



Navigating Environmental Law Issues for Attorneys, Lenders, and Landowners: What You Need to Know

A Presentation to the Mid-South Agricultural and Environmental Law Conference – June 7, 2019

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Environmental Law – Not Necessarily New . . .

- If anyone open his ditches to water his crop, but is careless, and the water floods the field of his neighbor, then he shall pay his neighbor corn for his loss.
- If a shepherd, without the permission of the owner of the field, and without the knowledge of the owner of the sheep, lets the sheep into a field to graze, then the owner of the field shall harvest his crop, and the shepherd, who had pastured his flock there without permission of the owner of the field, shall pay to the owner . . . corn [to compensate for the loss].
- If any man, without the knowledge of the owner of a garden, fells a tree in the garden he shall pay [compensation for the tree].

-- *CODE OF HAMMURABI, CIRCA 1750 BC*

Navigating . . .



Where Are You?

Where Are You Going?

What Will You Encounter?

Where Are You?: Environmental Laws and Regulations Today

- Federal – Administered by the U.S Environmental Protection Agency, the U.S. Army Corps of Engineers, the U.S. Fish & Wildlife Service, and others
- State – Agencies such as the Alabama Department of Environmental Management, the Arkansas Department of Environmental Quality, the Louisiana Department of Environmental Quality, the Mississippi Department of Environmental Quality, and the Tennessee Department of Environment and Conservation . . . and, in some cases, state health departments
- Local – City and County
- Common law obligations – nuisance, negligence, trespass, etc.

Where You are Going?: Compliance with Today's Environmental Laws and Regulations

- \$725,000 to settle liability with contamination from cattle tick baths in Florida
- \$320,000 for Clean Water Act violations (stormwater) at a lumber mill in Washington
- \$138,000 in civil penalties for an inadequate risk management plan at a meat-packing facility in Massachusetts
- \$50 million jury verdict (reduced to \$3.5 million) due to hog farm nuisance in North Carolina

Compliance with laws and regulations . . . and laws and regulations with which you can comply – Your opportunity for comment

- Federal law implemented by federal regulations that require public notice and comment – see daily Federal Register publication at www.federalregister.gov
- A similar process with each state's agency
- An obligation, whether state or federal, that any regulations enacted not only following appropriate administrative process in the course of their promulgation but also not be "arbitrary, capricious, or not in accordance with the [underlying/enabling] law"

Shoals, Storms, and Changing Currents – Sailing the Environmental Seas




Endangered Species Act

- ▶ Approximately 1,623 species of plants and animals in the United States are listed as endangered or threatened under the Endangered Species Act
- ▶ 132 in Alabama
- ▶ 36 in Arkansas
- ▶ 24 in Louisiana
- ▶ 50 in Mississippi
- ▶ 101 in Tennessee



Endangered Species Act – Cont.

- Lists (or delists) species as endangered or threatened (ESA Section 4)
- Prevents federal action from jeopardizing the continued existence of a listed species (ESA Section 7)
- Bans the taking, import, and export of a listed species (ESA Section 9)



Endangered Species Act – Cont.

- American burying beetle – downlisting?
- 5-Year status reviews ongoing on numerous species
- 14 species or distinct population segments proposed for listing, 22 species oDPS's are candidates for listing, and several hundred species are the subjects of petitions for listing
- Lawsuit pending in US District Court to force listing of eight species, to include eastern population of gopher tortoise and the Berry Cave salamander
- Changes to regulations likely pending

Ozark Hellbender



Other Issues

- Pesticides' impacts on threatened and endangered species
- U.S. District Court decisions with national impacts
- Definition of "waters of the United States"
- Does the Clean Water Act regulate groundwater?

What about lenders . . . ?



Some thoughts about lender liability

- ▶ Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996 provides defenses to CERCLA/Superfund liability both pre- and post-foreclosure
- ▶ With other statutes, however, such as CAA and CWA, foreclosure will bring liability for ongoing violations
- ▶ Perhaps the greatest liability is that an environmental situation creates such financial pressure on a borrower that he/she defaults



Questions?

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