ENVIRONMENTAL LITIGATION

JAMES B. MACDONALD JOHN E. CONWAY

DEPARTMENT OF LAW

UNIVERSITY OF WISCONSIN EXTENSION

Madison — 1972

LAW LIBRARY UNIVERSITY OF WISCONSIN MADISON, WIS. 53706

Library of Congress Catalog Card Number: 73-189124

University of Wisconsin Extension Department of Law Law School Building, Madison Wisconsin 53706

© 1972 by the Board of Regents of the University of Wisconsin

Printed in the United States of America All rights reserved KF 3775 137449 M3 .3

Summary of Contents

Foreword

Preface

To the Reader

Chapter 1

Patterns of Litigation

Chapter 2

Litigation Based on Property Ownership and Public Nuisance

Chapter 3

Litigation Based on Physiological Injury Independent of Property Ownership

Chapter 4

Litigation Involving Government as Regulator

Chapter 5

Government Powers in the Nature of Trusteeship

Chapter 6

Litigation Between Government and its Lessees

Chapter 7

Citizens' Actions Against Polluters Based on Environmental Considerations

Chapter 8

Citizens' Actions Against Administrative Agencies Based on Environmental Considerations

Chapter 9

Common Procedural Problems

Chapter 10

Trial Documents in a Litigated Case

Tables

Index

$Table\ of\ Contents$

FOREWORD	D	xiii
PREFACE		xv
TO THE RI	EADER	xvii
Chapter 1	PATTERNS OF LITIGATION	
§ 1.01	Scope of book	1
§ 1.01a	Environmental quality	2 3
§ 1.02	Analytical outline for environmental litigation	3
§ 1.03	Right, injury, remedy, and parties	4
§ 1.04	Right to a permanently liveable environment	5
§ 1.05	Rights based on constitutional provisions	6
§ 1.06	Rights based on common law	7
§ 1.07	Rights based on statutes	9
§ 1.08	Rights based on criminal statutes	10
§ 1.09	Rights based on admiralty	11
§ 1.10	Remedies, theory, and relief	11
§ 1.11	The defendant and his defenses	12
§ 1.12	Defenses; primary jurisdiction; exhaustion	
_	of administrative remedies	13
§ 1.13	Defenses; party problems	15
Chapter 2	LITIGATION BASED ON PROPERTY	
	OWNERSHIP AND PUBLIC NUISANCE	
§ 2.01	Scope of chapter	17
§ 2.02	Basis of plaintiff's right and cause of action	18
§ 2.03	The plaintiff: theories and remedies	19
§ 2.04	The plaintiff; federal jurisdictional problems;	
	standing	19
§ 2.04a	The plaintiff; class actions	19
§ 2.05	The defendant	20
§ 2.06	Defenses	20
§ 2.07	Nuisance; general theory	21
§ 2.08	Nuisance; defenses; contributory negligence	24
§ 2.09	Nuisance: defenses: reasonableness	24

§ 2.10	Nuisance; defenses; comparative convenience	25
§ 2.11	Nuisance; defenses; coming to the nuisance	27
§ 2.12	Negligence	28
§ 2.13	Damages as related to theory	28
§ 2.14	Damages for incidental personal inconvenience	29
§ 2.15	Other defenses	29
§ 2.16	The nature of rights in water	29
§ 2.17	Riparian ownership problems	31
§ 2.18	Water pollution; actions based on statutes	33
§ 2.19	Water pollution; joinder of defendants	35
§ 2.20	Air pollution; nuisance; relief	35
§ 2.21	Air pollution; negligence	36
§ 2.22	Air pollution; trespass	37
§ 2.23	Air pollution; statutory causes of action	37
§ 2.25	Air pollution; defenses; reasonableness of	
	defendant's conduct; comparative	
	convenience	37
§ 2.26	Damages	38
§ 2.27	Noise pollution	39
§ 2.28	Noise pollution; air cases	39
§ 2.29	Land-use control	41
§ 2.30	Absolute liability; extra-hazardous substances	41
§ 2.31	Weather modification	42
§ 2.32	Suits against government for its acts in	
	carrying out waste disposal	42
Chapter 3	LITIGATION BASED ON PHYSIOLOGICAL INJURY INDEPENDENT OF PROPERTY OWNERSHIP	
§ 3.01	The problem	45
§ 3.02	Theories	46
§ 3.03	Causation	46
§ 3.04	Damages	47
Chapter 4	LITIGATION INVOLVING GOVERNMENT AS REGULATOR	1
§ 4.01	Scope of chapter	49
§ 4.02	Government litigation; purposes; remedies	50
§ 4.03	Constitutional basis of government regulation	50
§ 4.04	Common-law basis of government litigation	51

§	4.05	Admiralty	52
Ş	4.06	Statutes	52
Ş	4.10	Federal government as plaintiff	54
	4.11	State as plaintiff	54
	4.12	State as plaintiff; state statutes permitting	
		government to sue on behalf of the public	55
Ş	4.13	State as plaintiff; common-law theories	
		permitting state to sue on behalf of its citizens	56
Ş	4.14	State as plaintiff; subject-matter jurisdiction	
		of federal court	57
Ş	4.15	Local government as plaintiff	57
	4.15a	Defendants	58
§	4.16	Defenses generally available when	
		government sues to regulate	58
§	4.17	Defenses to federal actions; standing	59
§	4.17a	Defenses; improper government action	60
Ş	4.18	Government's defenses	61
§	4.19	Government's defenses; immunity	62
Ş	4.20	Government defenses to actions challenging	
		federal administrative regulation	62
Ş	4.21	Defenses to state administrative regulation;	
		preemption	63
§	4.22	Remedies; provisional	64
Ş	4.30	Water pollution; federal litigation	65
Ş	4.31	Obstruction of navigation; 33 U.S.C.	
		§§ 401 and 403	65
Ş	4.32	Refuse Act of 1899	66
Ş	4.33	Oil pollution control	69
	4.34	Control of sewage from vessels	69
	4.35	Specific area protection	69
Ş	4.36	Prosecution under the Federal Water	
		Pollution Control Act	70
Ş	4.37	Thermal pollution	72
Ş	4.38	Outer Continental Shelf Lands Act	
		(43 U.S.C. § 1331)	72
Ş	4.40	Water pollution; state litigation;	
		state standards	73
§	4.41	State action to review federal administrative	
		action	74
	4.42	State criminal actions	75
§	4.43	State as plaintiff in admiralty	75

§ 4.44	Water pollution; municipal litigation;	
	municipality as plaintiff	75
§ 4.45	Water pollution; sewage disposal;	
	municipality as defendant	76
§ 4.46	Defenses to state statutes and local ordinance	s 77
§ 4.47	Dual authority problems	77
§ 4.5 0	Air pollution actions; general	78
§ 4.51	Air pollution; federal litigation	79
§ 4.52	Air pollution; state litigation	82
§ 4.53	Air pollution; local litigation	83
§ 4.54	Litigation concerning noise	84
§ 4.60	Land-use control	85
§ 4.61	Land-use control; zoning	87
§ 4.62	Land-use control; human ecology	89
§ 4.64	Subdivision control	90
§ 4.65	State-local conflicts in land-use regulations	91
§ 4.67	Solid wastes	92
§ 4.70	Esthetic interests	92
§ 4.75	Litigation about other harms to the	
	environment	94
Chapter 5	GOVERNMENT POWERS IN THE NATU OF TRUSTEESHIP	RE
•	OF TRUSTEESHIP	
§ 5.01	OF TRUSTEESHIP The nature of trusteeship	97 98
§ 5.01 § 5.02	OF TRUSTEESHIP The nature of trusteeship The public trust doctrine: basis	97
\$ 5.01 \$ 5.02 \$ 5.03	OF TRUSTEESHIP The nature of trusteeship The public trust doctrine: basis The public trust doctrine in action; water	97 98
\$ 5.01 \$ 5.02 \$ 5.03 \$ 5.04	OF TRUSTEESHIP The nature of trusteeship The public trust doctrine: basis The public trust doctrine in action; water Public trust; land	97 98 98
\$ 5.01 \$ 5.02 \$ 5.03	OF TRUSTEESHIP The nature of trusteeship The public trust doctrine: basis The public trust doctrine in action; water	97 98 98
\$ 5.01 \$ 5.02 \$ 5.03 \$ 5.04 \$ 5.05	OF TRUSTEESHIP The nature of trusteeship The public trust doctrine: basis The public trust doctrine in action; water Public trust; land Federal common law rights related to	97 98 98 99
\$ 5.01 \$ 5.02 \$ 5.03 \$ 5.04	OF TRUSTEESHIP The nature of trusteeship The public trust doctrine: basis The public trust doctrine in action; water Public trust; land Federal common law rights related to environment	97 98 98 99
\$ 5.01 \$ 5.02 \$ 5.03 \$ 5.04 \$ 5.05 \$ 5.06 \$ 5.07	OF TRUSTEESHIP The nature of trusteeship The public trust doctrine: basis The public trust doctrine in action; water Public trust; land Federal common law rights related to environment Federal statutes The National Environmental Policy Act	97 98 98 99 101 101
\$ 5.01 \$ 5.02 \$ 5.03 \$ 5.04 \$ 5.05	OF TRUSTEESHIP The nature of trusteeship The public trust doctrine: basis The public trust doctrine in action; water Public trust; land Federal common law rights related to environment Federal statutes	97 98 98 99 101 101 102
\$ 5.01 \$ 5.02 \$ 5.03 \$ 5.04 \$ 5.05 \$ 5.06 \$ 5.07 \$ 5.08 \$ 5.09 \$ 5.10	OF TRUSTEESHIP The nature of trusteeship The public trust doctrine: basis The public trust doctrine in action; water Public trust; land Federal common law rights related to environment Federal statutes The National Environmental Policy Act The federal navigational servitude	97 98 98 99 101 101 102 103 104 105
\$ 5.01 \$ 5.02 \$ 5.03 \$ 5.04 \$ 5.05 \$ 5.06 \$ 5.07 \$ 5.08 \$ 5.09 \$ 5.10 \$ 5.11	OF TRUSTEESHIP The nature of trusteeship The public trust doctrine: basis The public trust doctrine in action; water Public trust; land Federal common law rights related to environment Federal statutes The National Environmental Policy Act The federal navigational servitude Tidelands Continental shelf lands Lake beds	97 98 98 99 101 102 103 104 105 106
\$ 5.01 \$ 5.02 \$ 5.03 \$ 5.04 \$ 5.05 \$ 5.06 \$ 5.07 \$ 5.08 \$ 5.09 \$ 5.10	OF TRUSTEESHIP The nature of trusteeship The public trust doctrine: basis The public trust doctrine in action; water Public trust; land Federal common law rights related to environment Federal statutes The National Environmental Policy Act The federal navigational servitude Tidelands Continental shelf lands Lake beds	97 98 98 99 101 102 103 104 105 106
\$ 5.01 \$ 5.02 \$ 5.03 \$ 5.04 \$ 5.05 \$ 5.06 \$ 5.07 \$ 5.08 \$ 5.09 \$ 5.10 \$ 5.11 \$ 5.12 \$ 5.13	The nature of trusteeship The public trust doctrine: basis The public trust doctrine in action; water Public trust; land Federal common law rights related to environment Federal statutes The National Environmental Policy Act The federal navigational servitude Tidelands Continental shelf lands Lake beds Wetlands; state action Lakes	97 98 98 99 101 102 103 104 105 106 106 108
\$ 5.01 \$ 5.02 \$ 5.03 \$ 5.04 \$ 5.05 \$ 5.06 \$ 5.07 \$ 5.08 \$ 5.09 \$ 5.10 \$ 5.11 \$ 5.12 \$ 5.13 \$ 5.14	The nature of trusteeship The public trust doctrine: basis The public trust doctrine in action; water Public trust; land Federal common law rights related to environment Federal statutes The National Environmental Policy Act The federal navigational servitude Tidelands Continental shelf lands Lake beds Wetlands; state action Lakes Shoreland and floodplain zoning	97 98 98 99 101 102 103 104 105 106 106 108 108
\$ 5.01 \$ 5.02 \$ 5.03 \$ 5.04 \$ 5.05 \$ 5.06 \$ 5.07 \$ 5.08 \$ 5.09 \$ 5.10 \$ 5.11 \$ 5.12 \$ 5.13	The nature of trusteeship The public trust doctrine: basis The public trust doctrine in action; water Public trust; land Federal common law rights related to environment Federal statutes The National Environmental Policy Act The federal navigational servitude Tidelands Continental shelf lands Lake beds Wetlands; state action Lakes	97 98 98 99 101 102 103 104 105 106 106 108

§ 5.18 § 5.22 § 5.24 § 5.26 § 5.28	Land management; state Wildlife; federal Wildlife; state Navigational servitude; air Weather modification	109 110 110 111 112
Chapter 6	LITIGATION BETWEEN GOVERNMENT AND ITS LESSEES	
§ 6.01	Scope of chapter	113
§ 6.02	Illustrations	113
§ 6.03	Land management; federal	114
Chapter 7 CITIZENS' ACTIONS AGAINST P BASED ON ENVIRONMENTAL CONSIDERATIONS		ERS
§ 7.01	Scope of chapter	115
§ 7.02	Theory of representation in citizen actions	115
§ 7.03	The United States Constitution as a source of the rights of an individual claiming	
	environmental injury	116
§ 7.04	Government inaction as action	118
§ 7.05	State constitutional rights	120
§ 7.06	Statutes permitting citizens to sue	121
§ 7.07	Common-law rights: public right; individual or group as plaintiff	124
§ 7.08	Lack of standing as a defense	$\frac{124}{125}$
§ 7.09	Class actions on behalf of citizens	128
§ 7.10	Intervention of citizen groups	129
§ 7.10	Citizens' compelling of administrative action	130
		100
Chapter 8	CITIZENS' ACTIONS AGAINST	_
	ADMINISTRATIVE AGENCIES BASED OF ENVIRONMENTAL CONSIDERATIONS	٧
§ 8.01	Scope of chapter	131
§ 8.02		134
§ 8.03		135
§ 8.04	Judicial review: Administrative Procedure	
	Act	143
§ 8.05	Remedies: in general	149

8	8.06	Remedies: preliminary injunction: in general	151
	8.07	Remedies: preliminary injunction:	101
ß	0.01	irreparable harm	152
R	8.08		102
3	0.00	Remedies: preliminary injunction:	155
	0.00	ultimate success on merits	155
	8.09	Remedies: preliminary injunction: bond	157
Ş	8.10	Remedies: preliminary injunction:	
		appeal from denial of injunction	158
	8.11	Cause of action: in general	158
Ş	8.12	Cause of action: NEPA: in general	161
Ş	8.13	Cause of action: NEPA: must an	
		environmental impact statement be prepared?	163
Ş	8.14	Cause of action: NEPA: what constitutes	
		an adequate environmental impact statement?	170
8	8.15	Cause of action: NEPA: as cause for	
•		reversal of substantive agency decision	173
8	8.16	Cause of action: NEPA: as an aid in	
3	0.10	developing a cause of action under other	
		statutes	174
8	8.17	Statutes which have provided a cause of action	
	8.18	Standing: in general	179
	8.19	Standing: included concepts: justiciability	181
	8.20	Standing: included concepts: private	101
ያ	0.20	attorney general	182
8	8.21	Standing: included concepts: injury	184
			104
3	8.22	Statutes granting standing for a specific	107
c	0.00	type of action	187
	8.23	Clean Air Act	187
8	8.24	Federal Insecticide, Fungicide and	40 F
		Rodenticide Act	187
	8.25	Federal Power Act	189
Ş	8.26	When no statute grants standing for the	
		specific type of action: Administrative	
	,	Procedure Act	193
Ş	8.27	Jurisdiction: in general	213
Ş	8.28	Statutes granting jurisdiction for review of	
		specific agency activities	217
Ş	8.29	Administrative Procedure Act as granting	
_		jurisdiction	218
Ş	8.30	Statutes granting district court jurisdiction	220
-	Q 21	Jurisdiction: amount in controversy	221

Ş	8.32	Venue	222
	8.33	Parties: plaintiff	225
	8.34	Parties: defendant	226
§	8.35	Parties: intervention	226
§	8.36	Parties: class actions	227
§	8.37	Sufficiency of the administrative record	229
§	8.38	Defenses: in general	239
Ş	8.39	Defenses: exhaustion of administrative	
		remedies	239
	8.40	Defenses: ripeness	243
	8.41	Defenses: laches	244
	8.42	Defenses: sovereign immunity	246
Ş	8.43	Defenses: judicial review precluded by	
_		statute	248
Ş	8.44	Defenses: agency action is committed to	
		agency discretion by law	249
02 a.z.d	a 0 C	COMMON PROCEDURAL PROBLEMS	
Chapt			
	9.01	Causal connection	251
	9.02	Burden of proof	252
	9.03	Other evidence problems	253
	9.04	Injury	253
Ş	9.05	Damages	254
Chant	on 10	TOTAL DOCUMENTS IN A LITTERATION	T A COTO
_		TRIAL DOCUMENTS IN A LITIGATED (
	10.01	Comments	257
Š	10.01a	Comments of Edward Lee Rogers	257
		Comments of Richard S. Arnold	260
	10.02		265
	10.03	Motion to dismiss (for improper venue)	294
8	10.04	Order re motion to dismiss (for improper	005
g.	10.05	venue)	295
Ş	10.05	Motion for preliminary injunction and	000
2	10.06	supporting affidavit	299
Ş	10.00	Order after hearing on motion for	202
Ş	10.07	preliminary injunction Motion to dismiss (jurisdiction, standing,	303
Я	10.07	and cause of action)	324
Ş	10.08	Order re motion to dismiss (jurisdiction,	024
S	10.00	standing, and cause of action)	326
		standing, and cause of action,	040

	Ş	10.09	Answer	334
	Ş	10.10	Motion for leave to file first amendment	
			to complaint	343
	Ş	10.11	First amendment to complaint	345
	Ş	10.12	Answer to first amendment to complaint	347
	Ş	10.13	Interrogatories propounded to defendants	349
	§	10.14	Objections to plaintiffs' interrogatories	355
	Ş	10.15	Reply to defendants' objections to	
			plaintiffs' interrogatories	361
	Ş	10.16	Request for production of documents by	
			defendants	365
	Ş	10.17	Objections to request for production of	
			documents by defendants	368
	Ş	10.18	Reply to objections to request for production	
			of documents by defendants	371
		10.19	Further request for inspection of documents	375
	Ş	10.20	Orders re interrogatories and production	
			of documents	377
TA	TABLE OF CASES			383
<i></i>	D. F	п оп с	NA A MILIMIE C	410
T'A	ВL	E OF S	STATUTES	413
TA	BI	E OF	MISCELLANEOUS MATERIAL	421
IN	D_{μ}	! Y		425