

BOOK REVIEW

ROYAL C. GARDNER ON “LAWYERS, SWAMPS AND MONEY – U.S. WETLANDS LAW, POLICY AND POLITICS”

By Kuhumita Laha¹²⁹

Published: 2011, Pages: 255

ISBN-13: 978-1-59726-814-1 (Cloth: alk. paper); 10: 1-59726-814-3 (Cloth: alk. paper)

ISBN-13: 978-1-59726-815-8 (Pbk.: alk. paper); ISBN-10: 1-59726-815-1 (Pbk.: alk. paper)

Price: \$33.25 (Paperback)

At the beginning I am glad to write review of Book titled “Lawyers, Swamps and Money – U.S. Wetlands Law, Policy and Politics” written by Royal C. Gardner and published by *Island Press, Connecticut Avenue, Washington DC, USA*. Wetlands expert Prof. Gardner is famous for his extensive work on wetlands law and policy and this present fascinating book reflects not only his expertise, but also his special ability to inform the details of U.S. wetlands law and policy to the public. This book is an example of the extensive work of the Author by producing another vivacious piece of work in the sector of Natural Resources Law and Policy especially wetlands. He has made the U.S. wetlands law and policy accessible to all inspite of the complex issues raised from the areas of constitutional, administrative and environmental law. Wetlands law is a part and parcel of the Natural Resources Law. Wetlands are depositories of unique biodiversity and they provide numerous ecological services, maintain hydrological balance and give livelihood benefits to dependent communities. As such there is an eminent need for protecting the wetlands which are becoming vulnerable day-by-day as a result of climate change effects and thus the Wetlands law and policies are framed on the guidelines of Ramsar Convention¹³⁰ for preservation, protection and restoration of wetlands. The Convention defines Wetlands as ‘*areas of marsh, fen, peat-land, or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, blackish or salt, including areas of marine water the depth of which at low tide does not exceed six meters*’¹³¹. It also mentions that areas defined as wetlands ‘*may incorporate riparian and coastal zones adjacent to the wetlands,*

¹²⁹ Research Scholar, West Bengal National University of Juridical Sciences, Kolkata

¹³⁰ Convention on wetlands of International Importance especially as Waterfowl Habitat, February 2, 1971, 996 UNTS 245; TIAS 11084, 11 ILM 963 (1972), UN Treaty Series No. 14583 (entry into force in Dec. 21, 1975) (hereinafter referred to as Ramsar Convention).

¹³¹ *Id.*, Article 2.

*and islands or bodies of marine water deeper than six meters at low tide lying within the wetlands*¹³². In the modern world significance of wetlands are enormous for a better life with the surrounding environment. For this, the knowledge on wetlands law and policy for the protection, preservation and restoration of wetlands is essential for everybody in this world.

Wetlands throughout the world are sensitive and vulnerable ecosystems and critical habitats to the world's migratory birds and a broad range of endangered mammal, reptile, amphibian and plant species. There is also need for proper classification, mapping, providing proper definition of wetlands and enforcement of such laws and policies in the municipal laws. There exist various conflicts and problems relating to preservation, protection and restoration of wetlands as it is an interdisciplinary subject. The problems relating to climate change and biodiversity are also other issues which are to be addressed along with the wetlands protection issue. In addition, there exist a clash among human rights violations like community rights and development issue. The land and water dispute and problem of transboundary wetlands are feathers on the conflicting issues on this problem. For which there were attempts by the international community for having a rational and uniform system of wetlands protection and the ultimate result was Ramsar Convention. The last decade has witnessed the remarkable upbringing of uniformity in substantive as well as procedural wetlands law and policies. The Nations have taken measure to ensure protection of wetlands in the municipal, regional as well as international level. U.S.A. is also in the list of such nations. If Ramsar Convention is the international norm, at the national level, U.S.A. legislations, regulations, policies and decisions of courts have played their important role in rationalizing this concept relating to wetlands law and policy. This stream of natural resources law has become important in various sectors like green economy, sustainable development, climate change, environmental science, corporate social responsibility, agriculture, human development, poverty, health etc. In this background, this present book attempts to enlighten the reader with a complete knowledge on various sectors of wetlands protection regime in U.S.A. This subject being multidisciplinary in nature will draw attention of everyone irrespective of their field or stream they come from. In the modern era, protection, preservation and restoration of wetlands are mainstay issues as such in the recent past the importance of 'right of environment', i.e., an eco-centric approach has been adopted in the universe. There is a continuing need for literature and writing on this wetlands issue from different countries. I thus appreciate Prof. Royal C. Gardner for writing a comprehensive book on U.S. wetlands law and policy from a different perspective. He is an eminent and famous scholar in the sector of wetlands protection. He has done not only a literature study but also experienced it personally while serving as the Army Principal Attorney as advisor to the Corps of Engineers' administration of the Clean Water Act section 404 programmes. During 1999-2012 and at present Prof. Gardner has held various honorary chairs in various wetlands protection institutions and

¹³² *Id.*, Article 2.1.

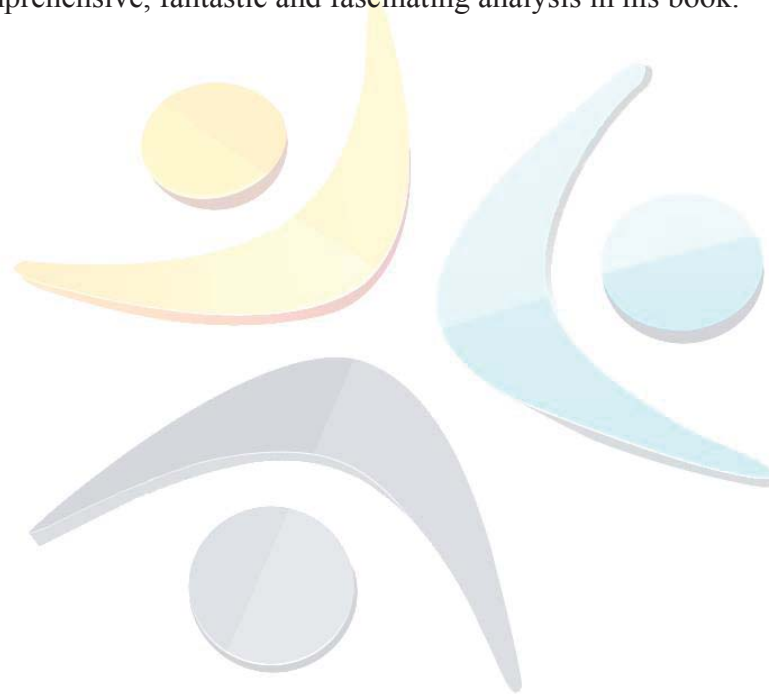
organisation in U.S.A. for mitigating wetland losses. He has been accepted by the legal fraternity very well as a writer which can be understood through the fact that his books and articles have been extensively used as text books and research materials all over the universe. He has been a regular contributor to the reputed journals on natural resources law, wetlands law and environmental law. The author has also written various books on the related topics. There are very few authors who have the courage to undertake the emerging areas of law like wetlands law and policy. But, I welcome the valiant effort of Prof. Gardner not only for exploring this issue but also for covering a huge segment of wetlands law and policy in U.S. Regime.

This book is an outcome of efficacious effort in depicting true picture of wetlands law and policy in U.S.A. and its implementation and effectiveness covering almost all areas in U.S. context with latest updates. This book contains 12 Chapters in 255 pages covering number of issues in U.S. Context. Chapter-1 is titled as '*The Ebb and Flow of Public Perception of Wetlands*' and it identifies that until and unless the thought of people is changed as a whole towards eco-centric approach and society is constraint to see wetlands as valuable resources before they disappear, laws governing management of such wetlands cannot flourish. Chapter-2 is titled as '*Administrative Law: The Short Course*' and in this Chapter the author evaluates the importance of Administrative law in implementing wetland law and policy in U.S.A. as administrative law is applicable to all agencies like U.S. Environmental Protection Agency and Corps of Engineers who deal with wetlands protection at federal level. He has also opined that now-a-days, environmental law has become administrative in nature because of regulatory framework. This Chapter has critically examined the administrative functions of agencies in discharging their duties of wetlands protection and role of executive, legislative and judicial wing of U.S.A. over the matter with application of case studies which has made this chapter lively and interesting. Chapter-3 is titled as '*What's a Wetland (for purposes of Clean Water Act jurisdiction)?*' which examines the definition of wetlands from legal viewpoint. The author has explained that the definition of wetlands seems simple but it is not so for the purpose of Clean Water Act because whether or not and to what extent an area is classified as wetland can have drastic effect on public for which it can be heavily litigated by those whose rights seem infringed. He has also criticised some decisions of U.S. Supreme Court which have ended in fractured decisions without majority. According to the Act if the area is considered as wetlands, not all harmful activities towards wetlands are regulated and only discharge of dredged or filling matters are prohibited. Chapter-4 is titled as '*Dredge and Fill: The Importance of Precise Definition*' and it strongly recommends for a precise definition as statute is guideline. In addition this chapter also examines the role of Clean Water Act Section 404 in granting or denying permissions of dredging, land clearing, mountaintop removal, filling etc. with help of various case studies from Appalachia to Alaska. The Author has described the unique and strange relationship between U.S. Environmental Protection Agency and U.S. Army Corps of Engineers in Chapter-5 titled as '*Strange Bedfellows: U.S. Environmental Protection Agency and U.S. Army Corps of Engineers*'. Though Clean Water Act entrusts Corps of Engineers for grant or denial of

permit, the role of Congress over the same cannot be ignored and surprisingly the Corps must apply EPA Standards and that makes the situation complex. For which the main object of the Clean Water Act and other related programmes, i.e., “no net loss” is not achieved. Chapter-6 titled ‘*No Net Loss: Lies, Damned Lies, and Statistics*’ reviews the major threats to wetlands and on the contrary examines various attempts to reduce wetlands impacts requiring Clean Water Act permit holders to balance the adverse impact by compensatory mitigation process. The Author has also identified the failure of federal Government in this ‘no net loss’ process apart from the statistics and has suggested to adopt wetlands mitigation banking to achieve the goal positively. Chapter-7 is named as ‘*Wetland Mitigation Banking: Banking on Entrepreneurs*’ and it looks at a growing industry in which private companies invest money in wetlands restoration project by securing wetlands credit for future use and it can be sold to developers for offsetting their project’s impacts. In light of this advance mitigation process, the author has examined how entrepreneurial wetland mitigation bank functions in reality with real case studies in U.S.A. Chapter-8 is named as ‘*In-lieu Fee Mitigation: Money for Nothing?*’ and it advocates in-lieu fee programmes for mitigation which is a third party programme run by environmental groups, land trusts or Governmental agencies. The developers invest money on these agencies for conducting future mitigation projects and sometimes mitigation banking faces competition from in-lieu fee mitigation and sometimes there is deadlock. Chapter-9 is titled as ‘*Levelling the Mitigation Playing Field*’ and tries to address the dispute between mitigation bankers and in-lieu fee mitigation administrators. It discusses how Corps and EPA as per direction of the Congress issued regulations to maintain equilibrium of standards among permit-holder responsible mitigation, mitigation banks and in-lieu fee mitigation programmes. But these equivalent norms mean equality as per standard of each stakeholder. Chapter-10 is titled as ‘*Wetland Enforcement: The Ultimate Discretionary Act*’ and it put stress upon means of enforcement of agencies like administrative penalties, civil penalties and even criminal sanctions. But sometimes there is an issue relating to the authority of those agencies over mitigation bankers and in-lieu fee mitigation administrators. The Corps and EPA try to resolve disputes through voluntary restoration instead of the compulsory enforcement hammer which is sometimes fruitless. However, the citizens can sue for Government’s inaction in enforcement but that too is also not flawless. Citizen’s suit cannot challenge the permit conditions or compensatory mitigation conditions. Chapter-11 is named as ‘*Regulatory Taking in the Wetland Context*’ and it examines the strain between wetland regulation and private property rights. It also discusses the concept of ‘just compensation’ under the Fifth Amendment to the Constitution and Clean Water Act Section 404 Programme. In furtherance, the situation is being dealt with where the property right is made limited and not confiscated totally from the private party with detailed case studies. Chapter-12 titled as ‘*Concluding Thoughts and Recommendations*’ is drafted to give recommendations looking forward to the future for betterment of laws and policies for protecting wetlands.

At this juncture, I would like to say that I am ecstatic to review the knowledge generated by Prof. Royal C.

Gardner in his book “Lawyers, Swamps and Money – U.S. Wetlands Law, Policy and Politics”. This book is useful for students, academicians and scholars, peoples from corporate world as it is a very good addition to the existing literature relating to wetlands law and policy in U.S.A. Apart from the above it is a very attractive and splendid in language for readers from all countries. Wetlands laws and policies are very technical but the achievement of the author is that the readers will not over bog down in the information. This book is not only a knowledge generator but also a good information provider in relation to wetlands protection laws, policies and their enforcement. I wish good luck and success to this book. I also wish and hope that the persons working in relation to wetlands all over the world will get a good help from the book. Lastly, I would like to congratulate the author for giving such comprehensive, fantastic and fascinating analysis in his book.



The LAW BRIGADE