

Training Program in Judicial Specialization for the Protection of Environmental Rights Phases One and Two

Supreme Court of Justice of the Nation of Mexico
Environmental Law Institute

Outlines and other materials from

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Types of Environmental Cases

- Citizen suits, including those brought by individuals or NGOs directly against a polluter, and those brought by individuals or NGOs against government
 - Civil enforcement brought by government – injunctive relief and economically-based penalties
 - Criminal enforcement (always brought by government)
 - Permit appeals (important because they can address matters prior to or preventative of environmental harm)
 - Tort cases for compensation, restoration and other remedies.
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- Pollution, natural resources, land use cases may all fall within the general concept of ‘environmental’ cases on the state level; compare New South Wales (Australia) Land and Environment Court jurisdiction, Vermont Environmental Court jurisdiction
 - On the federal level land use is not included
 - Civil compared with criminal jurisdiction; “civil” includes both private civil cases and public or administrative law cases.
 - Private tort claims for damages (compensation) and injunctive relief
 - Enforcement cases: governmental prosecutor (attorney general) enforcement, may be civil (for injunctive relief) or criminal; citizen suits and ngo enforcement; concept of civil or administrative penalties
 - Importance of having enforceable permit conditions, not just statutes and regulations
 - Trial compared with judicial review and appeal from agency action

- On-the-record review compared with de novo trial
- Preponderance of evidence standard in civil trials, beyond a reasonable doubt standard in criminal trials
- Entitlement to jury trial (but not required – can be waived) in certain types of US cases

Discuss the Following Terminology

decision
judgment
sentence
order
opinion
damages/ damage

Role of Judiciary in Resolving Environmental Disputes

- Role of judge in civil law and common law traditions; respect given to judges and legal scholars
- Difference in systems is not so great when law is primarily statutory, as with environmental law
- Written decisions are issued by the judge, sent to the parties, published and available to judges, lawyers and parties in other cases, and to scholars
- Not binding from one judge to another on the same level or in a different jurisdiction
- Especially in a case presenting new legal issues or application of a statute to an unusual factual situation, judge's written decision may be helpful in the same way as a scholarly article or treatise
- That is, good reasoning may be persuasive or useful to a fellow judge, even if though it is not binding
- Judges can address constitutional claims; generally do not reach a constitutional issue unless it is necessary to the resolution of the case

Parties and Standing Issues/ Access to Justice in Environmental Cases

- Party status generally defined by statute or court rule
- A "remedy for every wrong"; constitutional or human right
- Compare other countries' requirements for public participation and access to justice, sometimes constitutional
- Advantages and disadvantages of various levels of access: no limitations, potential effect on litigant, actual harm
- NGO access defined by interests of members, or by NGOs' own purposes
- actual 'case or controversy' compared with policy or theoretical issue
- effect of improved access on public satisfaction with legal system

Intake Procedures and Motions to Dismiss

- Generally the court clerical staff has no discretion to refuse a case; case is filed and entered into the numbering system. Some cases are commenced with a document called a Complaint, others are commenced by filing a Notice of Appeal or Notice of Request for Hearing.
- A party who believes the case has no merit or that the filing party does not have standing to bring the case may file a motion to dismiss the case after the case has been filed.
- The judge must give reasons for a decision granting or denying a motion to dismiss; that decision is public as well as given to the litigants.
- Typical US Court Procedures:
 - Case is filed at the Court – filing fee may be waived for poor litigant
 - Docket number assigned, case entered into computer
 - Judge assigned (methods to avoid “judge shopping”)
 - Letter sent to litigant about procedure – several notifications are required
 - Tracking system activated
 - Appellant or plaintiff must file documents defining issues in case
 - Time limit for other parties enter appearance, file answer, or file additional appeals or claims

Introduction to Case Management

- Usually by court rule or practice of individual court or judge
- Pretrial conferences, held by judges or staff
- Tailoring schedule to needs of specific case
- Scheduling mediation into process
- Resolving legal issues in advance of trial; narrowing issues for trial
- Site visits
- Managing discovery process – parties' entitlement to have access to opponent's evidence in advance of trial

Vermont Environmental Division Case Management practice (Rule 2 is provided below):

Initial conference held with the judge (4 to 6 weeks from case filing)

- most are held by telephone – some in person
- all are recorded on audio tape or CD
- covers sequence of pre-trial motions to resolve legal issues, mediation, discovery, and time required for trial and when it should be scheduled

The conference results in a written scheduling order prepared by the case manager and signed by the judge setting deadlines for all the steps discussed at the conference. A follow-up conference may be set with the judge or the case manager.

Court staff monitors deadlines and calls lawyers and self-represented parties as needed.

Pre-trial motions ruled on by the judge may decide important legal issues before or without trial. Decisions in writing, sent to litigants, published electronically.

Follow-up conference with case manager after mediation

- by telephone and not recorded

- check status of mediation/ settlement and follow up
- if not settled, set schedule for motions, trial

Final pre-trial conference with case manager about two weeks before trial

- by telephone and not recorded
- make sure all ready for trial
- if site visit useful, schedule for trial day or otherwise

Introduction to Remedies

Basic concept is to return the injured party to the situation before the harm occurred, to the extent that is possible

“Damages” - money awarded to the wronged or injured party from the party who was responsible, to **compensate** for the wrong or harm. Sometimes called “compensatory damages.”

“Equitable Remedies” when money damages are not adequate. Concept of irreparable injury.

“Injunctions” or “Injunctive Relief” – a court order directing the responsible party to do something or to stop or refrain from doing something.

“Restitution” – when the defendant has been unjustly enriched, due to the defendant’s wrongdoing or in some cases due to mistake. Constructive trusts.

Other remedies:

- Declaratory judgments
- Punitive “damages”
- Ancillary remedies to help carry out these remedies: contempt to enforce injunctions, collection of money judgments, attorney’s fees and litigation costs, attachment, receivership

Defenses to the availability of remedies

- Plaintiff’s bad conduct: “unclean hands”
- Delay – statutes of limitations, “laches”
- Estoppel and waiver

Preliminary or Interim Remedies and Orders in Environmental Cases

To maintain the status quo or the positions of the parties pending litigation

To prevent additional harm during the litigation

Must show

- irreparable injury – that a later payment of money damages at the end of the litigation would not be sufficient
- balancing of the hardship to the plaintiff and defendant
- the public interest would not be harmed by granting the relief – except that in cases in which the government or a citizen suit is seeking an injunction to enforce a statute, this element is considered to be shown simply by the existence of the statute.

Stays pending appeal

Posting a bond

Temporary Restraining Orders – may be issued without notice to the defendant, but must have a hearing quickly thereafter

Pre-judgment “freeze” orders to preserve property or funds pending litigation

Permanent Injunctions and other final court orders

Injunctions are court orders acting in the future

Preventing future harm

Remedying past harm – preventing the future bad effects of past harm

Must show threat of harm, irreparable injury (that damages are not sufficient)

Orders for cleanup

Orders to change practices

Orders to permanently protect historic buildings, forest reserves, wildlife habitat

May include money amount for each day of non compliance after notice to the defendant

Special considerations for injunctions requiring governmental action

Special considerations on modifying injunctions

Enforcing the injunction through contempt

Order directing a third party to carry out the action and collect the cost of doing so.

Enforcement of Court Judgments in Environmental Cases

- contempt (enforcing injunctions)
 - civil contempt (coercive)
 - criminal contempt
 - compensatory civil contempt – damages for period of time injunction not obeyed
- collection (enforcing money judgments)
- attachment (of bank accounts)
- collection from of wages or tax refunds
- lien on land to secure the judgment
- Civil Rule of Procedure 70 - Order directing a third party to carry out the action and collect the cost of doing so
- Receiverships

Vermont Rule of Civil Procedure Rule 70. Judgment for Specific Acts; Vesting Title

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party, except that the appointee of the court shall have no authority to execute a conveyance of land outside the State of Vermont. The court may also in proper cases adjudge the party in contempt. If real property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law, if a copy thereof, certified by the clerk, is recorded in the office in which a deed of such real estate is required by law to be recorded.

Issues to address re Settlement (whether due to mediation or otherwise)

- Settlement of cases between the parties.
- Approval of court; consent orders
- Participation of other parties not yet in case
- Settlements prior to case filing; embodied in consent order; may include Alternative Environmental Projects

Vermont Rules for Environmental Court proceedings – Case Management Rule

Rule 2 – procedural rule applicable to all types of cases

Rule 2. General Provisions

(a) Applicability. -- This rule applies in all proceedings under these rules, except as modified by provisions of the rules pertaining to particular proceedings.

(b) Coordination of Proceedings. -- On motion of a party, or on the court's own motion, where the same violation or project involves multiple proceedings that have resulted or may result in separate hearings or appeals in the Environmental Court, or where different violations or projects involve significant common issues of law or fact, the court may advance, defer, coordinate, or combine proceedings and may make other orders that will promote expeditious and fair proceedings and avoid unnecessary costs or delay.

(c) Discovery. -- Unless the parties otherwise agree, the court in a pretrial order issued under paragraph (d)(3) of this rule shall establish the type, sequence, and amount of discovery available under Rules 26-37 of the Vermont Rules of Civil Procedure, limiting the discovery permitted to that which is necessary for a full and fair determination of the proceeding.

(d) Pretrial Conference and Order.

(d)(1) The court shall hold a pretrial conference as soon as possible after the filing of the last pretrial memorandum required in a review of an administrative order or the last statement of questions required in an appeal or the time for filing either has passed. The court may hold subsequent conferences, on its own motion or at the request of a party, as necessary to promote the expeditious and fair disposition of the proceeding. Any conference may be scheduled by the court to be held by telephone. All unrepresented parties and counsel for all represented parties must attend all conferences. Unless a party or counsel is excused by the court in advance of the scheduled date, failure to attend a conference may result in sanctions, including dismissal of the appeal or entry of default. The judge shall preside at the initial conference but may assign the case manager to conduct all, or specific portions, of any subsequent conference and report to the judge on any matters agreed upon and any matters in dispute. Motions may be scheduled to be heard at any conference held by the judge, and any conference or motion hearing may be recorded by audiotape or other electronic means with leave of the court.

(d)(2) At the initial conference, the following matters shall be considered, if applicable, and appropriate schedules shall be established:

- (i) the status of any stay that has previously been granted;
- (ii) issues of intervention and party status;
- (iii) whether to advance, defer, coordinate, or combine proceedings pursuant to subdivision (b) of this rule;
- (iv) whether to allow clarification of the statement of questions; and
- (v) the potential for dismissal of all or some issues or for summary judgment or other disposition of any legal issue or issues before trial.

At the initial or any subsequent conference, the following additional matters shall be considered, if applicable:

- (vi) whether to narrow the issues to be heard;
- (vii) the appropriate type, sequence and amount of discovery;
- (viii) the use of prefiled evidence and expert witnesses;
- (ix) whether a site visit is needed;
- (x) the use of alternative dispute resolution or other means of expediting the proceeding; and
- (xi) any other matter necessary to the expeditious and fair disposition of the proceeding.

(d)(3) In every case, the court shall issue one or more written orders under Rules 16, 16.2, or 26(f) of the Vermont Rules of Civil Procedure, as appropriate. The order or orders shall, at a minimum:

- (i) dispose of any issues determined at the conference and set a date for the hearing and disposition of any other pending issues raised;
- (ii) state the type, sequence, and amount of discovery to be conducted and provide a plan and schedule for the completion of discovery;
- (iii) affirm a schedule for any alternative dispute resolution process ordered or agreed upon under V.R.C.P. 16.3;
- (iv) if prefiled evidence is to be used, contain appropriate orders concerning its use;
- (v) contain appropriate orders concerning the use of expert testimony at trial;
- (vi) contain appropriate orders governing a site visit, if any is to be conducted; and
- (vii) contain appropriate orders concerning trial scheduling.

V.R.E.C.P. 2, continued

(e) Evidence.

(e)(1) Rules of Evidence. -- The Vermont Rules of Evidence shall be followed in all matters within the original jurisdiction of the court and in all appeals by trial de novo, except that evidence, not privileged, that is not admissible under the Rules of Evidence may be admitted in the discretion of the court if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.

(e)(2) Prefiled Evidence.

(A) Except as provided in subparagraph (B) of this paragraph, prefiled evidence may be admitted as ordered by the court in a pretrial order issued pursuant to paragraph (d)(3) of this rule when a hearing will be expedited and the interests of the parties will not be prejudiced substantially.

(B) Prefiled testimony and related exhibits will be admitted only if the witness is present and available for cross-examination, unless the court and the parties otherwise agree or the witness is unavailable as defined in Rule 804(a) of the Vermont Rules of Evidence.

(e)(3) Site Visits. -- One or more site visits may be conducted when appropriate to assist the court in rendering a decision.

Vermont Environmental Enforcement statute – excerpts

10 V.S.A. (Vermont Statutes Annotated) § 8001:

[Purpose of the Vermont Uniform Environmental Enforcement Act is to standardize and enhance the enforcement powers of the state environmental and land use agencies, in order to:]

- (1) enhance the protection of environmental and human health afforded by existing laws;
- (2) prevent the unfair economic advantage obtained by persons who operate in violation of environmental laws;
- (3) provide for more even-handed enforcement of environmental laws;
- (4) foster greater compliance with environmental laws;
- (5) deter repeated violation of environmental laws; and
- (6) establish a fair and consistent system for assessing administrative penalties.

10 V.S.A. (Vermont Statutes Annotated) § 8010:

* * *

(b) In determining the amount of the penalty, the [court] shall consider the following:

- (1) the degree of actual or potential impact on public health, safety, welfare and the environment resulting from the violation;
- (2) the presence of mitigating circumstances, including unreasonable delay by the secretary in seeking enforcement;
- (3) whether the respondent knew or had reason to know the violation existed;
- (4) the respondent's record of compliance;
- (5) [replaced by (c)(2) below]
- (6) the deterrent effect of the penalty;
- (7) the state's actual costs of enforcement; and
- (8) the length of time the violation has existed.

(c)(2) In addition to any penalty assessed under subdivision (1) of this subsection, the [court] may also recapture economic benefit resulting from a violation up to the \$XXXX maximum allowed under [subsection (c)(1) addressing the maximum per day and total amounts for the factors in subsection (b)].