

Table of Contents

PART A. INTRODUCTORY

CHAPTER 1. INTRODUCTION

- § 1:1 Underlying assumptions
- § 1:2 Organization of the treatise
- § 1:3 Broader objectives

PART B. THE COMMON LAW

CHAPTER 2. THE ROLE OF THE COMMON LAW IN MODERN ENVIRONMENTAL PROTECTION

- § 2:1 Overview
- § 2:2 Importance of common law doctrines in an age of statutes

CHAPTER 3. NUISANCE

I. DEFINITIONAL ASPECTS OF NUISANCE LAW

- § 3:1 Public and private nuisances
- § 3:2 Defining private nuisances
- § 3:3 Legislative definitions of nuisances

II. IDENTIFYING THE PARTIES

- § 3:4 Plaintiffs
- § 3:5 Defendants

III. THE ROLE OF FAULT IN DETERMINING NUISANCES

- § 3:6 Fault and private nuisance
- § 3:7 Fault and public nuisance
- § 3:8 Nuisances *per se*

IV. THE CHANGING ROLE OF BALANCING

- § 3:9 Substantial and unreasonable interference
- § 3:10 The restatement's modification
- § 3:11 Preferences and presumptions in balancing
- § 3:12 Coming to the nuisance
- § 3:12.50 Causation

V. INTERSTATE NUISANCES

- § 3:13 Generally

VI. DEFENSES

- § 3:14 Generally

- § 3:15 Preemption of state common law
- § 3:16 Permits and statutory authorization
- § 3:17 Primary jurisdiction
- § 3:18 Statutes of limitation
- § 3:19 Consent and related doctrines

VII. REMEDIES

- § 3:20 Damages
- § 3:21 Injunctions and the balancing process
- § 3:22 Punitive damages
- § 3:23 Flexibility of remedy

CHAPTER 4. TRESPASS, STRICT LIABILITY, AND THE PUBLIC TRUST DOCTRINE

I. TRESPASS

- § 4:1 Traditional elements
- § 4:2 The fault requirement
- § 4:3 Invasion requirement
- § 4:4 Damages

II. STRICT LIABILITY

- § 4:5 Theory of strict liability
- § 4:6 Applying strict liability to environmental pollutants
- § 4:7 Recurring issues
- § 4:8 Causation and damages

III. THE PUBLIC TRUST DOCTRINE

A. THE DOCTRINE IN PERSPECTIVE

- § 4:9 Generally

B. RESOURCES SUBJECT TO THE TRUST

- § 4:10 Tidelands and navigable waters
- § 4:11 Navigability tests and private lands
- § 4:12 Other trust resources
- § 4:13 Constitutional and statutory provisions

C. THE DOCTRINE'S EFFECT

- § 4:14 Generally
- § 4:15 The procedural component
- § 4:16 The substantive component

D. THE DOCTRINE APPLIED

- § 4:17 Generally
- § 4:18 Use, impairment, or disposition of trust resources
- § 4:19 Access to trust resources
- § 4:20 The public trust and water rights

TABLE OF CONTENTS

IV. NAVIGABILITY AND PUBLIC ACCESS RIGHTS

§ 4:21 Generally

V. FUTURE DIRECTIONS FOR THE COMMON LAW

§ 4:22 Nuisance and strict liability

§ 4:23 The public trust doctrine

PART C. STATE ENVIRONMENTAL REGULATION

CHAPTER 5. CONSTITUTIONAL LIMITS ON STATE AND LOCAL POWERS

I. IN GENERAL

§ 5:1 Overview

§ 5:2 Traditional state and local powers

§ 5:3 The shift to federal standards

II. FEDERAL PREEMPTION OF STATE POWERS

§ 5:4 Generally

§ 5:5 Basic principles of federal preemption

§ 5:6 Express preemption by statutory declaration

§ 5:7 Implied preemption by inferred congressional intent

§ 5:8 Implied preemption by conflict in implementation

§ 5:9 State Preemption of local environmental regulation

§ 5:10 Express state law preemption by statutory declaration

§ 5:11 Implied state law preemption by inferred legislative intent

§ 5:12 Implied state law preemption by conflict in implementation

§ 5:13 Preemption by dormant commerce clause application

§ 5:14 —Discrimination

§ 5:15 —The balancing rule

§ 5:15.50 Tenth Amendment limits on federal power

III. OTHER CONSTITUTIONAL CONSTRAINTS

§ 5:16 Environmental regulation and constitutional limits—Generally

§ 5:16.50 Substantive due process and equal protection

§ 5:17 Void for vagueness doctrine

§ 5:17.50 Procedural due process

§ 5:18 Nondelegation doctrine

§ 5:19 Taking of property: In general

§ 5:20 Ripeness and compensation

§ 5:21 Takings: The general framework

§ 5:22 Categorical takings

§ 5:23 Determining a complete deprivation: The denominator issue

§ 5:24 Determining a complete deprivation: The nuisance exception

§ 5:25 The *Penn Central* Framework

§ 5:26 Regulatory exactions

- § 5:27 Compensation for takings: State takings legislation
- § 5:28 —Assessment laws
- § 5:29 ——Assessment of agency regulations
- § 5:30 ——Agency assessment of regulations
- § 5:31 —Compensation laws
- § 5:32 Compensation for takings: Miscellaneous takings provisions
- § 5:33 Self-incrimination and confidentiality rights
- § 5:34 Right to jury trial

CHAPTER 6. THE ROLE OF FEDERAL ENVIRONMENTAL STATUTES

I. OVERVIEW

- § 6:1 Generally

II. CLEAN AIR ACT

- § 6:2 Generally
- § 6:3 Federal standards and state implementation
- § 6:4 —National ambient air quality standards
- § 6:5 —State implementation plans
- § 6:6 Other federal requirements

III. CLEAN WATER ACT

- § 6:7 Generally
- § 6:8 Effluent limitations and standards
- § 6:9 Permits

IV. RESOURCE CONSERVATION AND RECOVERY ACT

- § 6:10 Generally
- § 6:11 Identification of hazardous wastes
- § 6:12 Generator standards
- § 6:13 Transporter standards
- § 6:14 TSD facility standards

V. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

- § 6:15 Generally

CHAPTER 7. THE REGULATORY STRUCTURE: STATE ORGANIZATIONAL PATTERNS

I. IN GENERAL

- § 7:1 Overview
- § 7:2 Relationship to other chapters

II. ANALYTIC AND PRACTICAL THEMES

- § 7:3 Generally

TABLE OF CONTENTS

- § 7:4 Orientation toward cooperative solutions
- § 7:5 Application of expertise
- § 7:6 Exercise of discretion
- § 7:7 Role of permits
- § 7:8 Need for safety valves
- § 7:9 Importance of timing and delay
- § 7:10 Public decision-making

III. THE FEDERAL MODEL

- § 7:11 Generally

IV. STATE PROGRAMS

- § 7:12 Generally
- § 7:13 Consolidated agency model
- § 7:14 —Medium-specific program offices
- § 7:15 —Agency chief and staff
- § 7:16 —Boards and commissions
- § 7:17 —Agency lawyers

CHAPTER 8. THE REGULATORY PROCESS: FUNCTIONAL PATTERNS AND DECISION POINTS

I. OVERVIEW

- § 8:1 Generally

II. LEGISLATIVE FUNCTIONS

- § 8:2 Generally
- § 8:3 Categories of environmental regulations
- § 8:4 Development and promulgation of regulations—Sources of proposed regulations
- § 8:5 Formal rulemaking procedures
- § 8:6 Informal communications
- § 8:7 Development and promulgation of regulations—Participation of the legislature
- § 8:8 Medium-specific regulations
- § 8:9 —Air pollution
- § 8:10 —Water pollution
- § 8:11 —Hazardous waste

III. EXECUTIVE FUNCTIONS

- § 8:12 Generally
- § 8:13 Pre-permit functions
- § 8:14 Review and issuance of permits
- § 8:15 —Application for permit to construct
- § 8:16 —Staff review of application
- § 8:17 —Applicant—staff—public consultation
- § 8:18 —Issuance of permit to construct
- § 8:19 —Appeal opportunity
- § 8:20 —Review and issuance of permit to operate

- § 8:21 —Permit renewal
- § 8:22 Permit enforcement

IV. JUDICIAL FUNCTIONS

- § 8:23 Generally
- § 8:24 Variances
- § 8:25 Permit disputes

PART D. STATE ENVIRONMENTAL LAWS

CHAPTER 9. HAZARDOUS WASTE SITE CLEANUP LEGISLATION

I. OVERVIEW

- § 9:1 Generally

II. STATUTORY APPROACHES TO SITE CLEANUP

- § 9:2 Generally
- § 9:3 New Jersey
- § 9:4 California
- § 9:5 Colorado

III. LIABILITY STANDARDS

A. IN GENERAL

- § 9:6 Overview
- § 9:6.50 “Disposal” of “Hazardous Waste”

B. STRICT LIABILITY OR FAULT

- § 9:7 Strict liability on the federal model
- § 9:8 Other liability standards
- § 9:9 Natural resource damages
- § 9:10 Oversight fees

C. CATEGORIES OF LIABLE PARTIES

- § 9:11 Generally
- § 9:12 Owners, operators, and innocent landowners
- § 9:12.50 Generators
- § 9:13 Transporters
- § 9:14 Involuntary owners and fiduciaries
- § 9:15 Lenders
- § 9:16 Cleanup contractors
- § 9:17 Miscellaneous parties

D. JOINT AND SEVERAL OR PROPORTIONAL LIABILITY

- § 9:18 Generally
- § 9:19 Joint and several liability

TABLE OF CONTENTS

- § 9:20 Joint and several liability with apportionment
- § 9:21 Proportional liability
- § 9:21.50 Cleanup levels

IV. STATE VARIATIONS ON CERCLA ELEMENTS

A. ENFORCEMENT

- § 9:22 Generally
- § 9:23 Statutory bases for cleanup orders
- § 9:24 Pre-enforcement review of cleanup orders
- § 9:25 Monetary penalties

B. CLEANUP COST LIENS

- § 9:26 Generally
- § 9:27 Conventional liens or superliens
- § 9:28 Superlien provisions—Priority
- § 9:29 —Coverage
- § 9:30 Prerequisites to imposition of liens
- § 9:31 Constitutional issues

C. CITIZEN SUITS

- § 9:32 Generally
- § 9:33 Parties—Plaintiffs
- § 9:34 Defendants
- § 9:35 Intervenors
- § 9:36 Preemption by agency action
- § 9:37 Remedies

D. VICTIM COMPENSATION

- § 9:38 Generally
- § 9:39 Alternative water supply programs
- § 9:40 Personal injury and property damage programs

E. PUBLIC PARTICIPATION

- § 9:41 Generally
- § 9:42 Notice
- § 9:43 Comment
- § 9:44 Meetings
- § 9:45 Grants
- § 9:46 Citizens committees
- § 9:47 State Superfund Management Board

V. REAL ESTATE TRANSACTION AND OWNERSHIP IMPACTS

- § 9:48 Generally
- § 9:49 New Jersey
- § 9:50 Connecticut
- § 9:51 California

VI. STATE VOLUNTARY CLEANUP LEGISLATION

- § 9:52 The concern over “brownfields”

- § 9:53 The federal response to brownfields
- § 9:54 State legislation: The objective
- § 9:55 Principal statutory provisions—Applicability
- § 9:56 —Cleanup levels
- § 9:57 —Liability limitations
- § 9:58 —Procedural reforms
- § 9:59 —Lender liability reform
- § 9:60 —Land use restrictions
- § 9:61 —Financial incentives
- § 9:62 —Public participation

CHAPTER 10. AIR POLLUTION

I. OVERVIEW

- § 10:1 Generally

II. THE FEDERAL CLEAN AIR ACT

- § 10:2 Clean Air Act implementation: State legislation
- § 10:3 SIP implementation: Theory and reality
- § 10:4 Attainment status and its consequences
- § 10:5 Areas of state emphasis and innovation

III. REGULATORY AGENCIES

- § 10:6 Generally

IV. STATE AMBIENT AIR QUALITY STANDARDS

- § 10:7 Generally

V. JURISDICTION

A. POLLUTANTS

- § 10:8 “Pollution” and “contaminants”
- § 10:9 Odors
- § 10:10 Accidental releases

B. SOURCES

- § 10:11 Generally

VI. AIR QUALITY RULEMAKINGS

- § 10:12 Generally

VII. PERMITS

- § 10:13 Title V of the Clean Air Act
- § 10:14 Construction permits
- § 10:15 Operating permits
- § 10:16 Procedures for issuing permits

VIII. CONTROLS ON STATIONARY SOURCES

- § 10:17 Emission control standards: RACT, BACT, and LAER

TABLE OF CONTENTS

§ 10:18 Other factors

IX. PERMIT FEATURES AND ISSUES

§ 10:19 Conditions

§ 10:20 Variances, emergencies, upsets and breakdowns

X. MOBILE SOURCES

§ 10:21 Federal and California standards

§ 10:22 Opt-in states

§ 10:23 Other state controls on vehicle emissions

§ 10:24 Transportation improvements

XI. TOXIC AIR EMISSIONS PROGRAMS

§ 10:25 Generally

XII. AIR POLLUTION AS NUISANCE

§ 10:26 Generally

XIII. MISCELLANEOUS POLLUTION SOURCES

§ 10:27 Acid deposition

§ 10:28 Consumer products

§ 10:28.50 Indoor air pollution

§ 10:29 Medical waste incinerators

§ 10:30 Asbestos

§ 10:30.50 Agricultural burning

§ 10:31 Trading, bubbles, and banking

XIV. FEES

§ 10:32 Generally

CHAPTER 11. WATER POLLUTION

I. OVERVIEW

§ 11:1 Generally

II. THE FEDERAL CLEAN WATER ACT

§ 11:2 Implementation of the Clean Water Act—EPA's technology-based effluent limitations

§ 11:3 —State authority

III. JURISDICTIONAL ISSUES

§ 11:4 The prerequisites to jurisdiction—“Waters” covered

§ 11:5 —“Water pollution”

§ 11:6 —Point and nonpoint sources

§ 11:7 —Causation

§ 11:8 Regulatory agencies

IV. THE PERMIT SYSTEM

§ 11:9 Permit requirements—Generally

- § 11:10 —Technology based limits
- § 11:11 —Consideration of economic cost
- § 11:12 —Imposition of conditions
- § 11:13 Permitting procedures—Nature of proceeding
- § 11:14 —Length of permit
- § 11:15 —General permits

V. IMPLEMENTING WATER QUALITY STANDARDS

- § 11:16 Water quality standards—The state and federal approach
- § 11:17 —Uses: Adoption and classification
- § 11:18 —Criteria
- § 11:19 —Reclassification
- § 11:20 Total maximum daily loads—Calculating a TMDL
- § 11:21 —Procedure for adoption
- § 11:22 —TMDLs and effluent limitations

VI. ANTIDEGRADATION POLICY

- § 11:23 Antidegradation—Features of the antidegradation policy
- § 11:24 —Implementing antidegradation policy

VII. STORMWATER REGULATION

- § 11:25 Stormwater permits—The federal two-phase framework
- § 11:26 —Disputes over implementation
- § 11:27 —State stormwater legislation

VIII. SEWAGE TREATMENT REGULATION

- § 11:28 Sewage treatment—Regulation of discharges from treatment works
- § 11:29 —State and local control

IX. THE SECTION 401 CERTIFICATION POWER

- § 11:30 Section 401 certification—The certification authority: In general
- § 11:31 —Scope of the certification authority
- § 11:32 —Reasonable assurances
- § 11:33 —Waiver

CHAPTER 12. *[Reserved]*

CHAPTER 13. STATE ENVIRONMENTAL POLICY ACTS

I. OVERVIEW

- § 13:1 Generally

II. STRUCTURE OF STATE ENVIRONMENTAL POLICY ACTS

- § 13:2 Scope of impact reporting requirements
- § 13:3 Threshold determinations
- § 13:4 Environmental impact statements and decisionmaking
- § 13:5 Delegation of duties

TABLE OF CONTENTS

III. THRESHOLD DETERMINATIONS

A. DECISIONS NOT TO PREPARE EISS

- § 13:6 Actions and projects
- § 13:7 Tests for threshold determinations
- § 13:8 Conditional findings of nonsignificance
- § 13:9 Timing issues
- § 13:10 Segmentation and cumulative impacts
- § 13:11 Judicial review of threshold determinations in practice

B. EXEMPTIONS

- § 13:12 Exemptions generally
- § 13:13 Ministerial Acts

C. OTHER ISSUES

- § 13:14 Emergencies
- § 13:15 Positive determinations

IV. ADEQUACY OF ENVIRONMENTAL IMPACT STATEMENTS

- § 13:16 Tests for adequacy
- § 13:17 Specific adequacy issues—Description of the action
- § 13:18 —Environmental effects of the action
- § 13:19 —Alternatives
- § 13:20 —Segmentation and cumulative impacts
- § 13:21 —Other adequacy issues
- § 13:22 Judicial review in practice

V. DECISIONMAKING UNDER SEPAS

- § 13:23 Generally

VI. REMEDIES

- § 13:24 Generally

PART E. LITIGATION

CHAPTER 14. LITIGATION

I. OVERVIEW

- § 14:1 Generally

II. STANDING

A. GENERAL PRINCIPLES

- § 14:2 Generally

B. INDIVIDUAL STANDING

- § 14:3 Generally

- § 14:4 Injury in fact
- § 14:5 Zone of interests
- § 14:6 Other tests

C. STATUTORY STANDING

- § 14:7 Administrative Procedure Acts
- § 14:8 Environmental Protection Acts

D. ORGANIZATIONS, GOVERNMENTAL PLAINTIFFS, AND TAXPAYERS

- § 14:9 Organizations
- § 14:10 Governmental entities and officials
- § 14:11 Taxpayers

E. OTHER ISSUES

- § 14:12 Administrative standing
- § 14:13 Standing from the practitioner's perspective

III. EXHAUSTION OF ADMINISTRATIVE REMEDIES

A. GENERAL PRINCIPLES

- § 14:14 The exhaustion requirement
- § 14:15 Purposes of requiring exhaustion
- § 14:16 Exceptions to the exhaustion requirement

B. THE PRINCIPLES APPLIED

- § 14:17 Completing the process and raising issues
- § 14:18 Adequacy of remedy
- § 14:19 Futility
- § 14:20 Irreparable injury
- § 14:21 Constitutional issues
- § 14:22 Issues of law

C. EXHAUSTION DOCTRINE FROM THE PRACTITIONER'S PERSPECTIVE

- § 14:23 Generally

IV. RIPENESS

A. GENERAL PRINCIPLES

- § 14:24 The concept of ripeness
- § 14:25 Statutory "finality"
- § 14:26 Legislative and judicial definitions of "finality"
- § 14:27 Other factors indicating ripeness

B. THE PRINCIPLES APPLIED

- § 14:28 Stage of agency proceedings
- § 14:29 Legal versus factual analysis

TABLE OF CONTENTS

§ 14:30 Hardship to the parties

C. RIPENESS FROM THE PRACTITIONER'S PERSPECTIVE

§ 14:31 Generally

V. PRIMARY JURISDICTION

§ 14:32 General principles

§ 14:33 The principles applied

§ 14:34 Primary jurisdiction from the practitioner's perspective

VI. VENUE

§ 14:35 Generally

VII. PARTIES

§ 14:36 Types of parties

§ 14:37 Public agency defendants

§ 14:38 Private party defendants

VIII. INTERVENTION

§ 14:39 Types of intervention

§ 14:40 Interest affected

§ 14:41 Timeliness

§ 14:42 Adequacy of representation

§ 14:43 Intervention from the practitioner's perspective

IX. STAY ORDERS AND BONDS

§ 14:44 Authority for stay orders

§ 14:45 Application to agency for stay

§ 14:46 Standards for granting a stay

§ 14:47 Bonds and other conditions of a stay

§ 14:48 Stay orders from the practitioner's perspective

X. THE ADMINISTRATIVE RECORD

§ 14:49 Generally

§ 14:50 Content of the record

§ 14:51 Evidence outside the record

§ 14:52 Cost and transmittal of the record

§ 14:53 The record from the practitioner's perspective

XI. ATTORNEY'S FEES

§ 14:54 Generally

XII. STATUTORY PROVISIONS RELATING TO SLAPP SUITS

§ 14:55 Introduction: Defining the SLAPP suit

§ 14:56 Judicial responses

§ 14:57 Legislative responses

§ 14:58 —Defining the conduct protected

- § 14:59 —Changes to motion practice
- § 14:60 —Immunities
- § 14:61 —Damages, attorney's fees, and costs

CHAPTER 15. JUDICIAL REVIEW

I. TESTS FOR REVIEWING AGENCY ACTION

- § 15:1 Introduction
- § 15:2 Themes in judicial review of environmental issues
- § 15:3 Quasi-legislative and quasi-adjudicatory acts
- § 15:4 Statutes governing judicial review
- § 15:5 “Arbitrary or capricious” test
- § 15:6 “Substantial evidence” test
- § 15:7 Other tests
- § 15:8 Questions of law
- § 15:9 Fungibility of tests

II. METHOD OF REVIEW, BURDEN OF PROOF, AND PRESUMPTIONS

- § 15:10 Generally

III. REVIEWING THE AGENCY'S JURISDICTION

- § 15:11 Introduction
- § 15:12 Agency jurisdiction
- § 15:13 Division of authority between agencies
- § 15:14 Extent of agency authority
- § 15:15 —Method of procedure
- § 15:16 —Scope of regulatory authority
- § 15:17 —Agency remedial authority
- § 15:18 Prerequisites to agency action

IV. REVIEWING THE AGENCY'S PROCEDURES

A. RULEMAKING PROCEDURES

- § 15:19 Agency policy and decisions as “rules”
- § 15:20 The choice between rulemaking and adjudication
- § 15:21 Procedural requirements

B. ADJUDICATORY PROCEDURES

- § 15:22 Generally
- § 15:23 Right to a hearing—Source of the right
- § 15:24 —Type of hearing
- § 15:25 Conduct of the hearing
- § 15:26 —Pre-hearing proceedings
- § 15:27 —Issues arising at the hearing
- § 15:28 —Post-hearing issues

TABLE OF CONTENTS

V. REVIEWING THE AGENCY'S FACTUAL CONCLUSIONS

A. "SUBSTANTIAL EVIDENCE" IN THEORY AND PRACTICE

§ 15:29 Generally

B. WHEN EVIDENCE IS "SUBSTANTIAL"

§ 15:30 Evidence in relation to the statute

§ 15:31 Sources of substantial evidence

§ 15:32 Inferences and weight of the evidence

§ 15:33 Conflicts in the evidence

C. THE TEST APPLIED

§ 15:34 Generally

§ 15:35 Substantial evidence found

§ 15:36 Substantial evidence not found

§ 15:37 Intensity of judicial review

VI. REVIEWING THE AGENCY'S LEGAL INTERPRETATIONS

A. PRINCIPLES OF STATUTORY CONSTRUCTION

§ 15:38 Generally

B. DEFERENCE TO THE AGENCY'S INTERPRETATION

§ 15:39 The deference principle

§ 15:40 The limits of deference

C. COMPLIANCE WITH AGENCY REGULATIONS

§ 15:41 The deference principle

§ 15:42 The limits of deference

VII. REVIEWING DECISIONS AND REASONING: IN GENERAL

§ 15:43 Overview

§ 15:44 Intensity of judicial review

§ 15:45 Decisional consistency with enabling statutes

VIII. AGENCY CONSIDERATION OF EVIDENCE IN THE RECORD

§ 15:46 Required consideration of factors

§ 15:47 Decision-makers' familiarity with the evidence

IX. DECISIONS BASED UPON AGENCY EXPERTISE

§ 15:48 The deference principle

§ 15:49 Challenging agency expertise

X. INDICATORS OF ARBITRARY DECISION-MAKING

§ 15:50 Illogical agency reasoning

§ 15:51 Inconsistent treatment of similar situations

§ 15:52 Conformance to environmental protection purposes

- § 15:53 Undermining regulatory expectations
- § 15:54 Changes in position
- § 15:55 Disagreements among regulatory agencies
- § 15:55.50 “Danger Signals” from agency actions

XI. CONDITIONAL APPROVALS OF PERMITS

- § 15:56 Authority for conditional approvals
- § 15:57 Validity of conditions—The reasonableness test
- § 15:58 —Violation of a statute or regulation
- § 15:59 —Conditions requiring future action

XII. FINDINGS

- § 15:60 Source of the requirement
- § 15:61 Findings in theory and practice
- § 15:62 Adequacy of findings
- § 15:63 The internal logic of agency reasoning

CHAPTER 16. ENFORCEMENT

I. IN GENERAL

- § 16:1 Overview
- § 16:2 Enforcement agencies and plaintiffs

II. ADMINISTRATIVE INSPECTIONS AND SEARCH WARRANTS

- § 16:3 The context of agency information-gathering
- § 16:4 Principles of warrantless inspections
- § 16:5 Issues regarding inspections—Authority to search or seek a warrant
- § 16:6 —Pervasively regulated businesses
- § 16:7 —Standards structuring the agency’s discretion
- § 16:8 —Search warrants: Probable cause and scope

III. ADMINISTRATIVE ENFORCEMENT: THE STATUTORY FRAMEWORK

- § 16:9 In general
- § 16:10 Methods of administrative enforcement—Notices of violation and citations
- § 16:11 —Abatement or cease and desist orders
- § 16:12 —Emergency orders
- § 16:13 —Permit suspensions or revocations
- § 16:14 —Civil penalty assessments
- § 16:15 —Remedial actions
- § 16:16 —Damages
- § 16:17 Hearing requirements
- § 16:18 Enforcement outside the permit process

IV. JUDICIAL ENFORCEMENT

- § 16:19 Injunctions to enforce the permit system
- § 16:20 Actions to enforce abatement orders
- § 16:21 Civil penalty assessments

TABLE OF CONTENTS

§ 16:22 Judicial review of administrative actions

V. SETTLEMENTS AND CONSENT DECREES

§ 16:23 Generally

VI. RECURRING ENFORCEMENT ISSUES

A. PREREQUISITES AND SCOPE OF AGENCY AUTHORITY

§ 16:24 Prerequisites to enforcement actions—Judicial enforcement
§ 16:25 —Administrative enforcement
§ 16:26 Scope of the agency’s regulatory authority
§ 16:27 Appropriate defendants—Landowners and facility operators
§ 16:28 —Agents and independent contractors
§ 16:29 —Corporate employees and officers
§ 16:30 Self-auditing and self-reporting

B. PROOF ISSUES

§ 16:31 Burden of proof
§ 16:32 Scienter
§ 16:33 Causation

C. SUFFICIENCY OF THE EVIDENCE

§ 16:34 Generally

D. INJUNCTIVE RELIEF

§ 16:35 Prerequisite of success on the merits
§ 16:36 Irreparable injury and the balance of equities
§ 16:37 The “status quo” and mandatory injunctions
§ 16:38 Scope and terms of the injunction

E. CIVIL PENALTIES

§ 16:39 In general
§ 16:40 Factors in penalty assessments
§ 16:41 Tests on judicial review
§ 16:42 Importance of reasoning in assessing penalties
§ 16:43 Indicators of arbitrary penalty assessments
§ 16:44 Remedy for arbitrary assessments

F. DEFENSES

§ 16:45 Technological impossibility and breakdowns
§ 16:46 Financial incapability
§ 16:47 Estoppel, laches, and unclean hands
§ 16:48 Constitutional defenses
§ 16:49 Other defenses

G. CONSENT ORDERS AND DECREES

§ 16:50 Scope of settlement agreement
§ 16:51 Agency authority to settle

VII. PRIVATE ENFORCEMENT

- § 16:52 Citizen suits
- § 16:53 Environmental Protection Acts

VIII. CRIMINAL ENFORCEMENT

- § 16:54 In general
- § 16:55 The statutory framework
- § 16:56 Common issues

PART F. EMERGING TRENDS

CHAPTER 17. ENDANGERED SPECIES PROTECTION

I. OVERVIEW

- § 17:1 Generally

II. THE FEDERAL ENDANGERED SPECIES ACT: AN OVERVIEW

- § 17:2 Basic provisions
- § 17:3 Role of the states

III. REGULATORY FEATURES OF STATE ENDANGERED SPECIES LEGISLATION

A. IN GENERAL

- § 17:4 Overview

B. LISTING OF SPECIES

- § 17:5 Mandatory versus permissive listing
- § 17:6 Candidate and threatened species
- § 17:7 Plant species

C. CRITERIA AND INFORMATION FOR LISTING

- § 17:8 Criteria and limitations
- § 17:9 Type of information required
- § 17:10 Decision-making and procedures
- § 17:11 Delisting procedures

D. CRITICAL HABITAT DESIGNATION

- § 17:12 Generally

E. STANDARD OF PROTECTION

- § 17:13 Jeopardizing species
- § 17:14 Takes and incidental takes

F. SCOPE OF PROTECTION

- § 17:15 Generally

TABLE OF CONTENTS

G. PROCEDURAL METHODS OF PROTECTION

- § 17:16 Generally
- § 17:17 Consultation
- § 17:18 Permitting
- § 17:19 Regulations
- § 17:20 Recovery plans
- § 17:21 Criteria in the decision-making processes of agencies
- § 17:22 State Environmental Policy Acts
- § 17:23 Public trust doctrine

H. THE FIFTH AMENDMENT

- § 17:24 Generally

IV. ENFORCEMENT

- § 17:25 Civil and criminal enforcement
- § 17:26 Problems of proof

V. OTHER TYPES OF PROTECTIONS

- § 17:27 Generally
- § 17:28 California: The Natural Communities Conservation Planning Act
- § 17:29 Florida: The Manatee Sanctuary Act
- § 17:30 Michigan: The Biodiversity Conservation Act
- § 17:31 Incentives

CHAPTER 18. OIL SPILL LEGISLATION

I. OVERVIEW

- § 18:1 The 1989–90 oil spills and their aftermath
- § 18:2 The federal and state responses
- § 18:3 Organization and content of this chapter

II. THE TRADITIONAL REGULATORY FRAMEWORK

- § 18:4 Liability statutes
- § 18:5 Civil penalty provisions
- § 18:6 Water pollution regulation

III. RESPONSE AND RECOVERY ACTIONS

- § 18:7 Comprehensive state legislation in general
- § 18:8 Notification requirements
- § 18:9 State contingency plans
- § 18:10 State response patterns
- § 18:11 Oil spill funds
- § 18:12 Third-party claims against the fund

IV. REGULATION OF ONGOING OPERATIONS AND FACILITIES

- § 18:13 Generally

V. DEVELOPMENTS IN OIL SPILL LEGISLATION

- § 18:14 In general

- § 18:15 Institutional improvements—Administration of prevention and cleanup efforts
- § 18:16 —On-scene coordination and emergency powers
- § 18:17 —Oversight functions
- § 18:18 Planning reforms—State contingency plans
- § 18:19 —Vessel and facility plans
- § 18:20 Operational limits and technological requirements
- § 18:21 Permitting and licensing
- § 18:22 Financial responsibility and funding requirements—Evidence of financial responsibility
- § 18:23 —Increased funding requirements
- § 18:24 Liability and defenses
- § 18:25 Fund disbursements and procedures
- § 18:26 Enforcement

VI. FUTURE DEVELOPMENTS

- § 18:27 Generally

CHAPTER 19. PUBLIC HAZARD DISCLOSURE, POLLUTION PREVENTION, AND ENVIRONMENTAL ADVERTISING

I. OVERVIEW

- § 19:1 Generally

II. FEDERAL STATUTES

- § 19:2 Generally
- § 19:3 Emergency Planning and Community Right-to-Know Act of 1986
- § 19:4 —Chemical reporting
- § 19:5 —Emergency response planning
- § 19:6 —Emergency release reporting
- § 19:7 —Enforcement
- § 19:8 Pollution Prevention Act of 1990

III. STATE PUBLIC HAZARD DISCLOSURE LAWS

A. IN GENERAL

- § 19:9 Background
- § 19:10 Laws implementing EPCRA

B. LAWS WITH SUPPLEMENTAL PROVISIONS

- § 19:11 Additional reporting facilities
- § 19:12 Standards for identifying hazards
- § 19:13 —Definitions of hazardous chemicals
- § 19:14 —Definitions of emergency release
- § 19:15 —Reporting thresholds
- § 19:16 Reporting and disclosure requirements—Inventory reporting and response plans
- § 19:17 —Public disclosure methods

TABLE OF CONTENTS

- § 19:18 Fee structures
- § 19:19 Additional enforcement provisions

C. REQUIREMENTS BEYOND EPCRA

- § 19:20 Generally
- § 19:21 Risk management plans
- § 19:22 —New Jersey
- § 19:23 —Delaware
- § 19:24 California’s Proposition 65
- § 19:25 —Discharge prohibition
- § 19:26 —Public warnings requirement
- § 19:27 —Disclosures by government employees
- § 19:28 —Enforcement

IV. POLLUTION PREVENTION PLANS

- § 19:29 Generally
- § 19:30 Massachusetts
- § 19:31 New Jersey
- § 19:32 California

V. ENVIRONMENTAL ADVERTISING AND LABELING

- § 19:33 Generally
- § 19:34 Federal efforts
- § 19:35 State regulation
- § 19:36 —Advertising standards
- § 19:37 —Seals of approval and official emblems

CHAPTER 20. GROUNDWATER PROTECTION SYSTEMS

I. OVERVIEW

- § 20:1 Hidden resources and hidden problems
- § 20:2 State regulatory efforts

II. GROUNDWATER HYDROLOGY AND CONTAMINATION

- § 20:3 Generally
- § 20:4 Hydrology and the definition of “groundwater”
- § 20:5 Groundwater storage and movement
- § 20:6 Groundwater contamination—Sources and types of contaminants
- § 20:7 —Patterns of contamination

III. FEDERAL EFFORTS TO PROTECT GROUNDWATER

- § 20:8 Federal legislation
- § 20:9 Federal guidance efforts

IV. STATE GROUNDWATER PROTECTION POLICIES

- § 20:10 Generally

V. GROUNDWATER PROTECTION SYSTEMS

A. CLASSIFICATION OF GROUNDWATER

- § 20:11 Purposes of classification
- § 20:12 Criteria and classes
- § 20:13 Examples of classification systems

B. GROUNDWATER QUALITY STANDARDS

- § 20:14 Standard setting
- § 20:15 Numeric standards
- § 20:16 —Wisconsin
- § 20:17 —Minnesota
- § 20:18 Narrative standards
- § 20:19 Examples of groundwater standards
- § 20:20 —Colorado
- § 20:21 —Massachusetts
- § 20:22 —Nebraska
- § 20:23 —New Jersey

VI. SPECIAL AREA PROTECTION PROGRAMS

A. THE INFLUENCE OF FEDERAL REGULATION

- § 20:24 Generally

B. “SENSITIVE AREA” DESIGNATIONS

- § 20:25 In general
- § 20:26 Sole source aquifer protection in New York
- § 20:27 The Minnesota Groundwater Protection Act
- § 20:28 The Nebraska Groundwater Management and Protection Act
- § 20:29 Protections adopted by local governments

C. WELLHEAD PROTECTION PROGRAMS

- § 20:30 In general
- § 20:31 Illinois wellhead protection program
- § 20:32 New Hampshire wellhead protection program
- § 20:34 El Paso groundwater protection strategy

VII. CONTROLS ON SPECIFIC SOURCES OF PRESENT OR POTENTIAL CONTAMINATION

- § 20:35 In general
- § 20:36 Underground injection wells
- § 20:37 Contamination from agricultural operations
- § 20:38 Underground storage tanks
- § 20:39 PFAS

VIII. IMPLEMENTATION AND ENFORCEMENT

- § 20:40 Generally

TABLE OF CONTENTS

CHAPTER 21. ENVIRONMENTAL REGULATION THROUGH ECONOMIC INCENTIVES

I. OVERVIEW

§ 21:1 Generally

II. THE DEBATE OVER POLLUTION CONTROL THEORY

§ 21:2 Criticisms of the existing system

§ 21:3 Economic incentive mechanisms

III. CONTROLLED TRADING SYSTEMS

A. THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT'S MARKETABLE PERMIT SYSTEM

§ 21:4 In general

§ 21:5 Scope of the program

§ 21:6 Baseline and ending allocations

§ 21:7 Rates of reduction

§ 21:8 The trading procedure

§ 21:9 Reconciliation of emissions

§ 21:10 Monitoring

§ 21:11 Enforcement

B. DILLON RESERVOIR CONTROLLED POINT-NONPOINT SOURCE TRADING PROGRAM

§ 21:12 In general

§ 21:13 The allocation and trading mechanism

§ 21:14 Enforcement of trades

C. THE TAR-PIMLICO TRADING SYSTEM

§ 21:15 In general

§ 21:16 The trading mechanism

§ 21:17 Enforcement

IV. POLLUTION FEES

§ 21:18 In general

§ 21:19 The Texas heating oil tax

§ 21:20 The California toxic discharge fees

§ 21:21 The Florida newsprint disposal fee

V. STATE BOTTLE DEPOSIT LEGISLATION

§ 21:22 In general

§ 21:23 The Oregon "bottle bill"—The deposit-refund mechanism

§ 21:24 The legislation in practice

CHAPTER 22. REGULATION OF GREENHOUSE GAS EMISSIONS

I. IN GENERAL

§ 22:1 Overview

II. REGIONAL INITIATIVES

§ 22:2 The Regional Greenhouse Gas Initiative (RGGI)
§ 22:3 The RGGI “Cap and Trade” System
§ 22:4 The Western Climate Initiative
§ 22:5 Midwestern Greenhouse Gas Reduction Accord

III. STATE AND LOCAL INITIATIVES

§ 22:6 The California Global Warming Solutions Act of 2006
§ 22:7 The New Jersey Global Warming Response Act
§ 22:8 State commissions
§ 22:9 Emissions performance standards
§ 22:10 Clean energy initiatives
§ 22:10.50 Climate superfund laws
§ 22:11 Transportation-related actions
§ 22:12 Local government actions

IV. LITIGATION

§ 22:13 Nuisance
§ 22:14 Environmental impact analysis
§ 22:15 Public utilities and other agencies
§ 22:16 Constitutional and common law litigation

APPENDICES

Appendix A. Articles on State Environmental Law

Table of Cases

Index