

Actors, Administrative Law, and the Environment



**EVSS-PUBA 534: Environmental
Law and Regulatory Policy**

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Overview

Key actors

- Structure and function of government

Sources of environmental laws

- Constitution
- Common law
- Statues
- Regulations
- Executive orders

Administrative law

Key (federal, state, and local) actors

Federalism

Mismatched scales

- Environmental impacts are often *diffuse*, where the consequences are geographically and spatially distant from the causes
- Mismatched political and natural boundaries
 - Who should make environmental law, national or local authorities?

Federalism

Jurisdiction

- *Exclusive*
- *Concurrent*

Preemption:

- *The higher authority of law displaces the lower authority of law*
- **Supremacy Clause**

Federal Government

Enumerated Powers

- Powers granted to the federal government in Article I, Section 8 of the Constitution

Environmental law and enumerated powers

- **Commerce Clause**
- **Property Clause**
- **Treaty power**

Indigenous Peoples

Tribal governments

- Distinct political bodies
- US government can limit sovereignty
- **Trust Doctrine**: federal government supports tribal self-government and economic prosperity

Trust Doctrine extends to environmental protections

- *United States v. Mitchell* (1983)
- *U.S. v. White Mountain Apache Tribe* (2003)
- *United States v. Navajo Nation* (2009)

Indigenous Peoples

Enforcement of environmental laws on tribal lands

*We analyze enforcement of and compliance with the Clean Water Act (CWA) and Safe Drinking Water Act (SDWA) to compare the implementation of environmental policy on tribal lands with nontribal facilities. **Analysis reveals that, compared with nontribal facilities, tribal facilities experience less rigorous CWA and SDWA enforcement and are more likely to violate these laws.***

Teodoro, Manuel P., Mellie Haider, and David Switzer. 2018. "U.S. Environmental Policy Implementation on Tribal Lands: Trust, Neglect, and Justice." *Policy Studies Journal* 46(1): 37–59.

Functional Separation

Separation of Power

	Congress	President	Courts
Legislative	make laws	recommend laws, veto, regulations	review laws
Executive	override vetos, oversight	enforce and implement laws	review executive acts
Judicial	advise and consent	pardon, nominate judges	interpret laws

Briefly describe the role of administrative agencies in environmental law and the relationships between administrative agencies and the other branches of government

Executive Branch Agencies

Executive Branch Agencies

Sources of environmental law

Environmental law, as now defined, is primarily a synthesis of pre-environmental era common law rules, principles from other areas of law, and post-environmental era statutes which are lightly influenced by the application of concepts derived from ecology and other areas of science, economics, and ethics.

-Tarlock, A. Dan. 2003. "Is There a There There in Environmental Law?" *Journal of Land Use & Environmental Law* 19(2): 213–54, pg. 222

Constitutional Law

- Provides for the structure and function of government
- Includes *limits on government and protection of individual rights*

SPOTLIGHT 5. THE U.S. CONSTITUTION

The core of the U.S. Constitution, drafted in 1787, lays out the structure of the federal government.

Article I: Establishes and describes the powers of the legislative branch, including the House of Representatives and the Senate

Article II: Establishes and describes the powers of the executive branch, which is led by the President

Article III: Establishes and describes the powers of the judicial branch, which is empowered to review the constitutionality of laws and their execution

Article IV: Addresses the responsibilities, duties, and powers of the states

Article V: Addresses the process for amending the Constitution

Article VI: Establishes the Constitution as the "supreme law of the land," in a provision known as "the Supremacy Clause"

Article VII: Describes the process for ratifying the Constitution

Common Law

- No comprehensive, codified set of rules
- Open to judicial interpretation
- Precedent; *stare decisis*
 - Case law
- Private: contract law, property law, and **tort doctrines**
- Public: constitutional law, **administrative law**, criminal law

Tort Doctrines

Tort law: *the law of civil wrongs, which allows individuals to sue other individuals who have harmed them*

Negligence

- *The failure to satisfy a standard of reasonable care while performing acts that foreseeably harm other people*

Trespass

- *The intentional interference with the property interest of a property owner*

Tort Doctrines

Nuisance

- *The substantial and unreasonable interference with a property right*
- **Private nuisance**
 - Focus on invasions of interests in the *private* use and enjoyment of land
 - Remedy: injunction or damages

Tort Doctrines

- **Public nuisance**

- Involves offenses against the state arising from actions that interfere with public property or that endangered the health or property of large numbers of people
- Remedy: injunction

Product liability

- *Someone manufactures and/or distributes a product that causes harm to a person or property*
- *Strict liability: not foreseeable and no intent to harm*

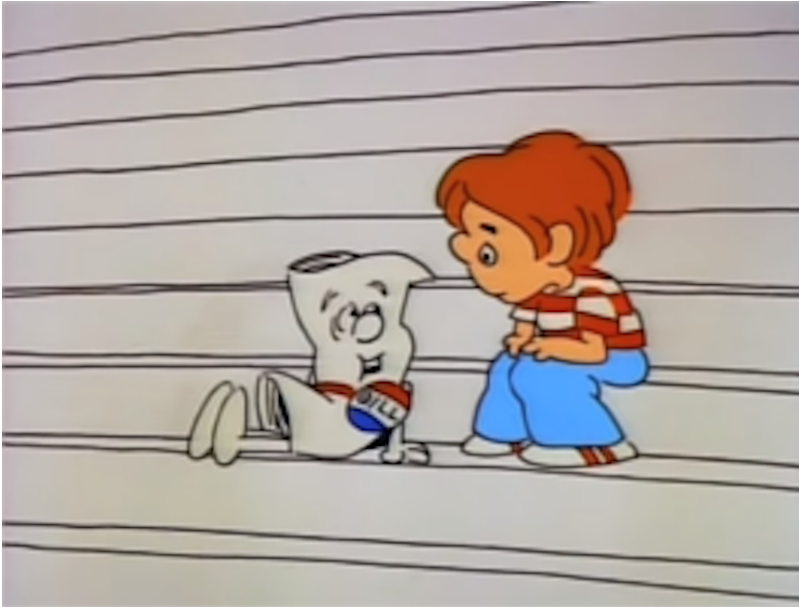
Property Law

Governs the legal relationship between people and things, [and] is particularly relevant to environmental quality through its impact on land use and on people's use of natural resources

- **Takings Clause**
 - Regulatory takings
- **Zoning**
- **Conservation easements:** *voluntary legal agreements between landowners and a trust or government agency, which permanently limit use of land to protect its conservation value*

Statutes

How does a bill become a law?



Regulations

Executive Orders

Written directions from the president that are legally binding so long as they fall within the president's constitutional authority

- Have the force of law, but can be reversed or significantly changed by a subsequent president

Administrative law

Administrative Law

Regulates how public administrative agencies do what they do and why, as well as their authority to do it

- Procedures agencies use
- Control the exercise of agency authority
- Transparency and review

...it is broadly concerned with the role and power relationships of administrative agencies in society or, simply, the ways in which administrative agencies use their power in implementing public policies (Warren, 2010, pg. 17)

Administrative Law

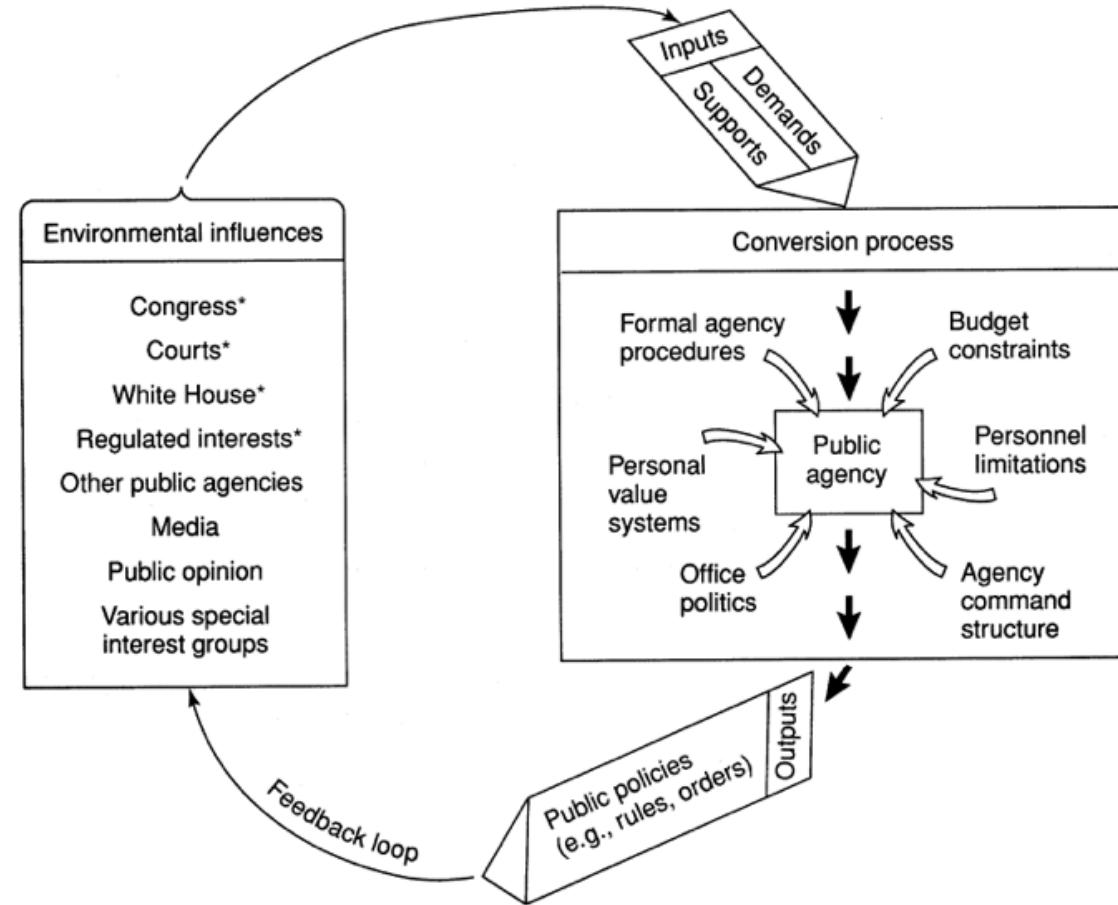


FIGURE 1.1 A General Systems Model and the Administrative System

Note: Asterisks denote significant influence.

Administrative Law

Administrative agencies perform all three government functions

- (Quasi)-Legislative: rulemaking
- Executive: execute laws
- (Quasi)-Judicial: administrative hearings

Agencies are *delegated* these powers by Congress and the president

Delegation

Citizens elect representatives to pass policies that they desire.



These representatives then set up and oversee agencies who are responsible for implementation.



Delegation

What is delegation? Why delegate?

- Shed some of the lawmaking burden onto administrators
- Technical expertise
- Politically advantageous

Separation of power issues

Intelligible principle doctrine: *Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."* *J.W. Hampton Jr. & Co. v. United States* (1928)

Discretion

Delegation provides some *discretion* to administrative agencies

Street-level bureaucrats

From a public administrative perspective, discretion is essential to the implementation of laws and the successful achievement of a government's policy objectives

Checking administrative discretion

- Structuring decision-making
- Procedural and substantive review

Structuring Decision-Making

Administrative Procedure Act (APA) of 1946

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence . . . ; (F) unwarranted by the facts.

Other requirements

- Best available science
- Cost-benefit analysis
- Environmental impact statements

Review

Four venues of review

- Within the agency itself
- Executive branch
 - OMB - OIRA
- Judicial review
 - *Chevron doctrine*
- Congressional review

For Next Time

Environmental Regulation and Rulemaking

Readings:

- **Dudley and Brito**, Chapter 2: *Theories of Regulation: Why Do We Regulate?*, from Dudley, Susan E., and Jerry Brito. 2012. *Regulation: A Primer*. 2nd Edition. Arlington, VA: Mercatus Center at George Mason University.
- **Rowell and van Zeben**, Chapter 4: *Regulatory Instruments*, from Rowell, Arden, and Josephine van Zeben. 2021. *A Guide to U.S. Environmental Law*. Oakland, CA: University of California Press.
- **Rosenbloom**, Chapter 3: *Administrative Rulemaking*, from Rosenbloom, David H. 2015. *Administrative Law for Public Managers*. Boulder, CO: Westview Press.

First in-class assignment