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**Environmental Protection and Justice:
Readings on the Practice and Purposes of Environmental Law, Third Edition
(LexisNexis 2007)
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TEACHER'S GUIDE

Suggestions for Use

Since the first edition of this book appeared in 1995, teachers in law schools and other college and university departments have used this book for a variety of classroom purposes. Some have used it as the principal text in courses focused on the modern environmental justice movement and related legal developments. Similarly, the book has served as the principal source of readings for the classroom component of some clinical legal education programs emphasizing environmental controversies.

Teachers also have used the book as a supplementary reader, rather than a principal course text. In introductory environmental law courses, the chapters focused on basic aspects of environmental lawyering—such as the foundational (Chapter 1), enforcement-related (Chapters 4 – 5), and access (Chapter 6) chapters—have been selected by teachers to give more breadth and reality to the course material. Other teachers in broad environmental law courses have chosen to assign various of the environmental justice materials (in Chapters 3, 4, 6, and especially 7) as an effective, concise vehicle for bringing modern “EJ” issues to their students. In the same fashion, some teachers of EJ-focused courses have included readings from this book along with other sources concentrated on this topic.

CHAPTER 1: INTRODUCTION

A. The Role of the Environmental Lawyer (Pages 1 – 8)

1. Overview (Pages 1 – 5)

Pages 1 – 4: In these few pages, the central thesis of the book is concisely presented and put in context for the student: “The thesis is that environmental lawyers serving regulated entities, as well as environmental lawyers serving any other type of client, seek to reconcile environmental protection goals with concepts of justice.” (Page 3.) The context is the variety of types of work, and types of clients, actually found in environmental practice. The purpose of this Overview is to orient the student to all of the remaining chapters (summarized at pages 4 – 5) and how they link to the thesis. Whether the course is based on all or only some of the chapters, the teacher and student should be able to keep generally in mind that what we are studying is “some of the most important problem areas in which environmental lawyers are called on to meet this difficult, dual responsibility” (page 4) of serving environmental protection and justice.

One important, but not quite explicit purpose of the Overview is to begin to allay the concerns—the guilt—that many students feel as they contemplate a career in environmental law. The disquiet arises from the longstanding, widely held sentiment among students that the only, or at least the best, way to practice environmental law is to work for a citizens environmental group or an environmental prosecution unit of government. When this predisposition is matched against the reality that many, if not most, of the law students who will work in this field will do so in private firms representing polluters and developers, self-doubt can arise—the sense of “selling out.” In an attempt to acknowledge this difficulty, and to allay this distress, the Overview offers a perspective on the importance and respectability of environmental law work regardless of who the client is.

2. The Changing Marketplace (Pages 5 – 8)

This brief section punctuates the Overview’s initial consideration of the environmental lawyer’s role. By looking at changes in the demand for legal services, and the availability of other types of environmental experts to work on at least some aspects of the lawyer’s tasks, the student is invited to tighten the focus as to what environmental lawyers really are needed for.

Although this material on The Role of the Environmental Lawyer does not set out questions for the students to consider, the teacher may wish to probe the material by posing questions such as the following for some potentially wide-ranging class discussion:

- ? What do environmental lawyers do?
- ? What aspects of that work could be, and increasingly is being, done by others?
- ? Is the work of most so-called environmental lawyers really work *for* the environment or are other objectives being pursued?
- ? Is work for an environmental group the only sure way of clearly working for environmental quality?
- ? Is it accurate to assert that all environmental lawyers are working for environmental protection and justice as they serve their clients’ interests?

B. Ethical Concerns: The Lawyer’s Values versus Duty to the Client (Pages 8 – 25)

1. Problems (Pages 9 – 11)

In a further effort to encourage the student to anticipate key aspects of what his or her career in environmental law might be like, this section and the Problems offered (pages 9 – 11) concentrate on possible conflicts between the lawyer’s own values and the client’s. How does the environmental lawyer handle conflicts between the work being done for clients and the lawyer’s own personal environmental values or ethical sense of acceptable professional tactics? How does the environmental lawyer deal with his or her own sense of “environmental justice”? In the subsequent Notes (pages 19 – 25), these questions are echoed, and supported by some

scholarship (Notes 1 and 2) and history (Note 3). In examining the Problems, the teacher may wish to fold in some of the Notes material and questions as well, as suggested below.

These questions are illuminated by the Problems presented here, and also in later chapters examining selected environmental enforcement issues (Chapters 4 and 5), controversies over access to and participation in environmental decision-making (Chapter 6), and environmental racism concerns related to the siting of risk-creating and polluting facilities such as hazardous waste treatment facilities (Chapter 7). The readings thus will explore some of the most important problem areas in which lawyers are challenged to serve both environmental protection and justice concerns through the vehicle of client representation.

The Problems present a sampling of specific contexts in which challenges to the individual's environmental and professional values might arise. In each Problem, it may be helpful to divide the discussion into two phases. First, can students identify just what each Problem's specific challenge is? Second, how would each student respond to the challenge? Certainly it is the second question which will create the more extensive and lively discussion, and likely produce considerable disagreement on most of the Problems.

Some thoughts on the challenge and possible responses for each Problem (drawing on the Professional Responsibility Standards readings) are as follows:

- (a) One identifiable challenge in this hypothetical is the conflict that can arise when an environmental lawyer is performing work for a client whose objective the lawyer does not agree with. Another level of this problem is the student's reaction to being directed to perform such work by a senior lawyer. Does the lawyer have a duty to accept the assignment even though he or she may want to keep the river pristine?

EC 2-26 allows a lawyer to refuse work, and EC 2-30 allows a lawyer to refuse work based on personal feelings that may impair his or her representation of the client. Rule 1.2 says that representation is not an endorsement of the client's views or activities.

Students should consider the consequences for the young lawyer working for a firm, and presumably not being the most direct and important communication channel with the client. There may well be issues of disloyalty to the "team" and potential embarrassment for the senior lawyer who has taken on the client. Will these types of considerations, and the need for the young lawyer to remain gainfully employed (and be able to pay down student loans), trump his or her own values and environmental preferences? Note 1's discussion of cognitive dissonance is apt here.

- (b) A lawyer faced with this hypothetical situation faces the uncomfortable task of having to respond to a client who declines to accept the lawyer's compliance advice.

What action should be taken after the client rejects the advice? Rule 1.2(d) allows counseling regarding the proper meaning of the law. Rule 1.16(b)(1) allows withdrawal if the client persists in criminal or fraudulent conduct. Just how important are seemingly technical, minor reporting requirements? The Futrell

excerpt (pages 15 – 17) argues that they are of fundamental importance for effective environmental regulation. Ethical dimensions are further examined by Richman & Bauer (pages 17 – 18) and Russell (pages 18 – 19). Note 2’s discussion of the “gatekeeper lawyer” is relevant to this problem.

(c) Should a state lawyer edit the proposal to avoid an environmental study of a state project? Is this ethical? If not, how might a lawyer honor his or her ethical duties, while still providing the best services possible to the client? What if the situation were reversed according to Footnote 5? Again, Futtrell’s argument (page 17) that ethical principles emerge from environmental statutes should be evaluated.

(d) Similar to (c), should a lawyer pursue a case with strong environmental merits despite the weak legal grounds it would be based on? Is it ethical to file such a claim in the hope that the developer will cease construction as a result? Rule 3.1 suggests that pursuing the lawsuit in this manner is “frivolous,” and Rule 3.2 urges the reasonable expediting of litigation and disapproves a failure to expedite “for the purpose of frustrating an opposing party’s attempt to obtain rightful redress or repose.”

(e) The lawyer here is faced with a choice as to whether he or she should pursue a collateral, discriminatory objective but on strong legal grounds. To sue on valid environmental legal grounds would promote the client’s racial discrimination to delay the low income housing project. Consider the arguments of Freedman and Tigar in Note 3.

Rule 1.16 allows withdrawal by the lawyer if the client pursues objectives the lawyer finds repugnant. However, Rule 1.2(b) states that to do work for the client would not mean that the lawyer is necessarily endorsing his or her client’s discriminatory viewpoints.

(f) Should the lawyer support the oil company’s “green” improvements? Or should he or she avoid consorting with the carbon-based fuel source and condoning peripheral “cosmetic” steps? According to Rule 2.1, “a lawyer may refer not only to law, but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.” Again, it may be helpful to consider Rule 1.2(b).

2. Professional Responsibility Standards (Pages 11 – 25)

Recognizing that the quoted Model Code and Model Rules provisions are not specifically focused on environmental matters, the following additional exercise may be added:

Using the format of the Model Rules (*e.g.*, “a lawyer may,” “a lawyer shall,” “a lawyer should,” etc.), and perhaps adapting and building on some of their current language, students can develop formulations that will provide more specific guidance for environmental lawyers faced with challenges such as in the above Problems. In other words, the students can be asked to try to formulate “Model Rules of Professional Conduct for Environmental Lawyers.” Individual students could be tasked to draft individual Model Rules, or variations on the existing Rules, to respond to the specific issues raised in the various Problems.

In beginning this exercise, students might consider again Futrell's argument that federal statutes such as NEPA contain basic "principles of environmental ethics" that "provide the lodestar for the development of an environmentally and socially responsible code of behavior to guide day-to-day actions of the environmental lawyer." (Page 17.) Can a list of such principles be developed by the class, drawn from the students' familiarity with the explicit and implicit values asserted in environmental statutes?

CHAPTER 2: CONCEPTS OF JUSTICE

A. Overview (Pages 27 – 28)

The premise underlying this chapter is that lawyers often speak about "justice," and environmental lawyers often discuss "environmental justice," without pausing to consider or explain just what they mean by the powerful word "justice." This chapter is such a pause.

Drawing on both old and new sources from philosophy and legal scholarship, the chapter offers a bridge between the students' readiness to argue for justice and the vast body of literature exploring the meanings of justice. Hopefully this chapter's readings, exercises, and questions will encourage students to probe how their own personal, even intuitive notions of justice compare to and can be refined by standard philosophical formulations.

In short, if students are to be encouraged to recognize that environmental lawyers serve justice, it certainly would help if they had a keener understanding of what justice means.

B. Three Types of Conflicts (Pages 28 – 30)

This brief commentary is fundamental in preparing students for all of the subsequent chapters and, ultimately, for the practice of environmental law. It highlights that environmental lawyers sometimes are working on disputes about the environmental merits of a problem; sometimes are working through competing claims for justice; and sometimes are addressing tensions between environmental concerns and justice claims. The effectiveness of the lawyer, I am suggesting, is greatly enhanced if he or she understands these distinctions and can clearly see what type of conflict, or combination of types, is at hand at any given time.

Additionally, as asked (page 29), do environmental lawyers representing certain types of clients "tend to emphasize certain concepts of justice more frequently than other concepts?" This question is probably best returned to with students after they have studied the readings in Section D. As suggested in the paragraph which poses this question, it may be possible to offer some generalized answers (*e.g.*, poverty lawyers emphasize distributional justice, business lawyers emphasize procedural justice, etc.). Even without clear answers, however, I find it useful to invite students to examine their own assumptions as to how different types of environmental practitioners may tend to serve different concepts of justice.

C. Exercise (Pages 30 – 31)

This exercise, on which I usually spend quite a bit of class time, is intended to help students explore the meanings of justice from a variety of different people’s perspectives. What do students believe each individual—perhaps a potential client—would see as justice in the making and implementation of environmental law? Initially this exercise should be pursued from a common sense, intuitive basis. Once again this invites the student to explore his or her own assumptions about possible meanings of justice. Examples of some of my students’ “answers” to this first area of inquiry are outlined below.

Next, linking this exercise with the bulk of the readings in this chapter, how does each role’s view correspond to the concepts of justice highlighted in the excerpts? Is the emphasis for a given person in the exercise generally on distributive, corrective, or procedural justice? What specific concepts within each of those categories are favored by each role?

Lastly, students should try to identify the points of possible conflict or tension between different roles’ views of what justice would provide them.

The following is a sample of “answers” given by my students to the first inquiry, about what each role would see as justice:

- Large, diversified company
 - ? Freedom to engage in business, grow economically, and make a profit, and protection of property from “takings” and from disclosure of proprietary information;
 - ? Environmental regulations to be “reasonable” and economically feasible;
 - ? Availability of safety valves, such as variances, for essentially unavoidable periods of noncompliance;
 - ? Liability based only on fault;
 - ? Discourse regarding regulations to be rational and substantial, eliminating trivial, hyper-technical objections and use of environmental requirements as “smokescreens” for other concerns;
 - ? Recognition for environmentally responsible actions, *i.e.*, “credit where credit is due”;
 - ? Review of proposed projects on a timely basis and by a single, unified level of government, and unified and expeditious follow-through on enforcement efforts;
 - ? Performance standards allowing compliance options and technological flexibility, rather than strict design specifications;
 - ? Regulatory and enforcement burdens only on rational bases, rather than selective enforcement on “deep pocket” or other grounds which undercut competitive equality;
 - ? Protection from competitive advantages of other geographic regions.

- Small, single product company
 - ? Freedom to engage in business, grow economically, and make a profit (perhaps incorporate by reference all concerns of large companies, or are there key differences?);
 - ? Preferential consideration because of small size, *e.g.*, in access to raw materials and in “tiering” of regulations for gentler treatment;
 - ? Understandable regulations and access to affordable, helpful, expert information regarding applicable standards and compliance solutions;
 - ? Protection against governmental errors, including options for appeal rights;
 - ? Predictability of standards and government actions;
 - ? Possible estoppel of government when erroneous information relied upon.

- National environmental group
 - ? Clarity of goals and adherence to goals regarding purity of protection; Uncompromising enforcement;
 - ? Less consideration of costs;
 - ? Less politics;
 - ? Less predictable enforcement and inspections;
 - ? Eliminate political “distortions” of policy;
 - ? Speedy enforcement action; understandable standards;
 - ? Uniform environmental standards across geographical regions;
 - ? Strict liability;
 - ? Unified enforcement agencies;
 - ? Mechanism for financial support for environmental protection achievements;
 - ? Access to decision-making processes;
 - ? Intelligible information available regarding government and private activities and plans;
 - ? Citizen’s standing to sue;
 - ? Policies protective of future generations’ needs, both humans and ecosystems.

- Resident of low-income, racial minority neighborhood
 - ? Standing to sue;
 - ? Access to private polluter’s information for the community and the workers;
 - ? Enforcement actions and penalties commensurate with what other areas receive;
 - ? Quick enforcement and consideration of the need for continuing jobs;
 - ? Access to government decision-making;
 - ? Policy in multiple languages;

- ? Assistance in participation, such as legal counsel and technical assistance;
- ? Environmental standards for “carrying capacity” of community;
- ? “Neighborhood veto”;
- ? Whistle-blower protections and remedies short of shutdown;
- ? Financial support mechanisms;
- ? Unified enforcement agency;
- ? Less discretionary standards.

o Retail store manager

- ? The challenge of balancing environmental protection, economic health and interests of specific groups;
- ? Protective health standards;
- ? Efficient government;
- ? Affordable living conditions;
- ? Accurate information available;
- ? NIMBY “quality of life” protection.

D. Three Types of Justice (Pages 31 – 46)

1. Distributive Justice (Pages 32 – 39)

The Rawls’ excerpts (pages 32 – 33) states two principles regarding the distribution of rights, duties and advantages. It also notes the reality of inequalities in social positions, emphasizing that “the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.” (Page 32.)

The principal question I suggest students should be directed to is in Note 1 on page 33: What aspects of environmental law and regulation should be seen as “major social institutions” unequally affecting people?

Among the many possible responses to this question are:

- ? The traditional legal burden of proof, which favors free market production and development activities and places the burden on the objector to point out environmental or safety concerns and argue for restraint.
- ? A variety of substantive and procedural requirements tending to direct siting of dangerous and dirty facilities to poor and/or racial minority areas.
- ? As an ironic side-effect of the responsiveness of enforcement officials to community pressure, weaker political power in some communities leading to diminished environmental enforcement attention there.
- ? Expectations and incentives for high volume agricultural production, with use of synthetic pesticides, raising risks for agricultural workers.

- ? More comprehensive environmental, health and safety regulation in some countries or regions, such as the U.S. and EEC, leading to the export of more dangerous substances, products, production activities, and wastes to poorer nations.

With respect to the values to be included in the calculation of just distribution, should Bowie's list (page 34) be expanded to add a minimum level of environmental health, safety, and comfort to values affecting distributions?

2. Corrective Justice (Pages 39 – 43)

As noted at page 39, the earlier Bowie excerpt (at pages 33 – 34) discusses retributive justice through the criminal law for punishment of breaches of laws or moral codes. Corrective justice (under its various labels and subcategories of retributive, rectificatory, or compensatory justice) can be seen at work in the environmental context by looking at both criminal law sanctions and tort law responses to damage done.

Hart (pages 40 – 43) sees equality promoted through compensatory justice, as one party has unacceptably diminished another and the prior equilibrium is to be restored. Hart's discussion of strict liability (page 42) is an important jumping off point for student consideration of corrective justice in many environmental law contexts, since there is such heavy reliance on strict liability in many environmental statutes. Hart's comments help to emphasize that when strict liability is imposed, fair treatment is affected by broader social welfare goals.

3. Procedural Justice (Pages 43 – 46)

Considering the Hart excerpt (pages 43 – 44), which environmental laws can be described as for the benefit of all individuals, and which only benefit some, even at the expense of others? Hart suggests that procedural fairness in the making of any such laws arises from the full consideration of all parties' interests as the basis for validating the policy choices made.

Rawls (pages 45 – 46) explains that perfect procedural justice occurs when there is a clear criterion for a fair outcome stated and the procedure guarantees this result. Imperfect procedural justice occurs when the correct outcome is agreed upon, but the procedure cannot guarantee this. Pure procedural justice occurs when there is no criterion for the right result, but the procedure, properly followed, defines it.

Does one of these three modes dominate in environmental law? Arguably it is the second, imperfect procedural justice, especially in view of the complexity of the issues and the frequent insufficiency of needed data. An argument also can be made for the importance of pure procedural justice, emphasizing Hart's point about the importance of full participation. These arguments can be reprised when Chapter 6 is reached, on Access to Decisions and Data.

CHAPTER 3: SETTING REGULATORY AGENDAS

A. Overview (Page 47)

The readings in this chapter introduce a variety of environmental and non-environmental factors which determine the areas of environmental concern addressed by legislatures and agencies, and relative priorities in the attention given to these areas.

As the Overview explains, this chapter will examine influences on society's choices to attend to certain environmental problems rather than others, and to attach different levels of priority among them. To the extent that these choices work more to the benefit of some groups than others, or even are detrimental to some interests, distributional equity concerns are raised. Also, if compensation for environmental harms is a priority, questions arise as to the corrective justice concepts to be pursued.

B. Social, Political, and Economic Factors (Pages 47 – 72)

In part, these readings examine the history of environmental law, in terms of the factors that gave us the current regulatory agenda. In part they also ask where we should be going from here, toward what goals, with what emphases among different areas of concern, and with what tools being used. In a broad sense, environmental concerns (as in the statutory declarations quoted at page 48) are the stated and real starting point for regulatory agendas to be set. However, we do not, and cannot, tackle all problems with equal thoroughness and aggressiveness, and many overlapping considerations come into play in determining what gets done.

The main question is why we regulate what we regulate. This is always a suitable question for students, but is of added saliency in periods in which major changes in regulatory emphases are the subject of public discussion, *e.g.*, when Congress is considering changes in some of the federal environmental programs or when a presidential election is underway and environmental issues—*e.g.*, global climate change—are a hot topic. One way to approach the question with students is by posing the following rather vast hypothetical role:

On the basis of the readings, if you were in Congress (or were a staff member to a congressional environmental committee or were a presidential advisor) and you were faced with a potentially vast overhaul of the nation's environmental statutes, what are the various factors you would consider in deciding what to regulate, what not to regulate at the federal level, what the goals of the environmental regulation would be, and what methods you would favor?

William Tucker (pages 49 – 51): What does the Tucker excerpt suggest about the groups whose concerns have affected the setting of regulatory agendas? Environmentalism favors the affluent over the poor, those who wish to preserve the status quo over those who favor growth for economic betterment. Is this argument persuasive? Does the argument also apply at the international level, in terms of developed nations' concerns for maintaining and enhancing environmental quality effectively translating into serious restraint on poor nations' development?

What were the bases for opposition from black communities and labor unions in the early years of modern environmentalism? Would you expect those concerns to be unchanged, and valid, now? What are the reactions from people in business? Is the “split personality” analysis accurate?

Phillip Shabecoff (pages 54 – 56): What is Shabecoff’s view regarding business’s orientation? Profit maximization would presumably be the major consideration; however, he notes that this is changing. What is his view regarding minority groups’ positions? It suggests environmental protection benefits are to be sought for all groups. He disputes Tucker’s suggestion that environmentalists are affluent, and sees more support among the poor and more resistance among the rich. Finally, he suggests that the exclusion of poor and minority groups from environmental group leadership is simply a belated recognition of these allies.

With respect to the hypothetical role suggested above, what interest groups would you be concerned about, and what would you expect to hear from them? Perhaps established environmental groups, industry associations, labor unions, civil rights groups, scientists and toxicologists, and budget and deficit experts.

Are there any areas of environmental regulation principally aimed at poor and racial minority individuals? (Page 56, Note 1.) For example, lead control, pesticides usage, asbestos in buildings, inner city carbon monoxide? Are these reassuring efforts or tokenism?

John P. Dwyer (Pages 57 – 61): What would you see as the proper role of Congress relative to agency implementation capabilities? With regard to political factors, Dwyer questions the legislative process, and highlights the incentives for legislatures to enact overly specific and noble goals that are unrealistic and not matched by agency resources to effectively accomplish them. Symbolic legislation transfers critical conflicts to agencies and courts. Dwyer addresses the disparity between overly ambitious, politically appealing “symbolic legislation,” which promises a risk-free environment, and the reality of its implementation.

What are the lawyers’ responsibilities when such legislation is being created? Does it serve different types of clients’ interests for legislation to be unrealistic and unsuited for clear-cut implementation? Is it better for laws to be very general and precatory in nature, leaving it for agencies to set more precise goals? Ely criticizes that approach as well (pages 61 – 62).

Can legislators find the right middle ground between generality and specificity in environmental prescriptions? Consider the example of the Clean Water Act and possible future enactments aimed at non-point source pollution. Should Congress declare firm goals for percentage reductions from different types of non-point source pollution, or declare broad policy goals and leave it to the EPA to implement? Are there other examples? What about Superfund reform and political considerations affecting the legislative design that is ultimately reached?

U.S. General Accounting Office (Page 64): How powerful a force do budgetary constraints pose? Perhaps they simply, constantly, and inevitably just emphasize the need to set priorities.

Eleanor Randolph (Pages 65 – 69): Who is to make the decisions in conflicts between environmental welfare (including health risks) and personal and local economic interests, such as jobs? Should environmental protection give way to economic development interests and maintenance of jobs? Who should decide such a thing?

If decisional power ordinarily rests with a government official, such as the EPA Administrator, should there be a change to instead rely more heavily on market incentives (pages 70 – 71) rather than command and control regulation? Would such a shift help or hurt economically disadvantaged communities (page 72)?

C. Global Factors (Pages 72 – 77)

Can the environmental lawyer adequately grasp the broader, global dimensions of issues being raised? As to what types of environmental problems should we look to international considerations in making U.S. environmental policy? What are the risks and benefits of doing so?

D. Risk Analysis Methods (Pages 77 – 98)

Earlier portions of the chapter address social, political, economic, and international factors. This risk analysis methods section raises possible alternatives to the more chaotic and unprincipled criteria for setting regulatory agendas. Is it salutary to make this task more technical?

As outlined by the Carnegie Commission report (pages 78 – 82), what are the basic techniques of risk analysis? Should we, and could we, base legislation largely on risk analysis and the scientific setting of relative priorities in terms of health and environmental hazards?

Can the EPA take the steps urged by the Science Advisory Board (pages 82 – 88) and implement a broad, risk-based regulatory program? Should it emphasize ecosystems as much as human health? Should it emphasize relative risk reduction, and not limit its risk comparison efforts to those environmental problems it is required by law to mitigate? Should it take initiatives that go even beyond specific legal mandates?

Could the EPA ignore popular fears and perceptions regarding risks, even if those attitudes were inconsistent with risk analysis findings?

With regard to the Huber article (pages 88 – 97), students can be asked to evaluate the distinction between standard-setting regarding old risks (controlling the known) and screening regarding new risks (preventing the new). Students especially should be urged to consider whether it is counter-productive to embody this distinction in our laws. Is the distinction based on an overly fearful approach to technological change? Why is the distinction so popular in environmental laws?

What should be done about possible negative effects of this bifurcated approach? Is comparative risk and substituted risk evaluation preferable? It is practical, affordable, and within the realm of human knowledge? Should the burden of proof perhaps be linked to whoever is in the best position and with best incentive to produce safety information?

E. Risk Analysis and Equity (Pages 98 – 105)

Can risk analysis address environmental racism and equity concerns? Environmental justice issues assert exclusion from traditional environmental concerns, business-oriented economic concerns, and also technical risk analysis.

Could greater use and some “reform” of risk assessment promote justice, as suggested by Kuehn? If so, which concepts of justice could be better served? Could enhanced use of risk assessment respond to any of the concerns identified for various roles in the Chapter 2 exercise for various roles (pages 30 – 31)?

CHAPTER 4: SELECTING ENFORCEMENT AND CLEANUP TARGETS

A. Overview (Pages 107 – 08)

This chapter shifts the student’s focus from the broad policy concerns of Chapter 3 toward the more concrete concerns of practicing environmental lawyers. As suggested earlier (in Chapter 1 at pages 4 – 5), Chapters 4, 5, and 6 address the types of justice concerns that arise most commonly in environmental practice. Indeed, these three chapters are the heart of the book’s attention to actual practice.

The principal question in this chapter is, to oversimplify it, who gets sued and why. Environmental enforcement lawyers constantly make choices as to which seeming violators of laws and regulations will be subjected to enforcement proceedings. Lawyers representing potential targets of enforcement often are called on both to assess the likelihood that the client will be a target and to devise strategies for preventing, ameliorating, or overcoming enforcement actions. Based on this recognition that a lot of lawyer work pertains to the selection of targets, this chapter addresses some of the considerations that determine who is selected for enforcement action under pollution control statutes such as the Clean Air Act or Clean Water Act or for cleanup responsibilities under remedial statutes such as Superfund.

At the outset, the student’s orientation toward these materials can be aided by a simple reminder that the range of factors addressed in Chapter 3’s discussion of regulatory priorities will be mirrored to a considerable extent in this chapter. Many of the same kinds of variables which influence the setting of environmental policy generally can be found at work again in particularized enforcement choices. Of course, given the invariably limited resources available to enforce the vast range of environmental requirements, choices of enforcement and cleanup targets inevitably must be made.

The varied policy justifications for these choices, their fairness from the viewpoint of potential targets, and their effectiveness to further environmental policy goals, are important concerns of environmental lawyers. Footnote 1 offers excerpts from judicial decisions explicitly linking cleanup allocations to procedural and substantive fairness concepts. In working through the exercises and readings in this chapter, the student can be invited to try to make his or her own explicit links between Chapter 2's justice concepts and enforcement priorities.

B. Exercises (Pages 108 – 10)

Exercise 1 suggests a policy drafting exercise aimed at highlighting the range of factors environmental enforcement agencies ought to have in mind as they identify enforcement targets. This exercise can be explored with the class as a group, talking through the creation of the requested outline of major factors. Alternatively, individuals or small groups can be asked to prepare outlines outside of class for later submission and discussion.

The obvious breadth of conceivably relevant factors simply means that students can draw on any and all of the readings in this chapter, as well as on other sources of pertinent material including prior chapters. In other words, as an alternative—or a supplement—to direct discussion of the individual readings in the chapter, this exercise can be used as a springboard for analysis of virtually all of them. Thus, for example, in preparing the enforcement policy outline students can address:

- ? The importance of fault versus strict liability as corrective justice considerations (as explained by Hart in Chapter 2 at pages 40 – 42);
- ? The value of risk analysis techniques (as presented in Chapter 3 at pages 77 – 98) for setting enforcement priorities;
- ? The value of carrots (as suggested by Seidenfeld at page 114 and the environmental auditing and management system materials at pages 128 – 35) versus sticks (as suggested by Seidenfeld and Rechtschaffen at 113 – 15);
- ? The appropriateness of criminal proceedings (as discussed by Paddock at pages 112 – 13 and Novick and Lazarus at pages 125 – 28); and
- ? The effectiveness of using an enforcement case to set an example (as suggested at page 111).

The students' listing of factors in the enforcement policy outline can be very long, of course. It should include the environmental justice considerations raised by the often-cited National Law Journal article (at pages 116 – 19) and Lazarus (at pages 119 – 20 and 123 – 24), though Bryant's skepticism (at pages 122 – 23) about the Law Journal's methodology also deserves discussion. The relative importance of administrative versus judicial forums (see Paddock at page 112, and comments at pages 111 – 12) should be evaluated, as well as the role of citizen-initiated enforcement.

The last part of this exercise asks the students to identify factors which may well influence enforcement decisions but in an ideal world probably should not. This question links, for example, to the reminder (at page 121) about politics as an extra-legal variable.

Exercise 2 (page 109) asks for the presentation of arguments on behalf of four different clients as possible enforcement targets. Implicit in this exercise is the reality, which may come as a surprise to some students, that environmental prosecutors at times engage in conversation with targets and their lawyers before a decision on whether or not to institute enforcement proceedings is made. As with Exercise 1, this exercise can be a vehicle for illuminating various of the perspectives presented in the Chapter's readings.

This exercise, even more than the prior one, lends itself well to dividing the class in half with some students making the "defense" arguments and others presenting the government's responses. One logical way to begin is with the prosecutors' descriptions of why they view a specific client's conduct as worthy of enforcement action. The target's lawyer then can respond. More realistically, however, I suggest that the defense lawyers' arguments can be heard first. This better reflects actual practice in which the government at the outset keeps its cards close to the chest and the target's lawyer makes the pitch that the client's alleged infraction is not worthy of the government's enforcement effort or at least is not worthy of major proceedings, substantial penalties, etc.

The third of the hypotheticals in this exercise touches on environmental justice considerations, although not in the usual context in which low-income or minority individuals are subjected to pollution impacts, rather than creating them. This scenario—or a variation on the second problem to locate the plant in a low-income minority community—can be linked to the important question presented in the Note at page 124: Can and should environmental statutes and / or enforcement policies be expressly aimed at rectifying environmental inequities? This question, of course, can also be addressed in Exercise 1.

CHAPTER 5: ADMINISTERING AND ENFORCING ENVIRONMENTAL STANDARDS

A. Overview (Pages 137 – 38)

This chapter continues the focus on the work environmental lawyers do. The topics addressed here are also closely linked to procedural justice concepts presented in Chapter 2. The underlying premise is that much of what environmental lawyers do aims at protecting their clients from unfairness in regulatory and enforcement processes. Environmental lawyers, especially those prosecuting or defending alleged violators of environmental standards, often must consider fairness aspects of the standards sought to be imposed and of the processes by which implementation and enforcement are carried out. This chapter examines some of the most basic and common of these types of justice concerns, largely in the procedural fairness realm.

Two preliminary points are worth emphasizing to students: First, some of these fairness concerns result from government actions prior to the initiation of formal enforcement proceedings, even though the concerns may only be raised later during such proceedings. An example would be the adoption of unfair or unintelligible regulatory standards, which may in some instances only become subject to objection during the presentation of a defense to an

enforcement action. Alternatively, other fairness concerns may arise during the conduct of the enforcement proceedings themselves, such as inadequate notice or restricted opportunity to be heard.

Second, students may need to be reminded that procedural fairness arguments can be presented on a number of different levels of legal discourse. As pointed out (at page 137), at one end of the spectrum are alleged constitutional violations and at the other end are simple common sense or equitable assertions of what constitutes fair treatment. Law students may need to be reminded that lawyers far more often deal with the latter than the former.

B. The Applicable Standards (Pages 138 – 45)

1. Clarity (Pages 138 – 45)

The volume and complexity of environmental statutes and regulations often create uncertainty about their meaning. The cases here present the constitutional foundation for minimum requirements of clarity and also highlight the vagueness of the vagueness test itself. Questions then arise about how clarity requirements should operate, *e.g.*, whether the same degree of clarity should be required regarding criminal as opposed to civil liability (*see* page 141, Note 3), whether the same degree of clarity should be required regarding strict liability as opposed to fault-based liability (*see* page 141, Note 2), and whether more general or more specific laws are fairer (*see* page 142, Note 5).

State v. Normandale Properties, Inc. (page 138) recites the basic constitutional standard governing vagueness challenges, but finds the hazardous waste statute sufficiently clear. The court concludes not only that the general definition of hazardous waste is adequate, but that a list of specific chemical compounds might have provided less than adequate notice of prohibited conduct. Note 4 at page 141 invites attention to the seeming illogic of this perspective that a more general law is less vague than a more specific law. The answer probably lies in the courts' practical recognition—in cases like *Normandale* and *Rocque* (page 142)—of what regulated persons are realistically likely to understand about what the law is saying about their activities.

Note 1 (page 141) follows up on the *Normandale* comment that some statutory definitions of hazardous waste might raise due process concerns. Would that problem arise if the containers being disposed of labeled specific substances but said nothing about their hazardous character? Would the problem arise regarding substances, such as certain acids, which only become hazardous at certain concentrations specified in agency regulations?

Similarly, Note 2 (at page 141) considers both the actual understanding by regulated persons and also the relationship between constitutional notice and a statute's scienter requirements. The latter is noted in *People v. Martin* (page 149), including the court's comment (page 151) that a scienter requirement "itself guarantees inadequate notice." Is the corrective justice preference for fault-based liability strengthened by the procedural justice requirement that notice is a prerequisite for punishment?

In *Ross Neely Express, Inc. v. Alabama Department of Environmental Management* (page 143), the court strikes down as unconstitutionally vague and overbroad dust control regulations requiring “reasonable precautions” and barring “visible fugitive dust emissions beyond the lot line.” Note the irony in the court’s use of a “reasonableness” test to invalidate the legislature’s “reasonableness precautions” requirement.

Note 1 at page 144 asks whether this case can be reconciled with *Exxon Company, U.S.A. v. State of Texas* (page 140) which upholds very broad, standard nuisance language. The *Exxon* case emphasizes the long history behind the traditional definition of the complainant’s injury in a nuisance case, while *Ross Neely* focuses on the defendant’s allowable conduct and whether the regulatory language gives sufficient guidance regarding it. Nonetheless, it remains difficult to reconcile the Alabama court’s rejection of the “reasonableness precautions” and “lot line” regulations with the Texas court’s acceptance of the nuisance language.

2. Rationality (Pages 145 – 49)

The overlapping concerns for substantive due process and equal protections (as summarized at pages 145 – 46), both of which focus on rational exercise of legislative authority, are seen in *Rockford Drop Forge Co. v. Pollution Control Board*. The case presents a potpourri of constitutional objections to the state’s regulations. The court upholds the stationary source noise regulations as against arguments based on vagueness, improper delegation of legislative authority, exceeding of statutory powers, and equal protection.

Note 2 at page 148 focuses on the type of evidence which would be relevant to the equal protections once all of the noise regulations are adopted. Applying the *Clover Leaf Creamery* (page 145) emphasis on whether the classifications are rationally related to the achievement of legitimate state interests, and the illustrative cases (at page 149), is there any conceivably irrational set of classifications? The reduction of noise in an “incremental manner” from any types of sources would make an unconstitutionality conclusion highly improbable.

3. Delegation of Powers (Pages 149 – 54)

The delegation, or separation of powers, issue touched on in *Rockford Drop Forge* reappears in *People v. Martin*. Both cases implicitly demonstrate the conceptual and strategic overlaps among the variety of constitutional concerns in this chapter. The court upholds, as against both vagueness and unlawful delegation claims, a criminal prosecution based on a general hazardous waste statute as augmented by detailed agency regulations and lists of hazardous wastes. Containing both the general and the specific, these requirements seem to dodge the problems seen in *Normandale* above.

Note 1 at page 152, and the case excerpts presented, are intended to emphasize the practical necessity for this type of lawmaking approach, with a general statute inviting specific supplementation at the agency level.

Note 2 summarizes the Supreme Court’s adherence in the *Whitman* case to its long-standing lack of enthusiasm for delegation challenges. The student should be reminded that

nondelegation objections at the state level are matters of state constitutional law and thus might possibly have more of a chance than those raised against federal legislation.

C. The Right to be Heard (Pages 154 – 60)

The fundamental due process right to notice and an opportunity to be heard is reviewed in *Horn v. County of Ventura* and the explanatory excerpt (pages 157 – 59) and notes (page 160). This material is presented principally for the benefit of students who have not yet studied it in an administrative law or constitutional law course. The material highlights that environmental and land use restrictions are a venerable are for procedural due process claims.

Horn (at page 157) raises the question of how specific a court can and should be in prescribing notice requirements. Students may find it interesting to discuss the extent to which the court's reluctance to specify "the nature, content, and timing" of the constitutionality required notice is a wise and efficient judicial stance. Probably more interesting is the question of whether the remainder of the "reluctance" paragraph demonstrates that the court overcame its reluctance to a considerable degree.

Note 3 at page 160 anticipates the focus in Chapter 6 on access to decisional processes. If constitutional concepts of due process pertain only to persons with a "significant property interest" (page 155), what concepts—constitutional or otherwise—might be enlisted to argue for extension of notice and participation rights more broadly, even to concerned citizens generally?

D. Unpredictability, Delay, and Overlapping Enforcement (Pages 160 – 68)

The pervasiveness of unpredictability and delay in the implementation and enforcement of environmental law is the focus of this section. As indicated in Notes 2 and 3 at page 165, delay can be a blessing or a curse in environmental law and also can be a matter of luck (good or bad), strategy, or administrative necessity.

Monsanto Company v. Environmental Protection Agency (page 160) is an unusual case for a number of reasons. It spotlights both the regulated company's seeming respectable effort to find the best way of complying with the benzene standard and the corresponding need for an extra period of time. The agency, however, seems to have run out of either patience with this effort, trust in the company, or confidence that the agency has discretion to extend the time again. In this tension we find both the company and the agency struggling with the appropriateness of delayed compliance.

Adding spice to the mixture is the "pollution prevention strategy" (page 163) angle, as indications are that the company was taking a broader view of its environmental responsibilities, in line with the agency's broader policy perspective. Note 1 at page 164 examines pros and cons of medium-specific versus cross-media environmental policy.

The dissent in *Monsanto* asserts that there is a discrepancy between what the record demonstrates and what the majority sees in it and in the EPA's position. Wrong or right in this instance, the dissent is a good reminder of the challenges and limits judges face in evaluating the

wisdom of environmental policies and the correctness of agencies' technical conclusions under the law.

Note 4 at page 166 briefly tackles the troublesome delay and the unpredictability which often arise in environmental law as a function of the overlapping enforcement authority of federal, state, regional, and local agencies. The procedural and corrective justice implications of the federal overfilling problem addressed in the *General Motors* decision provide an excellent lesson for future environmental practitioners about the complexity of the federal-state partnership in this field, as well as about procedural and corrective justice implications of this division of power.

CHAPTER 6: ACCESS TO DECISIONS AND DATA

A. Overview (Pages 169 – 73)

As should be clear to students and practitioners of environmental law, much of the work of environmental lawyers involves raising or responding to claims for greater access to environmental decisions and information. Perhaps the best way to capsule this point is by stating that environmental law work often tries to ensure an opportunity to provide input to decisional processes and at other times tries to ensure receipt of the output of such processes. There are various reasons for both types of access, beginning with the right to be heard in adjudicatory processes, extending to the need to know about environmental conditions, and leading to the desire to influence future policy.

The broad question addressed here is to what extent access to information and decisional processes should be broadened and to what extent it should be limited. Stated otherwise, what are some of the basic objectives of legal work promoting access, and what are some of the areas of conflict among those objectives? Obviously different aspects of procedural justice come into play, as the materials in this chapter illustrate. As noted at page 169, access concerns arise in an unlimited range of settings. The chapter offers selected, thought-provoking examples.

The procedural justice emphasis on participation in decision-making, and environmental law's embrace of this emphasis, are highlighted in the Selmi and Manaster excerpt (pages 170 – 71). The linkage between this emphasis and the distributive justice objectives of environmental justice advocates is highlighted in the Lazarus excerpt (pages 171 – 73). Lazarus offers suggestions about ways in which minority communities can have greater input into environmental decision-making, *e.g.*, through greater linkage to established environmental groups, and possibly through greater decentralization of environmental policy powers, rather than their centralization in the federal government.

The Note at page 173 invites a rather free-wheeling discussion of attitudes and ideas on citizens group involvement in environmental decision-making. Students can be asked to consider—either individually, in small groups, or as a full class—what would be the ideal structure, skills, and objectives of a new citizens group, assuming they were given a large amount of money and free time to organize one to influence environmental policy. The

discussion should become more specific as it proceeds with respect to the forums in which access would be sought for input and the forums from which information would be sought as output. Are these forums necessarily the same in all instances?

B. Access to Court (Pages 173 – 84)

The standing problem in *Lujan* is presented as a reminder of judicial limitations on opening the courts to every concerned citizen. As noted in Chapter 5 regarding procedural due process issues (at pages 154 – 60), issues such as those and standing are covered more extensively in courses such as administrative law or constitutional law. Again, the limited materials offered here are intended to sensitize students to the relevance of these issues to environmental law.

With regard to *Lujan*, students can be asked to consider the various reasons why the Court limited access in that case, *e.g.*, to avoid judicial action that will not produce any different outcome regarding the challenged activity, and to avoid the use of judicial resources regarding speculative harms. How sensible is it to require the plaintiffs to allege more specific travel and use plans?

The excerpt from the *Massachusetts* decision (pages 178 – 83), like the Note on *Laidlaw* (pages 177 – 78), highlights the still evolving character of standing doctrine. The questions suggested at page 184 provide avenues for exploration of where the law on standing could or should go.

C. Access to the Regulatory Process (Pages 184 – 96)

1. Participation Rights (Pages 184 – 88)

The *Phibro Resources* case is an example of a very practical access problem arising in the enforcement context. The company seeks access to adjudicatory decisions affecting its own interests, and in this case access is sought both for input and output purposes (or perhaps, better said, the need is for output regarding the settlement among others as a basis for new input by the company to protect its interests). What arguments can be made for the agency and the other litigants regarding keeping Phibro unaware of the settlement terms and unable to participate in the settlement discussions? What are Phibro's counterarguments?

- ? The agency claims it needs the strategic ability to reach settlements with some parties without satisfying all possible participants.
- ? The agency also urges that environmental protection is best served by a quicker cleanup.
- ? Phibro emphasizes enforcement of the letter of the agency's own broad access rule regarding consent order negotiations.
- ? Phibro also emphasizes the added cleanup costs, ineffective cleanup measures, and continuing criminal penalties possibly resulting from others' inadequate efforts

Note 1 at page 187 is an important reminder for students that participation arguments can be made on a hierarchy of different grounds. Note 2 highlights broader public interests in information about cleanup settlements.

2. Confidentiality Interests (Pages 188 – 93)

The *Monsanto* case is included to focus students' attention on the long-recognized needs for—and benefits of—confidentiality regarding certain types of business information, *i.e.*, trade secrets. The case recognizes and resolves a conflict between such confidentiality and public access interests. The Supreme Court accepts that public disclosure serves a public use, in this instance expressed through a congressional choice that is within its power. Because the trade secrets are property interests, however, the constitutional obligation to compensate for the taking is to be enforced.

Note 3 at page 192 spotlights the added realms of conflict between confidentiality and access arising from electronic recording and reporting of environmental information, as well as the availability of the Internet.

3. Open Meetings (Pages 193 – 96)

Krause presents a laundry list of purposes served by open meeting requirements. As appealing as these considerations are, there may be proceedings in which openness is more a curse than a blessing. The California dispute (pages 194 – 96) is an example. What are competing arguments regarding opening Hearing Board deliberations to the public?

The Note at page 195 recalls that a broad coalition of attorneys opposed application of the open meetings statute to hearing board deliberations. A variety of concerns prompted their opposition, *e.g.*, recognition by all of them that vigorous debate and analysis among the board members could be “chilled” by open deliberations, and fear that only parties with greater monetary resources (*i.e.*, not most environmental groups) could afford to pay for lawyers or others to sit and observe such deliberations.

The Note's last question, regarding legislative correction, challenges students to consider the political risks of opposition to open meetings in any forum.

D. English as a Barrier (Pages 196 – 200)

The selections here highlight a handful of problems related to the language of environmental law. The most obvious problem, as reflected in the *El Pueblo* litigation, is the desire for presentation of environmental information in a language other than English when a substantial portion of an affected community has limited facility with English. That case raises a question as to whether broad statutory language regarding public access to information should be liberally construed to require translation of documents into languages other than English. Should the judge in the Kettleman City controversy have required translation of the CEQA documents, based simply on a broad statutory policy for public disclosure of such documents? What would

be the benefits and harms of doing so? The Reich excerpt (page 196) similarly suggests such questions in the NEPA context.

A follow-up question, as seen in Note 1 at page 198, is whether legislation should directly require translation and, if so, what threshold criteria should be set for triggering the requirements.

Notes 2 and 3 at pages 199 – 200 acknowledge that, even apart from the non-English language difficulties, there are language challenges arising from the often technical and complex nature of environmental information. Access to decisions and data, students should recognize, is a problem for people approaching environmental law and regulation from many different positions.

CHAPTER 7: SITING OF POLLUTING FACILITIES

A. Overview (Pages 201 – 04)

The most controversial and difficult area in which environmental protection goals and concepts of justice intertwine is the siting of polluting and risk-creating facilities. Although the previous chapters also link environmental protection with justice in various ways, the complexity of the linkages in siting disputes is far greater. Siting brings together distributional justice concerns, as well as procedural justice problems and some corrective or compensatory justice arguments.

In light of these complexities, and the publicity often attending siting controversies, it should be no surprise that this chapter is the largest, most topical, and mostly fully linked to the environmental justice movement and the legal developments it has spawned.

The following statement on page 203 may be especially worth calling to students' attention, for it capsulizes much of what this book and environmental justice are about:

Although environmental law fundamentally concentrates on the environmental effects of activities undertaken in pursuit of other societal goals, now the law is evolving to address as well the societal effects of activities undertaken in pursuit of environmental goals.

The student who fails to grasp this point will miss much of the significance of these materials. Similarly, the discussion of “environmental justice” terminology at pages 203 – 04 is also important to discuss with students, for the various, seemingly interchangeable labels do not all carry the same meaning.

B. Racism and Siting (Pages 204 – 46)

This section offers a concise selection of foundational material for understanding the modern history of environmental justice activism related to facility siting. As Bullard describes the heart of the issue (page 208), “It is this unequal sharing of benefits and burden that has

engendered feelings of unfair treatment among poor and minority communities.” This material includes the core disputes over what the relevant data on racial and economic discrimination are and what they mean. Additionally, students will be invited to explore possible definitions of “racism” in this context, as well as differing perspectives on the causes of siting patterns. In short, this section can help the student construct a factual, conceptual, and policy framework for the legal materials which follow.

In going through these materials, discussion with students should address the causes and motives behind inequities in the extent to which poor and minority communities are subject to environmental risks and burdens different from those experienced by other communities. Discussion also can address ways in which these environmental and health burdens reflect broader social and economic injustices beyond the realm of environmental activities, policies, and laws.

The more purely legal materials in the latter portions of the chapter largely focus on the extent to which environmental policies, legal procedures, and government resources can be redesigned to redress these burdens and imbalances. The legal materials also are linked to the possible roles of the lawyer in siting disputes, recognizing—as stated in Chapter 1—that the environmental lawyer attempts to serve a client, environmental protection, and one or more justice concepts all at the same time.

1. Historical Background (Pages 205 – 12)

The 1972 report (pages 205 – 06) on the attitudes of South Central Los Angeles residents toward improvement of environmental conditions is included to highlight a few points. One is that minority community attention to environmental quality is not an entirely new phenomenon. Another is that the “environmental” concerns and priorities of some inner city residents may be very different from what most law students and professors have experienced or would assume (*e.g.*, “wandering cats and dogs” are reported as of greater concern than air pollution).

In contrast, Note 1 at page 210 probes the relevance of the “NIMBY” label to the concerns and objectives of poor and minority neighborhoods. Is it demonstrable, or plausible, that such a neighborhood would be motivated by the “NIABY” attitude? Can it realistically be expected that low income communities would embrace broad pollution prevention goals? Even if it is not, and instead the NIMBY attitude seems to hold sway, can’t the argument be made that all communities—rich or poor, majority or minority—are equally entitled to the defensive NIMBY stance?

2. Data and Debate (Pages 212 – 28)

The readings in this section present some of the seminal studies and persistent conflicts in the development of the environmental justice movement. The Notes at pages 227 – 28 invite the student to attempt to sort out the data and the debates the data have created. Note 1 invites consideration of what conclusions the student can reach on the basis of the conflicting studies as to the extent of the problem of discriminatory siting of waste disposal facilities, as well as the actual extent of greater exposure to environmental and health risks. It is useful to help students

grasp that discriminatory siting and greater exposure may not in all instances go together, although experience and common sense suggest that often that is the case. Probing this linkage at a minimum reminds the student that proof, and not just intuition, is important in the law's response to injustice.

Note 2 acknowledges the proof difficulties, even suggesting the unlikely conclusion that proof would “convincingly demonstrate no racially discriminatory effects in the siting of facilities.” If that were shown, should the legal system nonetheless respond to widespread public *belief* that there are such effects as well as damage to community health? Which branch of government should respond? The different responsibilities and political sensitivities of the legislative branch in particular, in contrast with the judiciary, should be probed.

Note 3 questions the importance of national or regional data from the perspective of a lawyer working on a siting controversy. What are the benefits and risks of linking any one such controversy to the “movement”? What are the pros and cons of not trying to make this linkage? The advantages of such linkage can be discussed, *e.g.*, the tactical experience, legal talent and prior research, and moral support available from other active environmental justice lawyers. Contrasting disadvantages might include an increased likelihood of missing opportunities for productive local relationships and resolutions by virtue of placing a siting dispute in a broader, more political context.

3. Definitions and Causes (Pages 228 – 46)

These readings present a variety of attempts to provide core definitions of environmental justice and injustice. In reviewing these attempts with students, it is helpful to remind them that there is a broad spectrum of possible types of siting cases of concern, as suggested in Note 1 at page 232. At one end of the spectrum is intentional, conscious selection of a community because it is poor and minority and thus will have lesser economic and political ability to resist the facility. The infamous Cerrell Associates report (discussed at page 218, and indirectly alluded to by Lazarus at pages 234 – 36) represents this position. At the other extreme are instances of the historical placement of facilities in communities that later have developed low income and / or minority populations as a function of housing market dynamics (as studied and debated by Been and others at pages 237 – 43). A city like Gary, Indiana may serve as an example. Note 1 asks students to ponder whether the type of case presented should make much difference in the devising of legal remedies. My view is that the type of case makes a great deal of difference, especially with respect to the development of policies to change future siting practices.

One of the most provocative definitional attempts is Torres's view that decisions with “predictable distributional impact” (pages 229 – 30) contributing to racial subordination and domination exemplify environmental racism. Thus, conscious ignorance of racial impacts can be seen as racist in effect, if not in intention as well. This perspective opens up the possible desirability of an affirmative action approach to environmental policymaking and siting, taking racial impacts into account to redress past racist patterns. As it is more likely that students have thought about affirmative action in other contexts—especially education—linkage of affirmative action issues in those contexts to siting controversies can produce worthwhile and lively class discussion.

The more pragmatic, compartmentalized view of an environmental lawyer such as Sive (at pages 243 – 44) can be contrasted with the more expansive objectives of Yang (pages 228 – 29), Torres, and Bullard (pages 233 – 34). As was done in Chapter 1, students should consider their own inclinations regarding the moral acceptability of forming coalitions, even with others with whom they may disagree on other social issues, in order to advance a particular environmental goal. More broadly, what is the environmental attorney’s responsibility to society in view of the merging of environmental and social justice concerns in siting disputes? Should environmental activism be intimately and constantly linked to poverty law objectives, or is a more pragmatic, issue-by-issue approach to environmental lawyering more likely to achieve environmental objectives, even if poverty law goals may be ignored or even recognized as inconsistent in a given instance?

For example, what if a Native American tribe or a minority neighborhood wants the jobs and tax base contribution provided by an environmentally questionable industrial or waste treatment facility? Do the poverty lawyer and the environmental lawyer then find themselves as opponents? Once again, the question becomes which model of advocacy is to be chosen. Note 3 at pages 244 – 45 identifies four options, harking back to the Chapter 1 materials.

C. Legal Tools and Strategies (Pages 246 – 316)

1. Linkage to Concepts of Justice (Pages 246 – 49)

Assuming, as variously shown in prior readings, that distributional inequities exist regarding siting, how should they be rectified? That question is the heart of this chapter. This first subsection emphasizes that ideally the answer, or set of answers, should be linked to clear understanding of the specific concepts of justice—“theory of fairness” in Been’s phrase (as pages 247)—being served.

The Note at page 248 invites the student to articulate the concepts of justice he or she thinks should be promoted, based on Chapter 2 and more specifically on Been’s seven meanings sketched in the excerpt at page 247. In seeking more fairness in the allocation of environmental benefits and burdens of the siting of industrial and waste facilities, which criteria should be given greater priority? Obviously there are no easy answers, but the student who is to grasp the complexity and importance of this problem area needs exposure to the possible answers.

2. The Need for Legal Action (Pages 249 – 55)

This material implicitly cautions against too readily assuming that only legal solutions are worth considering. Various non-legal approaches are identified and debated (*e.g.*, waste elimination, political allocation of risks, or compensation schemes), though it is generally agreed that some legal action inevitably is needed.

Brief discussion is why this conclusion is reached will be helpful to set the stage for the legal materials which follow. For example, what objections can be raised to the three options Boerner describes? (Page 250 – 53.) What are Bullard’s objections to compensation (page 254)?

Boerner (at page 253) raises the difficult question of whether significant health risks can arise from activities and pollution in compliance with legal environmental standards. This anticipates the cumulative risks issue to be addressed below.

3. State Siting Statutes (Pages 255 – 70)

If legal action is needed, question then becomes whether legislative, executive, or judicial branch—or what combination of their powers—is best suited to promote the remedial and preventive objectives. If judicial action is to be involved, what causes of action would seem best to serve the interests of all parties for justice and environmental protection? This section first examines possible legislative actions and litigation deriving from them. The following section addresses litigation theories directly.

The Godsil article (pages 256 – 59) summarizes some basic state law approaches to facilitating siting and reducing controversies over siting proposals. Recognizing that the NIMBY mentality characterizes many communities, now perhaps also including low-income and minority communities seeking to defend themselves against environmentally objectionable proposals, how much effectiveness can we expect of statutes seeking to preempt local NIMBY resistance? Can these statutes successfully overcome political pressure by defiant communities?

What are the pros and cons of the different approaches Godsil describes? As asked in Note 4 at page 270, what should be the basic components of a balanced and realistic state siting scheme? In reviewing the options, it is helpful to identify the critical variables the various approaches address, *e.g.*, who proposes the site, what are the criteria for acceptability of a site, and what mitigation is available if local preferences are overridden.

The two cases, *Stablex* (pages 259 – 66) and *Shelton* (pages 267 – 68), illustrate the operation, complexity, and preemptive force of state legislation for the siting of waste disposal facilities. As asked in Notes 1 and 2 at pages 268-269, should the racial or economic character of an affected local community have any explicit legal significance in state siting legislation, as apparently was not the case in either the New Hampshire or Connecticut legislation?

In light of the unsuccessful resistance of the local communities in those cases, what is the range of legal strategies available to the community lawyer who is asked to press a NIMBY objection as against a generally needed waste disposal facility? How helpful is evidence that the community is a previously disadvantaged community, either economically or environmentally? How does the lawyer resolve the tension between understanding the need for the facility and the community's unwillingness to bear the burden? Is the pollution prevention argument really the ultimate goal or is it a tactical way to express the NIMBY resistance?

4. Litigation Theories (Pages 270 – 316)

The principal pedagogical value of this section is the clarification it offers regarding the legal bases on which environmental justice litigation might proceed. Three basic avenues—

environmental statutes, constitutional doctrines, and civil rights statutes—are identified and addressed separately in the three subsections which follow:

a. Environmental Statutes (Pages 270 – 81)

Collateral uses of environmental statutes or reinterpretations of their scope are addressed in NEPA cases such as *First National* (pages 271 – 72) and Clean Air Act cases such as *Genesee Power* (pages 274 – 78) and the well-known Shintech controversy (pages 280 – 81). Students should contemplate the extent to which statutory language and Congressional purposes should be understood to encompass environmental justice considerations.

Note 2 at pages 273 – 74 concerning NEPA, and Note 2 at pages 279 – 80 regarding the Clean Air Act, highlight the possibly greater latitude for such reinterpretation of agency powers in light of the presidential Executive Order presented later (at pages 316 – 18).

b. Equal Protection Doctrine (Pages 281 – 93)

These constitutional cases are foundational for understanding both the history of environmental justice litigation and the severely limited utility of constitutional doctrine in this realm. Much of this material, of course, will be quite familiar to students who have studied constitutional law, and the difficulty of bringing a successful equal protection case over siting will become evident to students who are new to these cases. Accordingly, I do not recommend spending a great deal of time on this section. Probably the most intriguing question to pursue is whether, and with what type of evidence, discriminatory intent could be shown in an environmental justice siting case. Examination of the evidence offered in *Bean* (pages 283 – 89) and *East Bibb* (289 – 90) will highlight the challenge.

As always, a reminder may be in order that state constitutional law provisions—or even state civil rights legislation—conceivably could be of broader, more protective scope than the federal provisions.

c. Title VI of the Civil Rights Act of 1964 (Pages 293 – 316)

In view of the failure of equal protection doctrine to cover siting disputes, because of the difficulty of satisfying the discriminatory intent requirement, could relief be available under existing—or yet to be developed—civil rights statutory language?

Title VI of the Civil Rights Act of 1964, regarding federal government support for state and local environmental programs, has been pursued in administrative complaints to EPA (discussed in Note 2, pages 296 – 97), attempts to litigate alleged violations directly in federal court (discussed in Notes 1 and 3, pages 295 – 99), and attempts by EPA to develop “guidances” on how complaints should be handled (pages 299 – 316). The materials here capsize the history of these efforts and address the broad question of how much can be accomplished through Title VI.

In discussing the Title VI materials, and especially the Draft Guidance (pages 301 – 15), linkage to concepts of justice can be revisited. One value of pursuing this linkage is to give greater coherence to the extensive detail in the Draft Guidance. What concepts are promoted through Title VI policies and procedures? For example, procedural justice may be advanced through area-specific agreements (pages 303 – 04), while distributive justice is in play in the complex framework for adverse disparate impact analysis (pages 304 – 14). While examining and evaluating the Draft Guidance, as a notable attempt to put nondiscrimination concepts into operation in the important area of federally-supported environmental regulation, limitations on the Title VI approach such as those noted by Lazarus (pages 293 – 95) should also be highlighted.

Other, more specific questions to address include the difficult issue of whether compliance with environmental standards necessarily means there can be no adverse disparate impact. This issue is raised in Note 4 at page 299 and discussed in the Draft Guidance at pages 309 – 11. It opens up the related question of whether cumulative impacts of multiple polluters—even if all are in compliance—can be addressed through Title VI. Students should evaluate the following statement in the Draft Guidance at page 302: “Efforts that focus on all contributions to the adverse disparate impact, not just from the permit at issue, will likely yield the most effective long-term solutions.” Although in the abstract this statement is probably very appealing to students, they should be pressed to identify the legal, practical, and political hurdles such efforts would have to overcome in order to be effective.

D. Presidential and Congressional Responses (Pages 316 – 26)

The 1994 Executive Order, an internal directive to executive branch agencies to be more attentive to the discriminatory environmental implications of their actions and programs, has become an established feature of the environmental justice landscape. Students are likely to need orientation, however, as to the limited legal force of an executive order, particularly its disclaimer as to the creation of any enforceable rights. (See Note 1, page 321.)

In contrast, the influence of the Executive Order on the interpretation of other statutes, especially NEPA (as emphasized in the Clinton Memorandum at pages 318 – 19 and as explored earlier at pages 273 – 74), should be revisited. Similarly, questions posed earlier (at pages 116 – 25) about the possibility of factoring racial and economic inequities into cleanup and enforcement decisions can be probed again in the context of the Executive Order.

Lastly, Notes 4 and 5 at pages 325 – 26 present the important, recurring question of what the main components should be in a federal statute, or perhaps a state statute, to address environmental injustice in siting. As challenging as that question is, posing it to students is an effective way of helping them to bring together the various strands of this large chapter. More specifically, if they have concluded that there is a justice problem in siting and that the law should be able to do something substantial to alleviate it, the task of trying to delineate the main features of such a law logically follows and calls for hard, practical, and creative thought.