

Table of Contents

ACKNOWLEDGMENTS	V
INTRODUCTION.....	VII
Chapter 1. The Clean Water Act.....	1
I. Jurisdiction	1
A. Addition of a Pollutant	1
1. What Is a “Pollutant?”	1
2. What Is an “Addition” of a Pollutant?	5
3. De Minimis Exceptions.....	8
B. Navigable Waters	10
1. Introduction.....	10
2. Waters Adjacent to Traditional Navigable Waters, Interstate Waters, and the Territorial Seas.....	15
3. Tributaries.....	18
4. Waters Adjacent to Tributaries	20
5. Other Waters, on a Case-Specific Basis	21
6. Hydrologically-Connected Groundwater	24
C. Point Source	25
II. The National Pollutant Discharge Elimination System (NPDES) Program	27
A. The Federal/State Relationship	27
B. NPDES Permits	28
C. Technology-Based Requirements.....	29
1. Industrial Dischargers.....	29
a. Existing Dischargers.....	29
b. New Sources	30
2. Publicly Owned Treatment Works (POTWs)	31
3. Pretreaters—§ 307	31
D. Water Quality Considerations	32
1. How Water Quality Standards Are Set	32
2. How Water Quality Standards Are Implemented for Point Sources	34
a. Introduction.....	34
b. TMDLs	35
c. New Sources in the Water Quality Limited Context.....	37
d. The Effect of Water Quality Standards on Nonpoint Sources	38
III. The § 404 Permit Program.....	40
A. Introduction.....	40

B.	The § 404(b)(1) Guidelines and Public Interest Review	41
Chapter 2. The Clean Air Act		
I.	Introduction	49
II.	A Basic Overview of the Clean Air Act	50
III.	National Ambient Air Quality Standards (NAAQS)	51
A.	The NAAQS Process	52
B.	Substantive Challenges to Air Quality Standards	53
C.	NAAQS Implementation	55
IV.	State Implementation Plans	56
A.	Required Elements of a SIP	56
B.	The SIP Development and Revision Process	56
C.	SIPs and NAAQS Attainment.....	58
1.	NAAQS Designations.....	59
2.	SIP Adequacy	61
3.	Interstate Pollution Transport.....	62
D.	SIP Enforceability.....	63
V.	Stationary Source Emissions Standards or Limitations.....	64
A.	New Source Performance Standards	64
1.	Implementation Procedures	65
2.	Standards of Performance	66
3.	Applicability to “New” Sources.....	67
4.	Existing Sources.....	69
a.	Pollutants and Facilities Regulated Under § 111(d).....	69
b.	Regulatory Requirements for ESPS Under § 111(d).....	71
B.	New Source Review—PSD and NNSR	72
1.	Substantive Requirements of PSD and NNSR	73
a.	Prevention of Significant Deterioration.....	73
i.	Permitting Procedures	73
ii.	BACT.....	74
iii.	Air Quality and Increments.....	75
b.	Nonattainment New Source Review	76
i.	LAER.....	76
ii.	Offsets	77
2.	Applicability Requirements of PSD and NNSR (and NSPS)	77
a.	Summary of the New Source Review Applicability Requirements.....	78
b.	Major Sources	79
i.	Source Defined.....	79
ii.	Major Stationary Sources Defined	80
iii.	Potential to Emit	82

c.	Modifications	83
3.	The Special Case of Greenhouse Gases	85
4.	Summing up New Source Review	86
C.	National Emissions Standards for Hazardous Air Pollutants	86
1.	Source Categories.....	88
2.	Emissions Standards	88
a.	Major Sources	89
b.	Area Sources.....	91
c.	Residual Risk Standards	92
d.	Schedule for Developing Emissions Standards	93
3.	The Special Case of Power Plants.....	94
D.	Title IV Acid Rain Emission Caps	94
E.	Title V Permits.....	95
1.	Title V Sources and Requirements	96
a.	Covered Sources	96
b.	Contents of Title V Permits.....	97
2.	Title V Permit Shield and “Applicable” Requirements	97
3.	EPA Vetoes.....	98
VI.	Mobile Source Emissions Standards	99
VII.	Conclusion.....	100

Chapter 3. the Resource Conservation and Recovery

	Act	101
I.	Overview and Jurisdiction	101
A.	What Is a “Solid Waste”?.....	103
1.	Historical Background.....	104
2.	The New Rule.....	108
B.	What Is a “Hazardous Waste”?	111
II.	The Regulatory Program.....	114
A.	Generator Requirements	114
B.	Requirements for Treatment, Storage and Disposal Facilities (TSDs)	116
C.	The Land Ban	119

Chapter 4. Regulatory Enforcement **121**

I.	Overview	121
II.	Civil Enforcement in Court.....	121
A.	Proving the Violation.....	121
B.	Injunctive Relief.....	122
C.	Penalties	124
III.	Administrative Enforcement	125
A.	Administrative Compliance Orders—Judicial Review	126

B.	Administrative Penalties	128
IV.	Criminal Enforcement.....	129
V.	Other Broadly Applicable Enforcement Principles	131
A.	EPA Enforcement in Authorized States.....	131
B.	The Effect of a Permit.....	133
C.	Statute of Limitations	134
D.	EPA's Supplemental Environmental Project (SEP) and Audit Policies	135
VI.	Citizen Suits.....	136
A.	Introduction.....	136
B.	Standing	137
C.	Notice.....	141
D.	<i>Gwaltney</i> /Ongoing Violations.....	142
E.	Preclusion.....	148
F.	Attorney Fees	151

Chapter 5. The Comprehensive Environmental

	Response, Compensation and Liability Act.....	153
I.	Introduction	153
II.	CERCLA Applicability	153
III.	Federal Cleanup Authorities	155
A.	EPA-Lead Cleanup and Cost-Recovery	155
B.	Unilateral Orders	157
C.	Settlement	158
IV.	General Principles of CERCLA Liability	158
A.	Elements of Liability	158
B.	Categories of Liable Parties	159
C.	Standard of Liability	159
D.	Retroactivity	160
E.	Scope of Liability.....	160
V.	A Closer Look at the Most Important Categories of Liable Parties	162
A.	Owners and Operators	162
B.	“Arrangers for Disposal or Treatment”	167
C.	Derivative Liability Under CERCLA	169
D.	Defenses and Exclusions	171
VI.	The Selection of the Remedy (How Clean Is Clean?)	174
VII.	Private Party Cost Recovery and Contribution	177

Chapter 6. The Coastal Zone Management Act

I.	Introduction	181
II.	Coastal Zone Management Programs	182
A.	The Program Elements.....	182
1.	Defining the Coastal Zone	183
2.	Resource Protections in Coastal Zone Programs	185

B.	Nonpoint Source Program	187
C.	Program Development and Approval Procedures.....	188
III.	Consistency Review	189
A.	Section 307(c)(1) Consistency Requirements for Federal Agency Activities.....	190
1.	Federal Agency Activities.....	191
2.	The Presidential Exemption	192
B.	Section 307(c)(2) Consistency Requirements for Development Projects	194
C.	Section 307(c)(3) Consistency Requirements for Federally Permitted Activities.....	194
1.	Consistency Review for Federal Permits.....	195
2.	Consistency Review for Federal Licenses or Permits Under the Outer Continental Shelf Lands Act.....	196
3.	The Appeal Process.....	196
a.	Consistent with the CZMA.....	197
b.	In the Interest of National Security.....	199
IV.	Conclusion.....	199
Chapter 7. The Endangered Species Act.....		201
I.	Introduction	201
II.	Section 4—Listing and Critical Habitat Designation and Recovery Planning.....	202
A.	Listing Species	202
1.	Listing a Species as Threatened or Endangered	202
a.	Species and Distinct Population Segments ..	204
b.	Distinct Population Segment Policy	204
2.	Candidate Species	206
B.	Critical Habitat Designation.....	206
1.	Prudent and Determinable.....	208
a.	Not Prudent.....	208
b.	Not Determinable.....	208
2.	Department of Defense Exemption from Critical Habitat Designation	209
C.	Listing Petitions.....	209
D.	Recovery Planning and Species Delisting	210
III.	Section 7—Interagency Consultation and the Prohibition Against Jeopardy or Adverse Modification	211
A.	7(a)(1)—Conservation Programs	211
B.	7(a)(2)—Consultation and the Prohibitions Against Jeopardy and Adverse Modification	212
1.	Scope of Agency Action	212

2.	The “May Affect” Threshold Triggering Consultation	213
3.	The Biological Opinion	215
a.	Jeopardy Analysis	216
b.	Adverse Modification or Destruction of Critical Habitat	216
c.	Reasonable and Prudent Alternatives	217
d.	Incidental Take Statement	217
IV.	Sections 9 and 10—The Take Prohibition and Exceptions	218
V.	Conclusion	219
Chapter 8. The National Environmental Policy Act		221
I.	Introduction	221
II.	The EIS Trigger	222
A.	Legislative Proposals	222
B.	Major Federal Agency Actions	223
1.	Agency Actions	223
2.	Federal Agency Actions	224
3.	Major Actions	225
C.	Significant Environmental Effects	225
1.	What Are Significant Effects on the Human Environment?	225
2.	Procedures for Determining if an Action Is Significant	227
III.	The EIS	229
A.	EIS Procedures	229
B.	EIS Contents	230
C.	Timing of the EIS	232
IV.	Judicial Review	233
A.	Review Under the Administrative Procedure Act	233
B.	Ripeness and Standing	233
V.	Conclusion	235
TABLE OF CASES		237
TABLE OF STATUTES		243
TABLE OF REGULATIONS		249
INDEX		253