

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

TABLE OF CONTENTS

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

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

TABLE OF CONTENTS

§ 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
- § 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

TABLE OF CONTENTS

§ 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
- § 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

TABLE OF CONTENTS

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

TABLE OF CONTENTS

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
- § 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

TABLE OF CONTENTS

§ 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]*