, for he includes a chapter entitled *Laws Protecting Wildlife, Fish, Plants and Marine Mammals*.³⁷

The primary purpose of environmental law is the protection of natural resources from despoliation and degradation by pollution. The laws encompassed by this definition can be grouped according to their emphasis, that is, whether they focus on protecting a resource or on restricting a pollutant. By making this distinction, the legislative material acquires contours that make it more understandable and accessible. This division between protection of resources versus prohibitions against pollutants yields the following: (1) federal laws that focus on the protection of the water resource, including the Clean Water Act (Chapter Ten), the Safe

34. U. S. ENVIRONMENTAL LAWS (Wallis E. McClain, Jr. ed., 1995). This compendium does not include OSHA, which Mr. Shea summarizes in Chapter Fourteen of his book.

35. See Thomas Lundmark, Book Review, 21 *ECOLOGY L.Q.* 1073, 1074-76 (1994) (reviewing PATRICIA W. BIRNIE & ALAN E. BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* (1993) (stating “[A] legal definition of the environment should have as its object the protection and enhancement of the natural environment (defined as air, water, earth, and forms of life that are not unreasonably injurious to humans), rather than protection of humans themselves or the activities of man, i.e., the environment created by humans”). For a broader definition, see THOMAS F.P. SULLIVAN ed., *ENVIRONMENTAL LAW HANDBOOK* 1 (13th ed. 1995).

36. See, e.g., FINDLEY & FARBER, *supra* note 1, at 255; THOMAS J. SCHOENBAUM & RONALD H. ROSENBERG, *ENVIRONMENTAL POLICY LAW* 292 (2d ed. 1991).

37. See SHEA, *supra* note 3, at 88.

Drinking Water Act (Chapter Eleven), and the Rivers and Harbors Act of 1899 (discussed in Chapter Two); (2) federal laws to protect the air resource such as the Clean Air Act (Chapter Four); and (3) federal laws like RCRA (Chapter Six) and CERCLA (Chapter Seven), which protect the soil resource.

Federal laws that focus on the pollutant rather than the resource include most of the other laws that Mr. Shea discusses: the Toxic Substances Control Act (Chapter Nine), the Federal Insecticide, Fungicide and Rodenticide Act (Chapter Twelve), the Hazardous Materials Transportation Act (Chapter Thirteen), and the Oil Pollution Act (Chapter Seventeen). This group would also encompass the chapters on Noise Control Laws (Chapter Nineteen) and on Laws Governing Radioactive Materials and Wastes (Chapter Twenty).

The above suggested division of the chapters of *Introduction to U.S. Environmental Laws* omits the chapters on NEPA (Chapter Thirteen) and EPCRA (Chapter Eight). These two laws can usefully be discussed together. In part, EPCRA extends the philosophy of NEPA, that the public has a right to full information about environmental risks, and that serious risks should be avoided.³⁸

State laws are mentioned in Chapter One (Overview), Chapter Three (NEPA), Chapter Six (RCRA), Chapter Sixteen (Laws Relating to Lead), and Chapter Twenty-three (State Laws). Due to its short length, Mr. Shea's book cannot be expected to do justice to state and local legislation. Mr. Shea does warn the reader "that most state environmental agencies are major, fully staffed organizations."³⁹ He also notes that *some* states have laws similar to NEPA,⁴⁰ although there are actually about twenty such states.⁴¹ State environmental law includes countless nature protection provisions governing coastal areas,⁴² lakes,⁴³ rivers,⁴⁴ trails,⁴⁵

38. See 42 U.S.C. §§ 11001-11050 (1994).

39. SHEA, *supra* note 3, at 100.

40. See *id.* at 5.

41. See SCHOENBAUM & ROSENBERG, *supra* note 36, at 155.

42. See, e.g., California Coastal Act, CAL. PUB. RES. CODE § 30000-30012 (West 1984 & Supp. 1996).

wetlands,⁴⁶ flood plains,⁴⁷ parks,⁴⁸ state forests,⁴⁹ and natural areas.⁵⁰ States independently regulate mining.⁵¹ Private forests are directly regulated, if at all, only by state, local, and regional governments.⁵² Mr. Shea should consider mentioning these laws in the chapter entitled *Laws Protecting Wildlife, Fish, Plants and Marine Mammals* (Chapter Eighteen).

In future editions, Mr. Shea might wish to change his title to "Federal Environmental Regulation in the U.S." to clarify the scope of his book's coverage, or better yet: "Summary of Major Federal Environmental Legislation." Titled in this way, the book delivers what it promises. And I just might recommend it to foreign jurists.

43. See, e.g., Wisconsin Navigable Waters Protection Act, WIS. STAT. ANN. §§ 144.26-.266 (West 1989 & Supp. 1995).

44. See, e.g., California Wild and Scenic Rivers Act, CAL. PUB. RES. CODE §§ 5093.50-.69 (West 1984 & Supp. 1996).

45. See, e.g., MASS. GEN. LAWS ANN. ch. 132A § 12 (West 1991 & Supp. 1996); N.H. REV. STAT. ANN. ch. 216-D:1 (1989 & Supp. 1995).

46. See, e.g., Florida Preservation 2000 Act, FLA. STAT. ANN. § 259.101 (West 1991 & Supp. 1996).

47. See, e.g., Cobey-Alquist Flood Plain Management Act, CAL. WATER CODE § 8400-8415 (West 1992 & Supp. 1996); IOWA CODE ANN. § 455B.261-.281 (West 1990 & Supp. 1996).

48. See, e.g., ARK. CODE ANN. §§ 22-4-102 to -105 (1987 & Supp. 1996); ILL. ANN. STAT. ch. 105 § 466 (3) (West 1993 & Supp. 1996); KAN. STAT. ANN. §§ 74-4502 to-4551 (1992); WIS. STAT. ANN. § 27.01 (West 1989 & Supp. 1995).

49. See, e.g., MONT. CODE ANN. § 77-5-101 (1995); PA. STAT. ANN. tit. 25, §§ 51.1-3 (1967 & Supp. 1996); WISC. STAT. ANN. § 28.04 (1) (West 1989 & Supp. 1995).

50. See, e.g., ALA. CONST. amend. 543 § 2 (13) (1976 & Supp. 1991); COLO. REV. STAT. § 33-33-102 to 113. (1995); GA. CODE ANN. § 12-3-90 to 117 (1996); ME. REV. STAT. ANN. tit. 12, § 8003 (3) (N) (West 1995); PA. STAT. ANN. tit. 32, § 2013-2024 (1967 & Supp. 1996).

51. See, e.g., ALA. CODE § 9-16-1 to 134 (1996).

52. See Thomas Lundmark, *Methods of Forest Law-Making*, 22 B.C. ENVTL. AFF. L. REV. 783, 785 (1995).