PART I

AN INTRODUCTION TO THE LAW

A useful prelude to a functional understanding of environmental law is an appreciation of the U.S. legal system itself. The materials contained in Chapters 1 through 3 will help you gain that appreciation.

CHAPTER 1
THE AMERICAN LEGAL SYSTEM: THE SOURCE OF ENVIRONMENTAL LAW

SOURCES OF LAW

Particular contexts dictate reactions to environmental threats. Therefore, as a preface to outlining the possible reactions to environmental harm, you must understand our legal system. The first step in this review is understanding the origins of our laws. Three articles of the U.S. Constitution create a federal government composed of three major branches: The legislative branch (under Article I) primarily creates laws; the executive branch (under Article II) primarily enforces laws; and the judicial branch (under Article III) primarily interprets laws. While performing their major functions as described in the relevant articles, the executive and judicial branches also create laws. Administrative agencies are a fourth source of laws. The following sections describe how each of these branches serves as a source of laws. Table 1-1 summarizes where you can find the laws created by these branches of the federal government, as well as laws created by state and local governments. In looking for environmental laws, you will find that they may be created by all these branches and, therefore, may be found in all these sources.

THE LEGISLATIVE BRANCH AS A SOURCE OF STATUTORY LAW

Article I, Section 1, of the U.S. Constitution states, "All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a House and Senate." It is important for you to understand the process by which Congress makes a law (called a statute) because Congress creates most environmental laws. If you wish to change environmental laws, you must understand how to work through the legislative process. Groups that may be affected by a proposed law will seek to influence the proposal through lobbying at every stage of the legislative process. Some of these groups are highly organized forces that attempt to influence any proposed environmental legislation in Congress. Other groups are loosely knit, ad hoc organizations that emerge to influence only a particular proposal. Although most congressional lobbyists, especially those working on behalf of business interests, are paid professionals, a large number of lobbyists for environmental legislation are extremely committed volunteers.

TABLE 1-1 Where to Find Environmental Law

Level of Government	*Legislative Laws*	*Executive Orders*	*Common Law/ Judicial Interpretations*	*Administrative Regulations*
Federal	*United States Code* (USC) *United States Code Annotated* (USCA) *United States Statutes at Large*	*Title 3 of the Code of Federal Regulations* *Codification of Presidential Proclamations and Executive Orders*	*United States Reports* (U.S.) *United States Supreme Court Reporter* (S.Ct.) *Federal Reporter* (F., F.2d) *Federal Supplement* (F.Supp.) *Environmental Law Reporter* (ELR) Federal agency reports (titled by agency; e.g., *FCC reports*)	*Code of Federal Regulations* (CFR) *Federal Register*
State	State code or state statutes (e.g., Baldwin's *Ohio Revised Code*)		Regional reporters State reporters	State administrative code or state administrative regulations
Local	Municipal ordinances		Varies; often difficult to find. Many municipalities do not publish case decisions, but keep them on microfilm. Interested parties usually must contact the clerk's office at the local courthouse.	Municipality administrative regulations

The lobbying process for environmental issues is somewhat complicated. The situation is not always one of business lobbyists working against environmental lobbyists. Divergent opinions about proposed legislation are frequently seen within the environmentalist community. Established groups, such as the Defenders of Wildlife and the Environmental Defense Fund, tend to take more moderate positions and are more open to ideas for cutting the costs of environmental regulation. The moderate stances of such groups have prompted some former members to join organizations that take more extreme positions, such as Earth First! which has essentially given up on the governmental process and takes its case directly to the media by staging protest actions.

Those in the moderate group see themselves as practical and effective. They believe that, especially in recessionary climates, you will be ignored if you do not take economic arguments into account. Those in the more extreme group perceive the moderates as having sold out. Some of them also believe that the best way to get on television, and thus generate public support for one's position, is to take an extreme stance. Even when they hold divergent positions, some members of both camps view the proliferation of environmental lobbying groups, even when they hold diverse positions, as being positive because it means more voices sending the message to Congress that the public wants the environment protected.

During the 2000 election cycle, environmental groups contributed just over $2 million to candidates.[1] In 1999, spending on lobbying by environmental groups totaled more than $4.5 million.[2] This amount appears huge, but it is small in comparison with the amounts expended by various business sectors. For instance, in 1999, the oil and gas industry spent more than $60 million on its lobbying efforts.[3] Nevertheless, the amount spent by environmental lobbyists alone indicates that the lobbying effort is a significant aspect of the political process.

How much influence do environmental groups have on the federal government? Every other year, *Fortune Magazine* used to rate the most influential lobbyists and publish its "Power 25." The magazine surveyed members of Congress, their staff, and White House officials to determine which groups were most powerful. For 2001, the last year the list was published, the Sierra Club was the only environmental group to make the list, at number 52.[4] In previous years, groups such as the League of Conservation Voters, Natural Resources Defense Council, Environmental Defense Fund, and the National Wildlife Federation made the list.[5]

With the increased use of the Internet, some environmental groups are trying to get ordinary citizens involved in what could be described as "grass roots email lobbying." Groups such as Environmental Defense have set up Web sites that will send messages to Congressional representatives and the president on behalf of citizens who make such a request. To see how this process works, you can go to http://www.environmentaldefense.org/actioncenter.cfm. Once there, you can choose to e-mail your representatives about

How does a group decide which candidates to endorse? Let us look at the Sierra Club's endorsement process as an example.

1. Send questionnaires to all candidates to determine their position on issues they are likely to face. (However, sometimes the Sierra Club looks only at the past record of the candidates. If one candidate has a strong record in supporting the environment whereas the other has demonstrated a bias against the environment, the club will endorse based solely on past records.)
2. Examine the questionnaires and schedule interviews with the candidates.
3. Complete interviews and make recommendations to the respective political committee (chapter political committee for state and U.S. Congress races; group political committee for local or county races).
4. Vote. Two-thirds of the body must vote to endorse.

Adapted from the Sierra Club San Diego Chapter Web site, *http://sandiego.sierraclub.org/bylaws/index.asp?content=political.*

any of various environmental issues. Once you send one message from the site, you will regularly receive e-mail notices, telling you about new issues as they arise and inviting you to come back to the site to express your opinion on those new issues.

The focus for environmental lobbyists has traditionally been in Washington. But during the 1990s, as action at the state level became more important, we saw a shift toward more lobbying below the federal level. Many national organizations, for example, have local affiliates that lobby state legislatures when their interests are affected. Groups such as the Sierra Club and the National Audubon Society have local chapters that work to address issues at the state level. That shift of resources became even more dramatic during the 2006 mid-term elections, as more environmental lobbying groups started donating more money to state candidates and ballot issues, reflecting the increasing role in environmental regulation as the federal role is shrinking.

Steps in the Legislative Process

The federal legislative process is similar in many respects to the process followed by state legislatures, but each state constitution may require slightly different procedures. We focus on the federal process because it is the model on which state processes are based and because most environmental legislation is either federal or modeled on federal law. The reason our environmental laws are primarily federal is that environmental problems do not recognize state borders and, therefore, necessitate a uniform, nationwide approach.

All laws originate from legislative proposals called bills. A bill is introduced into the House or Senate by a single member or by several members. The bill itself may well have been drafted by a lobbyist. As explained above, most environmental groups have lobbyists who attempt to persuade

TABLE 1-2 Organizations Engaging in Environmental Lobbying

Business Interests	*Environmental Interests*
Business Roundtable	Environmental Defense Fund
Chemical Manufacturing Association	National Audubon Society
National Chamber of Commerce	National Resources Defense
National Environmental Development Council (a coalition of industries)	Council Sierra Club
Utility Air Regulation Group (a coalition of utilities and trade associations)	Wilderness Society

environmentally conscious legislators to introduce and support their bills. Various business interests also hire their own lobbyists. Table 1-2 lists some of the more active lobbying organizations that influence environmental legislation.

Once introduced, a bill is generally referred to the committee of the House or Senate that has jurisdiction over the subject matter of the bill. For example, a bill seeking to provide subsidies to firms willing to get half their energy from solar power will be referred to the House Committee on Energy and Commerce, which will in turn refer it to an appropriate subcommittee. Table 1-3 lists some of the committees and subcommittees to which environmental legislation may be referred. In most cases, a bill is simultaneously introduced into both the Senate and the House and referred to the appropriate committee and subcommittee in each. Once the bill is referred, the subcommittee holds hearings on the bill, listening to testimony from all concerned parties and establishing a hearing record. Lobbyists will be active during this time, sometimes by testifying at congressional hearings.

Following these hearings, the bill is marked up (drafted in precise form) and referred to the subcommittee for a vote. When the vote is affirmative, the subcommittee forwards the bill to the full House or Senate committee, which may accept the subcommittee's recommendation, put a hold on the bill, or reject it. If the House or Senate committee votes to accept the bill, the committee brings it to the full House or Senate membership for a vote. Throughout this process, the bill may be amended several times in attempts to secure its passage. Sometimes, opponents of a bill will also amend it, in an attempt to water down the bill or to cause it to be defeated. As a bill is going through this process, interested parties may follow its progress in the *Congressional Quarterly Weekly,* a publication that keeps track of what is happening to proposed legislation. (Most university libraries subscribe to this publication.)

By the time the bill is passed by both the House and the Senate, different versions of the proposed law will usually have been adopted by the two chambers. Therefore, the bill will need to go to a Senate–House Conference Committee, which, after compromise and reconciliation of the two bills, will

TABLE 1-3 Congressional Committees and Subcommittees Influencing Environmental Legislation

Senate	*House*
Agriculture, Nutrition, and Forestry Committee Subcommittee on Forestry, Conservation, and Rural Revitalization	Agriculture Committee Subcommittee on Department Operations
Appropriations Committee Subcommittee on Agriculture, Rural Development, and Related Agencies Subcommittee on Energy and Water Development Subcommittee on Interior Commerce, Science, and Transportation Subcommittee on Oceans and Fisheries	Oversight, Nutrition, and Forestry Committee Subcommittee on Conservation, Credit, Rural Development, and Research
Energy and Natural Resources Committee Subcommittee on Energy Research, Development, Production, and Regulation Subcommittee on Forests and Public Land Management Subcommittee on Water and Power	Appropriations Committee Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Subcommittee on Energy and Water Development Subcommittee on Interior
Environment and Public Works Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety Subcommittee on Fisheries, Wildlife, and Water Subcommittee on Superfund, Waste Control, and Risk Assessment	Energy and Commerce Committee Subcommittee on Energy and Air Quality Subcommittee on Environment and Hazardous Materials Subcommittee on Health
Finance Committee Subcommittee on International Trade	Government Reform Committee Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs
Foreign Relations Committee Subcommittee on International Economic Policy, Export and Trade Promotion	International Relations Committee Resources (formerly known as Interior) Subcommittee on Energy and Mineral Resources Subcommittee on Fisheries Conservation, Wildlife, and Oceans Subcommittee on Forests and Forest Health Subcommittee on Health Subcommittee on National Parks, Recreation, and Public Lands Subcommittee on Water and Power
Health, Education, Labor, and Pensions Committee Subcommittee on Public Health	Science Committee Subcommittee on Research Subcommittee on Energy Subcommittee on Environment
Indian Affairs Committee	Transportation and Infrastructure Committee Subcommittee on Water Resources and Environment Science
Judiciary Committee Subcommittee on Constitution, Federalism, and Property Rights	Small Business Subcommittee on Rural Enterprise, Agriculture, and Technology
	Ways and Means Subcommittee on Trade Subcommittee on Health

produce a single bill to be reported to the full House and Senate for voting. Very often, you will hear discussions in the media about differences between House and Senate versions of environmental laws that are making their way through this process. Often, one chamber's version will be supported by business interests and the other by environmental groups. The president will often throw his support publicly to one version or the other.

A final affirmative vote by both houses of Congress is required for a bill to become law. If passed, the bill is then forwarded to the president, who may either sign or veto the bill. When the president signs the bill into law, it becomes a statute. It is then written down and codified in the *United States Code* and the *United States Code Annotated.* If the president vetoes the bill, it may still become law if two-thirds of the Senate and House membership vote to override the veto. If the president takes no action within 10 days of receiving the bill from Congress, the bill becomes law without his signature; the exception to this procedure is that if Congress adjourns before the 10-day period has elapsed, the bill does not become law. The bill will have been pocket vetoed by the president; that is, the president will have "stuck the bill in a pocket"—vetoed it by doing nothing. Supporters will then have to reintroduce the bill during the next session of Congress.

Because Congress is responsible for passing environmental laws, citizens who wish to ensure that our environment is protected should keep themselves informed about their congressional representatives' voting records on environmental issues. The League of Conservation Voters has made it easy for concerned citizens to view their representatives' voting record on environmental issues by placing those records in an easily reachable database that can be found at http:www.lcv.org/scorecard/scorecardmain.ctm. This Web site also contains contact information of members of Congress.

THE JUDICIAL BRANCH AS A SOURCE OF CASE LAW

The federal courts and most state courts (discussed in Chapter 2) constitute the judicial branch of the government and are charged by their respective constitutions with interpreting the U.S. Constitution and statutes on a case-by-case basis. Most cases interpreting these laws are reported in large volumes called reporters, which are compilations of federal or state case laws. When two parties disagree about the meaning of a statute, they bring their case to the courts for interpretation. For example, if a bill to provide solar energy subsidies was signed by the president and became law, two parties might still disagree about its meaning and ask the federal courts to interpret it.

One disagreement that might arise with regard to such a bill is the time limit within which a firm must obtain half its energy from solar power. Although you would think that something as important as a time limit for conversion would be clearly stated in the statute, such an omission is not unusual. Congress, especially in the environmental area, often makes very broad laws and leaves it to the courts to fill in the gaps. As one senator said when Congress was about to pass the Superfund legislation, "All we know is

the American people want these hazardous waste sites cleaned up . . . [L]et the courts worry about the details."

Congress may have also made the law intentionally vague because a more specific bill could not garner sufficient support for passage. The sponsors may have specifics in mind, but knowing there will be strong opposition to those details, they water down the language in the bill and hope that the courts will interpret the law to impose the specifics the drafters had in mind. This strategy can be risky because Congress never knows exactly how the courts will interpret a law. However, in the event that the judiciary interprets the law in a manner not intended by Congress, the legislative body can always amend the law, in effect overruling the judicial interpretation.

When interpreting a law, the judicial branch sees itself as trying to ascertain congressional intent. The court first looks at the "plain language" of the statute; that is, words are given their ordinary meaning. The court then looks at the legislative history to determine the intent of the legislature. This history is found in the hearings held by the subcommittees and committees, as well as any debates on the Senate and House floors. Hearings are published in the *U.S. Congressional News and Administrative Reports* and may be ordered from the Government Printing Office or found in the government document section of most university libraries. Debates about a bill are published in the daily *Congressional Record,* which also may be found in most libraries. When arguing before the court on behalf of their interpretation of the law, lawyers will draw from the *Congressional Record*. Thus, when trying to get a watered-down bill passed, its drafters will often try to insert language into the *Congressional Record* that would be supportive of their preferred interpretation of the law.

Not all judicially created laws are based on statutory or constitutional interpretation. Such laws for which there is no such basis are referred to as common law. Common law emerges from actual court cases. It develops when a problem arises for which there is no applicable statute or constitutional provision. We then have what is known as a case of first impression. Cases of first impression obviously provide judges with the greatest latitude to make law. The judge must create a law to resolve the problem. The rule laid down to resolve this case is called a precedent. If a similar case arises in the future, the courts have a tendency to follow the precedent. Very few environmental laws, however, are created in this manner; most environmental laws are based on statutes.

The rule that the court lays down when interpreting a statute or ascertaining its constitutionality is also known as a precedent. Such precedent will be relied on in the future when other judges are ruling on interpretations of statutes and the Constitution. This process of reliance on precedent is called *stare decisis,* which literally means "let the decision stand."

Not all precedents are equally important. Precedents are binding only on courts on a lower level and in the same system. For example, precedents from the Ohio Supreme Court bind the Ohio appellate and the Ohio trial

courts; they do not bind the Michigan courts. However, an Ohio precedent may be used in a Michigan case as a persuasive device. In other words, lawyers in a Michigan case may point out how Ohio Supreme Court resolved the law and argue that the Ohio court's reasoning was logical and, therefore, should be adopted. Likewise, in the federal system, a Fifth Circuit Court of Appeals decision would not have any precedential effect on another circuit court appeal. However, the precedent would be binding on the district courts within the Fifth Circuit.

Although the process of *stare decisis* seems straightforward, its application actually provides the judge with an opportunity to impose his or her values on the law. Judges have discretion, in part, because no two cases are ever exactly the same. Judges, therefore, will usually be able to distinguish (a legal term) the case at bar from the case that others are arguing should provide the precedent. When distinguishing a case, judges find a difference between the case before them and the precedent-setting case significant enough to allow them to rule differently in the second case. In many cases, one lawyer will be arguing that the case before the court is similar to the potential precedent, and the opposing lawyer will be trying to point out significant differences between the two.

Another factor that makes reliance on precedent less predictable than you might assume is that there are frequently conflicting precedents, especially at the trial and initial appellate levels. Finally, a judge may always simply overrule the clearly applicable precedent. The judge will generally cite some reason for overruling the precedent, such as changes in technology or community values since the precedent was established, but he or she does not need to do so. He or she may simply say that the prior ruling was erroneous and that overturning the precedent is simply a matter of "correcting" the law.

The U.S. Supreme Court and most state supreme courts have what is generally known as the power of judicial review (i.e., the power to determine whether a statute is constitutional). Although not expressly provided for in the Constitution, the Supreme Court established this right in the landmark case of *Marbury v. Madison,* making the Supreme Court the final arbiter of the constitutionality of every law. Judicial review gives the Court ultimate power to restrict the activities of the legislative and executive branches.

Because most environmental law is federal statutory law, and because the U.S. Supreme Court is the final arbiter of the constitutionality of laws, most decisions you will read about in this book will be from the Supreme Court. As you will see, through its case-by-case interpretation of the Constitution and statutes, the Supreme Court has established a line of authoritative cases on various environmental matters.

THE EXECUTIVE BRANCH AS A SOURCE OF LAW

The executive branch includes the president, the president's staff, and the cabinet. The heads of all executive departments (e.g., the secretary of state, the secretary of labor, the secretary of defense, and the secretary of the treasury)

make up the cabinet. The executive office is composed of various bodies, such as the Office of Management and Budget (OMB) and the Office of Personnel Management (OPM). The executive branch is influential in the rule-making processes of both the legislature and the administrative agencies. The president influences Congress by proposing legislation, by publicly supporting or opposing proposed laws, and by using the veto. The OMB's role in influencing administrative regulations through cost–benefit analysis is detailed in Chapter 3. The executive branch exercises direct rule making through its power to make treaties and issue executive orders.

Treaty Making

The president has the power, subject to the advice and consent of the Senate, to make treaties. These treaties become the law of the land based on the supremacy clause of the Constitution (Article XI); they supersede any state law. For instance, when President Reagan entered into the Montreal Protocol, a treaty mandating reductions in the production of chlorofluorocarbons (CFCs) and halons, that treaty became the law of the land, and its provisions superseded any existing federal or state laws inconsistent with the treaty. Thus, the Kentucky legislature could not subsequently pass a law that would allow the unlimited production of those chemicals within the state borders.

Treaty making is one of the few ways that the United States can influence the environmental policies of other nations. Even though treaty making is primarily the job of the executive branch, we cannot overlook the Senate's role. For example, in December 1997, the executive branch negotiated the Kyoto Treaty, aimed at reducing the production of gases believed to cause global warming. As of May 1998, the Kyoto Treaty had been signed by 34 countries. However, in December 2000, the treaty had not even been presented to the Senate for approval, to a large extent, because the executive branch was not confident that it would be able to secure enough votes for ratification. In 2001, a new president took office and declared that the United States no longer intended to be a party to that treaty, and even though there would be no formal "unsigning," the document would not be submitted to Congress during his term as president.

The United States has displayed increased antagonism toward environmental treaties in recent years. The Bush administration's unilateral stance on international issues was loudly demonstrated in 2002 when President Bush announced that he would not attend the Johannesburg World Summit on Sustainable Development. The United States is currently in default of a pledge made at the 1992 Rio Summit to reduce greenhouse gas emission to 1990 levels. Despite this nation's current reluctance to participate in international agreements, environmental problems are increasingly going beyond the scope of national boundaries. Consequently, treaties are becoming more essential in creating effective environmental policy solutions, but the United States is no longer taking a leadership role in this area. Chapter 11 further discusses the use of treaties in the creation of international environmental

law and identifies a number of additional international environmental treaties that the United States has yet to sign and ratify as of 2006.

Executive Orders

Throughout history, the president has made laws by issuing executive orders. For example, President Reagan, by virtue of an executive order, ruled that all executive federal agencies must do a cost–benefit analysis before setting forth a proposed regulation for comment by interested parties. In 1999, President Clinton issued executive order 13123, "Greening the Government through Efficient Energy Management," which promoted energy conservation in federal facilities by mandating a 30 percent reduction in energy use by 2005. The executive order also promotes the use of renewable energy technologies and set the goal of installing 20,000 solar energy systems at federal facilities by 2010. Executive orders made by one president can be superseded by a contrary executive order made by the next president. For example, during his last year in office, President Clinton issued an executive order that made federal contracts difficult to get for companies that violated federal law, including environmental law. However, upon taking office, President George W. Bush reviewed, and rescinded, many of Clinton's executive orders, once again making it easier for federal contracts to be granted to those who are found to repeatedly violate environmental laws. Thus, although an executive order may be a quick way to achieve a goal, the victory may be short lived because the next president may undo the order. (Interested citizens can now easily find executive orders by searching the *Federal Register* Web site http://www.archives.gov/federal_register/executive_orders/executive_orders.html.)

The executive order as a source of law is also used by governors to respond to emergencies and budgeting problems. Often, a governor will call out the National Guard by executive order. In some states, the governor may use these orders to implement particular aspects of the budget process. For example, he or she may order a freeze on hiring in the state university system or order an across-the-board cut in budgets in all state departments when quarterly tax revenues are lower than anticipated.

Signing Statements

During his first 6 years in office, President George W. Bush issued 800 signing statements, which are a way of diluting or changing laws passed by Congress rather than vetoing them. According to his administration, the president has the authority through these statements to "revise, interpret, or disregard legislative measures on national security or constitutional grounds." Although other presidents have used this power on occasion, President Bush has used it more than all other presidents combined. The president's use of this power has been condemed by the American Bar Association, and there has been discussion by some Congresspersons about the need to limit the president's use of this tool, but thus far no legislation has been passed to limit its use.

ADMINISTRATIVE AGENCIES AS A SOURCE OF LAW

Less well known to the general public as a source of law are the federal regulatory agencies, among them the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA). Congress has delegated to these agencies the authority to make rules governing the conduct of business and labor in certain areas. This authority was delegated because it was thought to be in accord with the public interest, convenience, and necessity. There was some concern, however, about the delegation of so much power to bodies with no elected representatives, so their rule-making processes (described in Chapter 3) are especially open to public participation. Proposed rules, as well as the rules finally implemented by an agency, must be published in the *Federal Register,* and the public must be given the opportunity to comment on these proposals.

Because of their substantial impact on the laws of this nation, administrative agencies sometimes represent what many observers have called a fourth branch of government. Because most of the federal environmental laws mandate the creation of many administrative regulations, we describe this fourth branch of government in greater detail in Chapter 3.

CLASSIFICATIONS OF LAW

CASE AND STATUTORY LAW

As noted earlier, laws are classified as either case laws or statutory laws, depending on how they are made. Judges make case laws; legislators make statutory laws. We generally find case law in case reports and statutory laws in codes. Even though this distinction is frequently made, it is important to remember that the two types of law are entwined through the process of statutory interpretation. We really do not know what a statute means until it is interpreted by the courts, whose judges attempt to construe congressional intent. Sometimes, the court's interpretation is not as was intended by Congress. Congress may then respond by amending the statute to make its meaning clear.

PUBLIC AND PRIVATE LAW

Aside from the distinction between statutory laws and case laws, another classification may be helpful in your study of environmental law—the distinction between public law and private law. Public laws are those set up to provide for the public welfare; they are generally applied by administrative agencies. These laws usually regulate classes of people or organizations. Environmental laws are considered public law. Other branches of public law include securities laws, labor laws, and antitrust laws.

On the contrary, private laws generally regulate the conduct between two individual parties. Private laws may sometimes be used in environmental

matters. For example, if a company does not properly test a chemical and, consequently, sells a product that injures a consumer, that consumer may be able to bring a private action for compensation against that company. Such a private action is called a tort or personal injury case. Other private law actions include breach of contract and fraud.

CRIMINAL LAW AND CIVIL LAW

Perhaps an even more important distinction is that between civil and criminal law. This distinction is important because the rules governing each are different, as are the outcomes sought in each case.

Criminal law is made up of federal and state statutes that prohibit wrongs against the state or society in general—conduct such as arson, rape, murder, forgery, robbery, and illegal dumping of hazardous waste. The primary purposes of criminal laws are to punish offenders and to deter them and others from committing similar acts, usually through imprisonment or fines. The prosecutor, the party who initiates a criminal case, is the government, usually represented by a federal district attorney or a state prosecutor. The prosecutor is said to be representing society and the victim against the defendant, who is most likely to be an individual but may also be a corporation.

For purposes of both criminal and civil litigation, a corporation can sue and be sued, just as a person can. Corporations, in the context of litigation, are sometimes referred to as artificial or juristic persons. Of course, a corporation cannot be jailed; if a corporation is found to be guilty, a fine is imposed in lieu of a jail term.

Crimes are generally divided into felonies and misdemeanors, based on the severity of the harm the actions may cause. In most states, the more harmful felonies (e.g., rape, arson, and criminal fraud) are commonly punishable by incarceration in a state penitentiary and/or by fines. The less harmful misdemeanors (e.g., shoplifting) are crimes usually punishable by shorter periods of imprisonment in a county or city jail, as well as by smaller fines. However, what may be a misdemeanor in one state could be a felony in another.

Civil law is usually defined as the body of laws regulating relations between individuals or between individuals and corporations. In a civil matter, the party analogous to the prosecutor is the plaintiff. The plaintiff is usually seeking either compensation or equitable relief (an order for specific performance or an injunction). There is no division in civil law comparable to that between felonies and misdemeanors in the criminal system. In the civil system, laws are divided by subject matter, with the most common civil matters being tort cases and contract cases. Other substantive areas of civil law include domestic relations (family law), bankruptcy, agency law, property, business organizations, sales, secured transactions, and commercial paper.

Most people consider being convicted of a crime much more serious than being found guilty of violating a civil law. There is much greater "societal scorn" heaped on the criminal. Also, only criminal law threatens

the defendant with the loss of liberty. For those reasons, the defendant in a criminal case is given much greater procedural protection. First, although almost anyone can file a civil action against another person, before a criminal defendant can be tried for a serious federal crime, an indictment must be handed down against him or her. Most states also require an indictment by a grand jury when a defendant is charged with a felony. To get an indictment, the prosecutor must convince the grand jury—generally composed of 15–23 citizens—that the prosecution has enough evidence to justify bringing the potential criminal defendant to trial.

When a defendant is charged with a misdemeanor, a local judge or magistrate will fulfill a role comparable to that of a grand jury. This initial step provides a safeguard against political prosecution. It is necessary because even when one is ultimately found not guilty, the act of being tried for a crime still tarnishes the defendant's reputation, so it is desirable to make the trial of an innocent party as rare as possible.

Another difference between criminal law and civil law lies in the burden of proof placed on the party bringing the action. In both cases, the party filing the action must prove his or her case. However, a person filing a civil case must prove that the defendant violated the law by a preponderance of evidence—proving that it is more likely than not that the defendant committed the act. If the defendant is charged with a crime, however, the prosecution must prove the defendant's guilt beyond a reasonable doubt, a much more stringent standard. Some people think of the difference as being the need to prove a civil case by 51 percent and a criminal case by 99.9 percent.

Environmental Criminal Prosecutions

Our primary concern with criminal law lies in the fact that violations of many environmental statutes constitute criminal offenses. As we examine specific environmental statutes, note that the same act often gives rise to both criminal and civil penalties. Criminal penalties are often imposed when an act is considered as willful or knowing violation. The most publicized trend in criminal actions today is the increasing use of imprisonment of corporate violators, including those who violate criminal provisions of environmental laws. Since new federal sentencing guidelines took effect in 1987, incarceration has increased, and plea bargains involving probation and community service have been less frequent. The EPA makes incarceration an important part of the criminal enforcement program. The stigma associated with incarceration serves as a greater deterrent than a fine that can be passed along as the cost of doing business. The prison sentence must be served by the violator. Also, when a company criminally violates an environmental law, an additional punishment may be the suspension of all of its government contracts.

The first major increase in the use of criminal sanctions to enforce environmental laws occurred in 1982, when the Department of Justice (DOJ) created a separate Environmental Crimes Unit in its Land and Natural

Resources Division, and the EPA established an office for Criminal Investigations. Since 1982, there has been a steady increase in the use of criminal sanctions. In 1990, the EPA referred a record 56 cases to the Justice Department for criminal prosecution, surpassing the previous year's high of 50. A record 100 defendants were charged with crimes in 1990, and 55 were convicted and sentenced to 75.3 years.

In 1994, the EPA took another major step toward increasing its ability to compel observance of the law by reorganizing its enforcement and compliance programs and creating the Office of Enforcement and Compliance Assurance, with an emphasis on targeting serious violations.

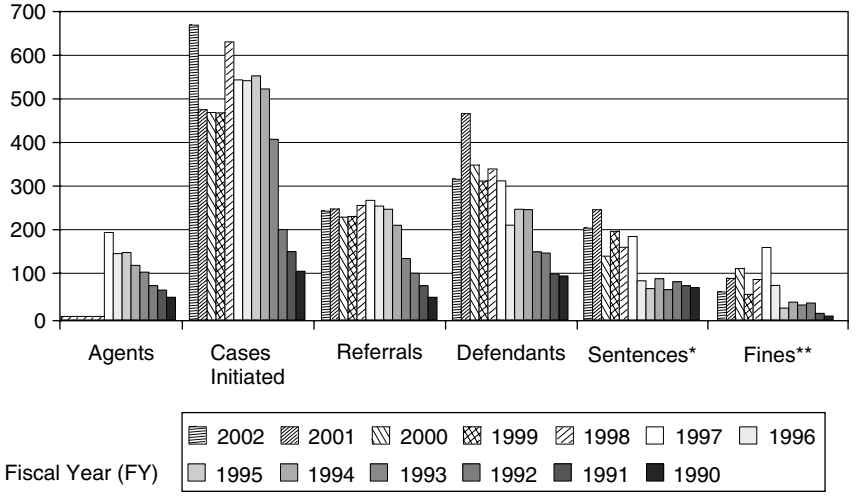
According to a report issued by the EPA in 2001, in 1997 a record 278 cases were referred to the Justice Department, with 322 defendants charged with environmental crimes. A total of 195.9 years of prison were imposed on the convicted defendants, and criminal fines of $169.3 million were imposed.[6] (See Figure 1-1 for a 13-year statistical comparison of criminal prosecutions.) The large increases in the criminal program are at least partly due to the Pollution Prosecution Act of 1990, which increased the number of criminal investigators to 200. Referrals have not continued to increase under the current Bush Administration, however. According to a 2003 EPA report, in 2001, there were 256 cases referred to the Justice Department (less than those in 1997), although there were 477 defendants charged (over 150 more than those in 1997) for 256 years of prison and $95 million in fines.

However, in the FY 2005 Annual Report, the Office of Compliance and Enforcement made changes to previously reported data, and also slightly modified the information they provided in their annual report, making it difficult to really make comparisons between enforcement before and after the year 2000. According to the most recent report prepared by the Office of Enforcement and Compliance Assurance, 320 defendants were charged environmental crimes and sentenced to 186 years. Fines and restitution totaled $100,000.[7]

In one of the toughest criminal sentences handed down in an environmental case, a Pennsylvania waste-pit owner, William Fiore, was sentenced to serve 6–12 years in a state prison for deliberately piping 1.2 million gallons of toxic leachate into the Youghiogheny River near Pittsburgh. The largest criminal penalty ever assessed an individual for violating an environmental law was given in 1990 to a trader on Wall Street. He was fined $2 million for filling wetlands without a permit.[8] The biggest criminal fine ever imposed on a corporation was the $22 million Exxon Valdez fine.[9] Similarly, in 1996 when Iroquois Pipeline pled guilty to degrading wetlands and streams while constructing a natural gas pipeline, it was assessed $22 million in fines and penalties.[10] Table 1-4 reveals some of the significant prison sentences, as well as fines, given in recent environmental cases.

Thus, since the early 1990s, the EPA has demonstrated a belief that criminal penalties have an important role in environmental enforcement. This view seems consistent with the public view but not with that of corporate

FIGURE 1-1 Office of Criminal Enforcement 13-Year Statistical Comparison



	Agents	Cases Initiated	Referrals	Defendants	Sentences*	Fines**
FY 1990	51	112	56	100	75.3	5.5
FY 1991	62	150	81	104	80.3	14.1
FY 1992	72	203	107	150	94.6	37.9
FY 1993	110	410	140	161	74.3	29.7
FY 1994	123	525	220	250	99.0	36.8
FY 1995	153	562	256	245	74.0	23.2
FY 1996	151	548	262	221	93.0	76.7
FY 1997	199	551	278	322	195.9	169.3
FY 1998	N/A	636	266	350	173.0	92.8
FY 1999	N/A	475	241	322	208.3	61.6
FY 2000	N/A	477	236	360	146.0	122.0
FY 2001	N/A	482	256	477	256	95
FY 2002	N/A	674***	250	325	215	62

* Years of incarceration
** Millions of dollars
*** FY 2002 Includes 190 counter-terrorism investigation initiatives.

Source: http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy02accomplishment.pdf (September 8, 2003) "EPA Criminal Enforcement: Major Outputs: FY 1998 to FY 2002."

executives. A poll reported in the *Wall Street Journal* on March 11, 1992, revealed that 75 percent of the general public believed that executives should be held personally liable for their environmental crimes, but only 49 percent of 500 executives of large corporations agreed.[11] A majority of the public rated environmental crime as worse than price-fixing and insider trading, whereas 80 percent of corporate executives thought that the latter two were more serious crimes.

TABLE 1-4 Significant Individual Fines, Prison Sentences, and Corporation Fines Handed Down in Environmental Cases

Fines Handed Down to Individuals in Environmental Cases

Name	*Violation*	*Date*	*Fine*
Robert Renes, vice president of Marman USA, Inc.	Forged EPA seals on false certificates of registration for pesticides his company sold abroad	1996	$150,000
Leslie Wallin, president of Eklof Marine Corporation	Charged for an oil spill off Rhode Island coast because tugs and barge were not properly equipped to safely navigate storm waters	1997	$100,000
Guy Hoy III, owner of Hoy's Marine	Discharged sandblasting residue and paint into waterways after repeated warnings to cease the harmful practice	2002	$70,000 in restitution & $27,000 in state fines
Ben Shafsky, assistant operations manager for Doyon Drilling Corporation	Violated the Oil Pollution Act (OPA) by injecting paint thinner, paint, oil, and solvents down the out rim of oil-producing wells on Endicott Island and concealing the illegal disposal of hazardous waste	1998	$25,000
Allan Sinclair, former drilling rig supervisor	Violated the OPA by mistakenly concealing the illegal disposal of hazardous waste and failing to notify federal officials about the crime	1998	$25,000
Gary Seymour	Violated FIFRA by placing pesticide on a deer carcass for the purpose of killing coyotes	2002	$23,100
Benjamin Grafton, employee of Arizona Chemical Company, Inc.	Violated the Clean Water Act (CWA) by tampering with a water-monitoring method	1997	$20,000
Benny Joe Surratt, employee of Arizona Chemical Company, Inc.	Violated CWA by tampering with a water-monitoring method	1997	$20,000

(continued)

TABLE 1-4 *(cont.)*

Fines Handed Down to Individuals in Environmental Cases

Name	*Violation*	*Date*	*Fine*
Ray McCune, president and owner of Reclaim Barrel Supply Company and Allstate Container Company	Illegally stored hazardous waste in two facilities	1996	$20,000
Dana Dulohery, former plant manager at a Louisiana-Pacific Corporation manufacturing company	Violated the Clean Air Act by tampering with air emission control equipment and conspired to falsify emission report data	1998	$15,000

Prison Sentences Handed Down in Environmental Cases

Name	*Violation*	*Date*	*Prison Sentence*
Carl Eugene Hines, owner of H&J Auto and Salvage	Illegally disposed hazardous wastes and charged with other drug, firearms, and witness intimidation crimes	1998	480 months
Daniel Martin, worked at H&J Auto and Salvage	Transported hazardous waste without a manifest, illegally stored hazardous waste, and committed drug crimes	1998	240 months
Allan Elias, owner of Evergreen Resources	Knowingly exposing his employees to cyanide gas without proper safety precautions and lying to the government	2000	204 months
Gary Benkovitz, owner of Bay Drum and Steel	Intentionally dumped toxic waste into Tampa's sewer system and waterways	1999	156 months
Donald R. Budd, owner of Texas Environmental Services	Conspired to commit and committed mail fraud on behalf of Texas Environmental Services, a laboratory he owned, by providing false wastewater and drinking water reports	1997	72 months
Johnnie James Williams, owner and operator of W&R Drum, a drum recycling facility	Illegally stored and disposed of hazardous waste in violation of RCRA in a neighborhood that has environmental justice issues	1997	41 months

TABLE 1-4 *(cont.)*

Prison Sentences Handed Down in Environmental Cases

Name	*Violation*	*Date*	*Prison Sentence*
Raymond Feldman, owner of Ray's Automotive	Unlawfully disposed containers of ignitable, lead-bearing hazardous paint wastes in violation of RCRA and conspired to unlawfully transport and dispose of these drums of waste	1997	37 months
Mark D. Henry, director and treasurer of Bee de Waste Oil	Convicted on two counts of wire fraud, two counts of mail fraud, one count of conspiracy to violate RCRA. Schemed to defraud approximately 75 companies trying to comply with environmental regulations. Accepted 28,000 tons of soil contaminated with hazardous waste, claiming it would be recycled	1996	37 months
Jeffery Jackson, plant manager, and Micheal Peters, environmental manager, at Hunstman Chemical Plant	Both were found guilty of violating regulations under the Clean Air Act for the discharge of dangerous levels of benzene	2002	36 months & a $50,000 fine each
Billy Joe Jones, former operator of wastewater treatment facility	Violated the CWA by knowingly allowing 65,000 gallons of raw sewage into the Ohio River	1997	27 months
Billy Jack Orange, worker at H&J Auto and Salvage	Conspired to illegally transport and store hazardous wastes	1998	27 months
Lee Poole, uncertified pesticide applicator	Illegally applied the restricted use pesticide, methyl parathion, to homes	1998	24 months
James Goldman, vice president of Tin Products	Discharged toxic waste water in violation of the Clean Water Act causing serious harm to aquatic life and the shut down of a water treatment plant	2003	18 months

(continued)