

TABLE OF CONTENTS

CHAPTER 1

The Structure of Environmental Enforcement

| | | |
|---------|---|------|
| § 1.01 | Introduction | 1-2 |
| § 1.02 | Absence of a Comprehensive Approach | 1-3 |
| § 1.03 | The EPA’s Enforcement Structure | 1-6 |
| | [1] Historical Underpinnings: From Fragmentation to “De-Balkanization” | 1-6 |
| | [2] EPA’s Present Enforcement Structures | 1-7 |
| | [3] Consolidated Approach to Enforcement: Multimedia | 1-8 |
| | [4] EPA’s Trial Attorneys—The Department of Justice | 1-11 |
| § 1.04 | The Federal/State Relationship | 1-13 |
| | [1] Overview | 1-13 |
| | [2] The Delegation Process | 1-13 |
| | [3] Parallel Proceedings, Overfiling and Judicial Abstention | 1-17 |
| | [a] Parallel Proceedings | 1-17 |
| | [b] Overfiling | 1-18 |
| | [c] Abstention | 1-26 |
| | [4] Double Jeopardy | 1-28 |
| § 1.05 | The Government’s Pre-Litigation Enforcement Authority | 1-31 |
| § 1.05A | Agency Decisions and Rule Making | 1-34 |
| | [1] The Administrative Record | 1-35 |
| | [2] Threshold Barriers to Review | 1-42 |
| | [a] Standing | 1-42 |
| | [i] Procedural Aspects of Standing | 1-42 |
| | [ii] Proof of Standing | 1-43 |
| | [iii] Organizational Standing | 1-43 |
| | [iv] Standing in Climate Change Cases | 1-44 |

ENVIRONMENTAL ENFORCEMENT

| | | |
|--------|---|------|
| | [b] Exhaustion | 1-45 |
| | [c] Ripeness | 1-46 |
| | [3] The Final Agency Action Requirement | 1-48 |
| | [4] Judicial Deference to Agency Action | 1-51 |
| § 1.06 | Citizen Suits | 1-57 |
| § 1.07 | The Criminalization of Environmental Enforcement | 1-60 |
| § 1.08 | The Politics of Environmental Enforcement | 1-62 |
| | [1] Generally | 1-62 |
| | [2] The Novel Coronavirus: A Case Study | 1-62 |
| § 1.09 | Conclusion | 1-65 |

CHAPTER 2**The Statutory Power to Investigate**

| | | |
|--------|---|------|
| § 2.01 | Overview | 2-2 |
| | [1] Administrative Subpoenas and Agency Interrogatories | 2-2 |
| | [2] Statutory Reporting Requirements | 2-2 |
| | [3] Intrusive Inspections and Searches | 2-3 |
| § 2.02 | The Statutory Framework | 2-5 |
| | [1] Comprehensive Environmental Response, Cleanup and Liability Act | 2-5 |
| | [a] Section 104(e) Information Requests | 2-5 |
| | [b] Power to Inspect | 2-12 |
| | [c] Sanctions | 2-13 |
| | [d] Administrative Subpoenas | 2-13 |
| | [2] Resource Conservation and Recovery Act | 2-15 |
| | [a] Power to Inspect | 2-15 |
| | [b] Enforcement and Sanctions | 2-16 |
| | [3] Clean Water Act | 2-17 |
| | [a] Discharge Monitoring Reports | 2-17 |
| | [b] Inspections | 2-20 |
| | [c] Sanctions | 2-21 |
| | [4] Clean Air Act | 2-26 |
| | [a] Inspections | 2-27 |
| | [b] Self-Monitoring and Reporting Requirements | 2-29 |
| | [c] Administrative Subpoenas | 2-30 |
| | [d] Sanctions | 2-31 |
| | [5] Emergency Planning and Community Right-to-Know Act | 2-36 |
| | [a] Providing Information | 2-36 |
| | [b] Sanctions | 2-39 |
| | [6] Frank R. Lautenberg Chemical Safety for the 21st Century Act (Toxic Substances Control Act) | 2-40 |

TABLE OF CONTENTS

xi

| | | |
|-----|---|------|
| [a] | Inspections | 2-41 |
| [b] | Sanctions | 2-42 |
| [7] | Other Environmental Acts with Information Provisions | 2-42 |

CHAPTER 3

Dealing with Government Investigatory Demands

| | | |
|--------|--|--------|
| § 3.01 | Introduction | 3-2 |
| § 3.02 | Difficulty of Obtaining Meaningful Review of Government Investigatory Demands | 3-3 |
| | [1] Pre-Enforcement Review | 3-3 |
| | [2] Standards of Review | 3-4 |
| § 3.03 | The Government's Demand for Entry | 3-5 |
| | [1] Responding to Demands for Entry and Inspection | 3-5 |
| | [2] Restraints on Civil Inspections | 3-5 |
| | [3] Standards for Obtaining an Administrative Warrant | 3-10 |
| | [4] Warrantless Inspection Pursuant to Statutory Authority | 3-17 |
| § 3.04 | Scope of Response to an Information Request | 3-22 |
| | [1] What Kind of Information Must Be Provided? | 3-22 |
| | [a] Financial Information | 3-22 |
| | [i] Financial Records | 3-22 |
| | [ii] Financial Information from Parent Entities | 3-23 |
| | [b] Redundant Information | 3-24 |
| | [2] Scope of Investigation by Recipient | 3-24 |
| | [3] Assertions of Confidentiality and Privilege | 3-26.1 |
| | [a] Trade Secrets | 3-27 |
| | [b] Privilege | 3-27 |
| | [i] Attorney-Client Privilege | 3-29 |
| | [ii] Attorney Work-Product | 3-36 |
| | [iii] Self-Critical Analysis | 3-40 |
| | [4] Can the Government Speak with a Facility's Employees? | 3-41 |
| § 3.05 | "Reasonable Basis" | 3-44 |
| | [1] Sufficient Cause | 3-44 |
| | [2] The Paperwork Reduction Act | 3-47 |
| § 3.06 | Application of Sanctions for Insufficient Response | 3-49 |
| § 3.07 | The Takings Issue | 3-52 |
| § 3.08 | Combining Statutes for Tougher Results | 3-54 |
| § 3.09 | Handling the Investigatory Stage | 3-55 |
| | [1] Mixed Questions of Law, Fact and Tactics | 3-55 |

ENVIRONMENTAL ENFORCEMENT

| | | | |
|--------|-----|--|------|
| | [2] | Written Requests for Information | 3-55 |
| | [3] | Reporting Requirements Incident to Permits and Regulated Activities | 3-56 |
| | [4] | Inspections and Administrative Searches | 3-56 |
| § 3.10 | | Conclusion | 3-58 |

CHAPTER 4**Penalties and Penalty Policies**

| | | | |
|--------|-------|---|------|
| § 4.01 | | Introduction | 4-2 |
| | [1] | Overview | 4-2 |
| | [2] | Distinguishing Civil and Criminal Penalties | 4-7 |
| | [3] | The Environmental Appeals Board | 4-10 |
| | [4] | Chapter Preview | 4-10 |
| § 4.02 | | Counting Violations | 4-12 |
| | [1] | General Description of the Problem. | 4-12 |
| § 4.03 | | Statutory Criteria | 4-19 |
| § 4.04 | | The 1984 EPA Generic Policy on Civil Penalties | 4-21 |
| § 4.05 | | The BEN Model: Determining Economic Benefit of Noncompliance | 4-22 |
| § 4.06 | | The ABEL Model: Determining the Ability to Pay | 4-27 |
| § 4.07 | | Statute-Specific Penalty Policies | 4-29 |
| | [1] | Clean Air Act Penalty Policies. | 4-29 |
| | [a] | Clean Air Act Stationary Source Penalty Policy | 4-29 |
| | [i] | Economic Benefit of Noncompliance | 4-29 |
| | [ii] | Gravity Component | 4-30 |
| | [b] | Supplementary Clean Air Act Penalty Policies | 4-32 |
| | [2] | The RCRA Civil Penalty Policy | 4-36 |
| | [a] | Gravity | 4-36 |
| | [b] | Economic Benefit of Noncompliance | 4-38 |
| | [c] | Adjustment Factors. | 4-38 |
| | [i] | Good Faith Efforts to Comply | 4-38 |
| | [ii] | Degree of Willfulness and/or Negligence | 4-39 |
| | [iii] | History of Noncompliance | 4-39 |
| | [iv] | Ability to Pay | 4-39 |
| | [v] | Other Unique Factors | 4-40 |
| | [3] | The Clean Water Act Civil Penalty Policies | 4-40 |

TABLE OF CONTENTS

xiii

| | | |
|--------|---|------|
| [a] | The General Clean Water Act Penalty Policy | 4-40 |
| [i] | Clean Water Act Penalty Calculation | 4-42 |
| [ii] | Economic Benefit | 4-42 |
| [iii] | Gravity Component | 4-43 |
| [iv] | Gravity Component Adjustment Factors | 4-47 |
| [v] | Other Considerations | 4-48 |
| [b] | The Clean Water Act Dredge and Fill Penalty Policy | 4-49 |
| [c] | Judicial Decisions | 4-50 |
| [4] | The CERCLA and EPCRA Penalty Policies | 4-54 |
| [a] | Emergency Planning and Notification | 4-54 |
| [i] | Nature of the Violation | 4-55 |
| [ii] | Extent Level | 4-57 |
| [iii] | Gravity Level | 4-58 |
| [iv] | Circumstances | 4-58 |
| [v] | Multi-Day Penalties | 4-59 |
| [vi] | Penalty Factors Relating to the Violator | 4-59 |
| [b] | Toxic Chemical Emissions Reports | 4-61 |
| [c] | CERCLA <i>De Minimis</i> and <i>De Micromis</i> Waste Contributors | 4-67 |
| [d] | Calculating Amount of Civil Penalty Settlement and Punitive Damages for Failure to Comply with an Administrative Order | 4-69 |
| § 4.08 | Penalty Mitigation Through Environmental Benefit Projects | 4-71 |

CHAPTER 5

Temporary Restraining Orders, Preliminary Injunctions, and Stays Pending Appeal in Environmental Litigation

| | | |
|--------|---|------|
| § 5.01 | Introduction | 5-2 |
| § 5.02 | Rules Governing Interlocutory Injunctive Relief | 5-4 |
| § 5.03 | Preliminary Injunctions | 5-6 |
| [1] | Standards for Granting Relief | 5-6 |
| [a] | The Second Circuit | 5-6 |
| [b] | The Ninth Circuit | 5-7 |
| [c] | Other Circuits | 5-8 |
| [2] | The Nature of Irreparable Injury | 5-9 |
| [a] | Proof of Irreparable Harm | 5-12 |

ENVIRONMENTAL ENFORCEMENT

| | | |
|--------|---|------|
| | [b] Failure to Prove Irreparable Harm. . . . | 5-15 |
| | [c] Balancing the Public Interest. | 5-16 |
| | [d] Problems in Demonstrating Irreparable Injury in Air and Water Cases | 5-18 |
| | [e] NEPA Cases. | 5-19 |
| | [3] Avoiding the Burden of Proving Irreparable Injury. | 5-22 |
| | [a] General Rule. | 5-22 |
| | [b] Analysis of Supreme Court Authority | 5-22 |
| | [c] Statutory Basis | 5-27 |
| | [d] Imminent Endangerment Provisions. . . | 5-30 |
| | [4] Innovative Applications of Injunction in the Environmental Context | 5-35 |
| | [5] Injunctions Against Regulatory Agencies. . . | 5-36 |
| § 5.04 | Procedures for Obtaining a Preliminary Injunction | 5-37 |
| | [1] Timing | 5-37 |
| | [2] Required Documents. | 5-37 |
| | [3] Affidavits. | 5-38 |
| | [4] Other Supporting Material | 5-38 |
| | [5] Live Testimony | 5-39 |
| | [6] Use of Discovery. | 5-39 |
| | [7] Consolidated or Accelerated Proceedings. . . . | 5-39 |
| § 5.05 | Strategy on Motions for a Preliminary Injunction: | 5-40 |
| | [1] Movant's Tactical Advantages | 5-40 |
| | [2] Ascertaining the Necessity of a Hearing. . . . | 5-40 |
| | [3] Movant's Preparation | 5-40 |
| | [4] Beating the Trial Calendar | 5-40 |
| | [5] Respondent's Tactics. | 5-41 |
| § 5.06 | Temporary Restraining Orders | 5-42 |
| | [1] Nature of the Temporary Restraining Order | 5-42 |
| | [2] <i>Ex Parte</i> Grants of TROs. | 5-44 |
| | [3] Protection Against <i>Ex Parte</i> Grants. | 5-45 |
| | [4] Emergency Nature of the TRO | 5-46 |
| § 5.07 | Other Aspects of Preliminary Injunctions and Temporary Restraining Orders. | 5-47 |
| | [1] Findings and Conclusions. | 5-47 |
| | [2] Orders | 5-47 |
| | [3] Security for Preliminary Injunctions | 5-48 |
| § 5.08 | Motions for Stays Pending Appeal and Scope of Appellate Review. | 5-51 |

CHAPTER 6

The Criminal Process in Environmental Regulation

| | | |
|--------|--|--------|
| § 6.01 | Overview: The Interface Between Environmental Law and Criminal Justice | 6-2 |
| | [1] Unique Characteristics of the Criminal System. | 6-4 |
| | [2] The Prosecutor. | 6-4 |
| | [3] The Grand Jury | 6-5 |
| | [4] Limitations on Defense Counsel | 6-7 |
| § 6.02 | Federal Law of Environmental Crimes | 6-9 |
| | [1] Introduction | 6-9 |
| | [2] The Development of the Environmental Criminal Statutes | 6-9 |
| | [3] The Federal Statutes | 6-10 |
| | [a] The Clean Air Act | 6-10 |
| | [i] Development of the Statute | 6-10 |
| | [ii] Clean Air Act Amendments of 1990. | 6-12 |
| | [b] The Clean Water Act | 6-16 |
| | [i] Development of the Statute | 6-16 |
| | [ii] Clean Water Act of 1987. | 6-17 |
| | [c] The Resource Conservation and Recovery Act | 6-23 |
| | [i] Illegal Transportation and Disposal of Hazardous Waste | 6-23 |
| | [ii] Material Omissions and Falsification of RCRA Records. | 6-24 |
| | [iii] Destruction or Alteration of RCRA Records Relating to Non-Listed Wastes. | 6-24 |
| | [iv] Knowing Endangerment. | 6-27 |
| | [v] The “Mixture Rule” and the “Derived-From Rule” | 6-30.2 |
| | [d] Regulation of Chemicals | 6-32 |
| | [i] The Federal Insecticide, Fungicide and Rodenticide Act | 6-32 |
| | [ii] The Toxic Substances Control Act | 6-34 |
| | [e] Superfund | 6-36.1 |
| | [f] Reporting Violations | 6-37 |
| § 6.03 | The Element of <i>Mens Rea</i> | 6-42 |
| | [1] Introduction | 6-42 |
| | [2] <i>Mens Rea</i> and RCRA | 6-54 |
| | [2A] <i>Mens Rea</i> and the Clean Water Act. | 6-61 |

ENVIRONMENTAL ENFORCEMENT

| | | | |
|--------|-----|---|--------|
| | [3] | The Negligence Standard | 6-64 |
| | [4] | Exceptions to <i>Mens Rea</i> ; the Misdemeanor . . . | 6-66 |
| | | [a] Public Welfare Statutes | 6-66 |
| | | [b] Responsible Corporate Officers | 6-68 |
| | | [c] Willful Blindness | 6-73 |
| | [5] | Mistake of Fact and Mistake of Law | 6-74 |
| | [6] | Corporate Liability for Individual Actions | 6-75 |
| | [7] | State Approaches to <i>Mens Rea</i> | 6-76.1 |
| § 6.04 | | State Enforcement of Environmental Criminal Statutes | 6-76.3 |

CHAPTER 7**Criminal Representation and Defense
in Environmental Law**

| | | | |
|--------|-----|---|--------|
| § 7.01 | | The Defense of Alleged Environmental Crimes . . . | 7-2 |
| | [1] | Reasons for the Institution of Criminal Proceedings | 7-2 |
| | [2] | Guidelines for the Initiation of Criminal Proceedings | 7-3 |
| | [3] | Conducting the Pretrial Defense | 7-5 |
| | [4] | The Use of Scientific Data | 7-6 |
| | [5] | Competing Tensions | 7-10 |
| | [6] | Structuring the Approach to the Prosecutor | 7-12 |
| § 7.02 | | Representation of the Corporate Client | 7-17 |
| | [1] | General Considerations | 7-17 |
| | [2] | Violations Committed During the Corporate Response | 7-17 |
| | [3] | Interview of Employees | 7-25 |
| | [4] | Search and Seizure—Criminal Investigation at the Gate | 7-26 |
| | [5] | The Grand Jury | 7-28 |
| | [6] | The Corporate Response | 7-29 |
| | [7] | Relationship with the Corporation's Employees | 7-33 |
| | | [a] Nontarget Employees | 7-33 |
| | | [b] Targeted Employees | 7-34 |
| | [8] | Department of Justice Guidelines on Prosecuting Corporations | 7-37 |
| § 7.03 | | Disposition of the Criminal Case | 7-42.3 |
| | [1] | Disposition and Global Considerations | 7-42.3 |
| | | [a] The Question: To Plead or Not to Plead | 7-42.3 |
| | | [b] The Federal Sentencing Guidelines | 7-42.3 |
| | | [c] Global Settlements | 7-46 |

TABLE OF CONTENTS

xvii

| | | |
|--------|---|--------|
| | [d] Parallel Civil and Criminal Enforcement Proceedings | 7-47 |
| [2] | Need for Confidentiality | 7-54 |
| [3] | Plea Bargaining | 7-55 |
| [4] | Structuring the Settlement of a Criminal Case | 7-55 |
| [5] | Subsequent Civil Proceedings | 7-55 |
| | [a] Suspension and Debarment | 7-56 |
| | [i] Statutory Provisions | 7-56 |
| | [ii] The Regulatory Framework | 7-58 |
| | [b] SEC Disclosure | 7-58.1 |
| | [c] Bad Actor Disqualifications | 7-62 |
| § 7.04 | Significance of Criminal Prosecution | 7-65 |

CHAPTER 8

The Whys, Whens and Hows of Environmental Self-Auditing

| | | |
|--------|--|------|
| § 8.01 | Introduction | 8-3 |
| § 8.02 | What Is an Environmental Audit? | 8-7 |
| | [1] Introduction | 8-7 |
| | [2] Sources for Guidance on Self-Policing and Auditing | 8-8 |
| | [3] Substantive Goals of an Environmental Compliance Audit | 8-9 |
| § 8.03 | The Benefits of Effective Environmental Auditing | 8-10 |
| | [1] Introduction | 8-10 |
| | [2] The Imposition of Significant Civil Penalties | 8-10 |
| | [3] Economic Benefits of Environmental Auditing | 8-11 |
| | [4] Exercising “Environmental Triage” | 8-12 |
| | [a] Tort Liability | 8-13 |
| | [b] Criminal Liability | 8-13 |
| | [5] Mitigation of Penalties as a Result of an Existing Audit Program | 8-13 |
| | [a] EPA Policy | 8-14 |
| | [i] History of the EPA Auditing Policies | 8-14 |
| | [ii] The EPA’s 2000 Audit Policy | 8-15 |
| | [b] Department of Justice Policy | 8-22 |
| | [c] The Federal Sentencing Guidelines | 8-23 |
| | [d] Self-Auditing Benefits Under Existing Federal Statute | 8-23 |
| | [e] Self-Auditing Benefits Under Existing Federal Statute | 8-25 |

ENVIRONMENTAL ENFORCEMENT

| | | | |
|--------|------|---|------|
| | [f] | State Self-Auditing Privilege and Immunity Legislation | 8-25 |
| | [i] | Typical Audit Privilege Legislation | 8-26 |
| | [ii] | Typical Audit Immunity Legislation | 8-26 |
| | [6] | Benefits Listed by the General Accounting Office | 8-27 |
| § 8.04 | | How to Conduct an Effective Environmental Audit | 8-28 |
| | [1] | Dangers of Ineffective Auditing | 8-28 |
| | [2] | Principles of Effective Environmental Auditing | 8-28 |
| | [3] | Who Should Conduct the Audit? | 8-29 |
| | [a] | Independent Auditors | 8-29 |
| | [b] | The Use of Counsel | 8-30 |
| | [4] | The Actual Performance of the Audit | 8-32 |
| | [a] | Overview of Concerns | 8-32 |
| | [b] | The Audit Process | 8-33 |
| | [c] | Management Commitment: Designing the Scope of the Audit and the Use of Checklists | 8-33 |
| | [d] | Review of Available Institutional Records | 8-34 |
| | [e] | The Auditor's Areas of Concern | 8-35 |
| | [f] | Prior Directives, Orders and Consent Decrees | 8-36 |
| | [g] | Discharge of Waste Water | 8-36 |
| | [h] | Air Emissions | 8-37 |
| | [i] | Treatment, Storage and the Disposal of Hazardous Wastes | 8-37 |
| | [j] | Above and Below Ground Storage Tanks | 8-39 |
| | [k] | Toxic Substances | 8-39 |
| | [l] | Superfund | 8-39 |
| | [m] | Reporting Requirements | 8-39 |
| | [5] | Making Sure the Documents Are Accurate | 8-40 |
| | [6] | Employee Interviews: Getting the Facts | 8-41 |
| | [7] | The Facility Inspection | 8-41 |
| | [8] | Verification of Data | 8-43 |
| | [9] | Writing the Environmental Audit Report | 8-45 |
| | [10] | Review Reconciliation and Implementation | 8-46 |
| § 8.05 | | Minimizing the Risks Associated with Environmental Auditing | 8-47 |
| | [1] | The Risks | 8-47 |
| | [2] | Maintaining, to the Greatest Extent Possible, the Confidentiality of the Audit | 8-47 |
| | [3] | The Attorney-Client Privilege | 8-48 |

TABLE OF CONTENTS

xix

| | | | |
|--------|-------|---|--------|
| | [a] | The Requisite Elements of the Privilege | 8-48 |
| | [b] | Waiver of the Privilege | 8-50 |
| | [c] | The Limits of the Privilege | 8-52 |
| | [d] | Recommended Practices for Document Creation, Handling, Distribution and Storage | 8-53 |
| | [4] | The Work Product Doctrine | 8-53 |
| | [5] | The Self-Evaluation Privilege | 8-60 |
| | [a] | Judicial Development | 8-60 |
| | [6] | The Risk of Waiver Through Prosecution | 8-61 |
| § 8.06 | | Environmental Compliance Procedures Beyond Auditing | 8-62 |
| | [1] | Auditing and Environmental Management | 8-62 |
| | [a] | Line Management Attention to Compliance | 8-62 |
| | [b] | Integration of Environmental Policies, Standards and Procedures | 8-63 |
| | [c] | Auditing, Monitoring, Reporting and Tracking | 8-63 |
| | [i] | Frequent Auditing | 8-63 |
| | [ii] | Continuous On-Site Monitoring | 8-63 |
| | [iii] | Internal Reporting | 8-63 |
| | [iv] | Tracking Response Status | 8-64 |
| | [v] | Redundant Checks | 8-64 |
| | [d] | Employee Training | 8-64 |
| | [e] | Incentives for Compliance | 8-64 |
| | [f] | Discipline for Noncompliance | 8-64 |
| | [2] | The “ISO 14000” Standards | 8-65 |
| | [3] | EMS Software | 8-70.2 |
| | [4] | The CERES Principles | 8-71 |
| § 8.07 | | Dealing With the Public and the Press | 8-73 |
| | [1] | Community Involvement | 8-73 |
| | [2] | Dealing with the Press | 8-73 |
| § 8.08 | | Conclusion | 8-77 |

CHAPTER 9

Civil Enforcement Under the Clean Water Act

| | | | |
|--------|-----|---|--------|
| § 9.01 | | Introduction | 9-3 |
| § 9.02 | | Antecedents | 9-4 |
| § 9.03 | | The Clean Water Act Amendments of 1972 | 9-6 |
| § 9.04 | | The Permit System | 9-8 |
| | [1] | Navigable Waters | 9-11 |
| | [2] | Point Sources | 9-15 |
| | [3] | National Pollutant Discharge Elimination System Permits | 9-22.1 |

ENVIRONMENTAL ENFORCEMENT

| | | | |
|--------|-----|--|--------|
| | [4] | State Pollutant Discharge Elimination System Permits | 9-22.2 |
| | [5] | Technology-Based and Water-Quality-Based Standards | 9-22.4 |
| | | [a] Technology-Based Standards | 9-22.4 |
| | | [b] Water-Quality-Based Standards | 9-23 |
| | [6] | Water Quality Criteria for Toxics | 9-24 |
| | [7] | Toxic Pollutant Standards | 9-24.2 |
| | [8] | State Standards | 9-24.3 |
| § 9.05 | | The Pretreatment Regulatory Program | 9-25 |
| | [1] | Introduction | 9-25 |
| | [2] | Prohibited Discharges | 9-26 |
| | [3] | Categorical Standards | 9-27 |
| | [4] | Other Controls | 9-28 |
| § 9.06 | | Nonpoint Source Control | 9-30 |
| | [1] | Stormwater Pollution | 9-31 |
| | [2] | Federal Regulation of Stormwater Discharges | 9-31 |
| | | [a] Stormwater from Industrial Activities | 9-32 |
| | | [b] Municipal Separate Sewer Systems | 9-34 |
| | | [c] Stormwater from Construction Activities | 9-34 |
| § 9.07 | | Wetlands | 9-37 |
| | [1] | Introduction | 9-37 |
| | [2] | Potentially Liable Parties | 9-40 |
| | [3] | Administrative Enforcement | 9-40 |
| | [4] | Civil Judicial Enforcement | 9-42.1 |
| | [5] | Settlement | 9-44 |
| | [6] | Governmental Policy | 9-44 |
| | [7] | Criminal Enforcement | 9-44 |
| § 9.08 | | Oil Spills | 9-46 |
| § 9.09 | | Civil Enforcement Under the Clean Water Act | 9-49 |
| | [1] | Varied Enforcement | 9-49 |
| | [2] | Discretion in Enforcement | 9-49 |
| | [3] | Federal Enforcement | 9-50 |
| | [4] | Administrative Enforcement | 9-51 |
| | [5] | Court Injunctions | 9-53 |
| | [6] | Emergency Power | 9-54 |
| | [7] | Citizen Suits | 9-55 |
| § 9.10 | | Defenses | 9-57 |
| | [1] | Introduction | 9-57 |
| | [2] | Initial Considerations | 9-57 |
| | | [a] Permit Writing | 9-57 |
| | | [i] Mixing Zones | 9-60 |
| | | [ii] Biologically Available Metals | 9-61 |
| | | [iii] Minimum Levels of Quantification for Discharge Permit Limits | 9-62 |

TABLE OF CONTENTS

xxi

| | | |
|-----|---|------|
| | [iv] Cooling Water Intake Structures | 9-63 |
| [b] | Variances. | 9-65 |
| | [i] The Fundamentally Different Factors Variance | 9-65 |
| | [ii] Section 301(g) Variance. | 9-65 |
| | [iii] Thermal Discharges | 9-66 |
| | [iv] “Variances” From Water Quality Standards. | 9-66 |
| | [v] Intake Water | 9-68 |
| [c] | The Anti-Backsliding Provision. | 9-68 |
| [d] | Well-Trained Personnel | 9-70 |
| [e] | Fast Action in the Event of Exceedance. | 9-70 |
| [3] | Bypasses and Upsets. | 9-70 |
| | [a] Upsets | 9-71 |
| | [b] Bypasses | 9-73 |
| [4] | Sampling Error | 9-74 |
| [5] | The Permit Shield | 9-76 |
| [6] | Violation-Counting Issues. | 9-77 |
| [7] | Litigating the Penalty | 9-80 |
| [8] | Defenses in Citizen Suits | 9-83 |
| | [a] Inadequate Notice. | 9-83 |
| | [b] Wholly Past Violation | 9-83 |
| | [c] Prior State or Federal Enforcement. | 9-84 |
| | [d] State Provisions More Stringent Than Federal Provisions | 9-84 |
| [9] | Inadequate Defenses | 9-84 |
| | [a] Good Faith Effort Not a Reliable Defense | 9-84 |
| | [b] Economic or Business Necessity Not a Defense | 9-85 |
| | [c] Impossibility | 9-85 |

CHAPTER 10

Civil Enforcement Under the Clean Air Act

| | | |
|---------|--|-------|
| § 10.01 | Introduction | 10-1 |
| § 10.02 | The Clean Air Act’s Alphabet Soup: NAAQS, NESHAPs and SIPs. | 10-3 |
| | [1] NAAQS | 10-3 |
| | [2] NESHAPs | 10-5 |
| | [3] SIPs | 10-7 |
| § 10.03 | The Clean Air Act’s Title V Permit Program. | 10-9 |
| | [1] Permits and Parameters. | 10-13 |
| | [2] Allaying the Fears of Business. | 10-15 |
| § 10.04 | Information Gathering | 10-17 |

ENVIRONMENTAL ENFORCEMENT

| | | |
|---------|---|-------|
| § 10.05 | Federal Enforcement Provisions | 10-25 |
| | [1] Compliance Orders | 10-27 |
| | [2] Administrative Penalties | 10-29 |
| | [3] Field Citations | 10-31 |
| | [4] Federal Court Action | 10-32 |
| | [5] Judicial Review | 10-33 |
| | [6] Newer Federal Enforcement Tools | 10-34 |
| | [7] Civil Penalty Policies | 10-40 |
| § 10.06 | Defenses Under the Clean Air Act | 10-53 |
| § 10.07 | Climate Change Enforcement | 10-62 |

CHAPTER 11**Civil Enforcement Under the Resource
Conservation and Recovery Act**

| | | |
|---------|--|---------|
| § 11.01 | Introduction | 11-2 |
| § 11.02 | The Management of Hazardous Waste | 11-4.1 |
| | [1] Solid Waste | 11-4.1 |
| | [2] Hazardous Waste | 11-7 |
| | [3] The Subpart C Characteristics | 11-9 |
| | [4] Testing for the Toxicity Characteristic | 11-10 |
| | [5] The Part 261 Subpart D Lists | 11-11 |
| | [6] Special Provisions for Certain Hazardous Waste | 11-12.1 |
| | [7] Generators of Hazardous Waste | 11-17 |
| | [a] Generators' Manifest Requirements | 11-19 |
| | [b] Generators' Pre-Transport Requirements | 11-21 |
| | [c] Generators' Recordkeeping and Reporting | 11-22 |
| | [d] Exports by Generators | 11-23 |
| | [8] Transporters of Hazardous Waste | 11-24 |
| | [9] TSD Owners or Operators | 11-25 |
| | [a] On-Site Generators Storing Wastes Less Than Ninety Days | 11-25 |
| | [b] All Other Owners and Operators | 11-26 |
| | [10] Corrective Action | 11-27 |
| | [a] Applicability | 11-28 |
| | [b] Regulatory Requirements for Corrective Action | 11-29 |
| | [c] Corrective Action Management Units | 11-29 |
| | [d] Temporary Units | 11-30 |
| | [e] What Is a Facility for Corrective Action Purposes? | 11-30 |
| | [f] Corrective Action and Contribution | 11-31 |
| | [11] Land Disposal Restrictions | 11-31 |

TABLE OF CONTENTS

xxiii

| | | |
|---------|---|-------|
| § 11.03 | Regulation of Underground Storage Tanks | 11-33 |
| § 11.04 | Permits | 11-37 |
| § 11.05 | Federal Enforcement | 11-39 |
| | [1] Compliance Orders, Administrative Penalties and Injunctive Relief | 11-42 |
| | [2] Civil Penalties | 11-43 |
| | [a] Gravity | 11-43 |
| | [b] Economic Benefit of Noncompliance | 11-44 |
| | [c] Adjustment Factors | 11-44 |
| | [i] Good Faith Efforts to Comply | 11-45 |
| | [ii] Degree of Willfulness and/or Negligence | 11-45 |
| | [iii] History of Noncompliance | 11-45 |
| | [iv] Ability to Pay | 11-45 |
| | [v] Other Unique Factors | 11-46 |
| | [3] Interim Status Corrective Action | 11-46 |
| | [4] Consent Orders | 11-46 |
| | [5] Criminal Action | 11-48 |
| | [6] The Likelihood of Enforcement | 11-49 |
| | [7] What to Expect in a RCRA Investigation | 11-51 |
| § 11.06 | State Reinforcement | 11-53 |
| | [1] The Statutory Requirements | 11-53 |
| | [2] The RCRA Grant Program | 11-53 |
| § 11.07 | Defenses | 11-55 |
| | [1] Statutory Defenses | 11-57 |
| | [2] Definitional Defenses | 11-57 |
| | [3] Procedural Defenses | 11-59 |
| | [4] Regulatory Exclusions | 11-63 |
| | [5] Other Defenses | 11-64 |
| | [a] Recycling | 11-64 |
| | [b] Safe Storage | 11-65 |
| | [c] Compliance with Other Statutes | 11-65 |
| | [d] The Household Waste Exclusion | 11-66 |
| § 11.08 | Citizen Suits | 11-67 |

CHAPTER 12

Structure of the Comprehensive Environmental Response, Compensation and Liability Act

| | | |
|---------|---|-------|
| § 12.01 | Overview of CERCLA | 12-3 |
| | [1] Introduction | 12-3 |
| | [2] Hastily Drafted Legislation | 12-4 |
| | [3] Basic Structure of CERCLA | 12-8 |
| | [a] Five Basic Components | 12-8 |
| | [b] Liability: Strict, Retroactive, and Perhaps Joint and Several | 12-10 |

ENVIRONMENTAL ENFORCEMENT

| | | | |
|---------|-------|---|----------|
| | [i] | Strict Liability | 12-12 |
| | [ii] | Retroactive Liability | 12-13 |
| | [iii] | Joint and Several Liability Under CERCLA | 12-15 |
| | [4] | Causation | 12-17 |
| § 12.02 | | The National Priorities List | 12-20.2 |
| | [1] | Introduction | 12-20.2 |
| | [2] | How Sites Are Listed | 12-21 |
| | [a] | The State Role in Site Selection | 12-22 |
| | [b] | The Hazard Ranking System | 12-23 |
| | [c] | Listing Because of Health Threats | 12-24 |
| | [d] | Delisting After Cleanup | 12-24 |
| § 12.03 | | The National Contingency Plan | 12-26 |
| § 12.04 | | The Heart of CERCLA—Section 107 Liability | 12-30 |
| | [1] | Parties Liable | 12-30 |
| | [a] | Current Owners and Operators | 12-31 |
| | [i] | Lessors and Lessees | 12-36 |
| | [ii] | Banks and Financing Institutions | 12-38 |
| | [iii] | Past Owners | 12-41 |
| | [b] | Liability of Arrangers or Generators | 12-44 |
| | [c] | Liability of Transporters | 12-48 |
| | [d] | Statutory and Common Law Approaches to Finding Additional Solvent Parties | 12-49 |
| | [i] | Parent and Subsidiary Corporations | 12-50 |
| | [ii] | “Direct” CERCLA Statutory Liability | 12-52 |
| | [iii] | “Indirect” CERCLA Liability Through Developing Common Law | 12-58 |
| | [e] | Continuity of Enterprise – Mere Continuation Test in Detail | 12-65 |
| § 12.05 | | Defenses | 12-66.1 |
| | [1] | Standard Statutory Defenses | 12-66.1 |
| | [a] | Act of God | 12-66.1 |
| | [b] | Act of War | 12-66.2 |
| | [c] | Third Party Defense | 12-66.2 |
| | [2] | Other Statutory Defenses | 12-66.4 |
| | [a] | The Innocent Purchaser Defense | 12-66.4 |
| | [b] | Secured Creditor Defense | 12-66.6 |
| | [c] | The Consumer Product Exception | 12-66.7 |
| | [d] | The Scope of “Release” to the “Environment” | 12-66.9 |
| | [e] | The Petroleum Exclusion | 12-66.10 |
| | [f] | The Pesticide Exclusion | 12-66.11 |
| | [g] | Federally Permitted Release | 12-66.11 |

TABLE OF CONTENTS

| | | |
|---------|---|----------|
| | [h] Naturally Occurring Substances | 12-66.13 |
| | [i] Statute of Limitations | 12-66.13 |
| | [j] Recycling | 12-66.20 |
| [3] | The Small Business Liability Relief and Brownfields Revitalization Act | 12-66.21 |
| | [a] Liability Defenses for “ <i>De Micromis</i> ” Waste and Municipal Solid Waste | 12-66.21 |
| | [b] Ability to Pay | 12-66.22 |
| | [c] Contiguous Property Defense | 12-66.23 |
| | [d] <i>Bona Fide</i> Prospective Purchaser | 12-66.24 |
| | [e] Amendments to the Innocent Landowner Defense | 12-66.26 |
| | [f] Limits on Federal Response Actions at Sites Subject to Response Actions Pursuant to State Law | 12-66.30 |
| § 12.06 | Costs of Response | 12-66.31 |
| | [1] Limited Damages | 12-66.31 |
| | [2] Removal and Remediation Costs | 12-66.33 |
| | [3] Oversight and Indirect Costs | 12-66.34 |
| | [4] Interest | 12-66.35 |
| | [5] Determining the Necessity of Response Costs | 12-66.36 |
| § 12.07 | Cleanup Standards for Response Actions | 12-67 |
| | [1] Introduction | 12-67 |
| | [2] Statutory Basis | 12-67 |
| | [a] Preference for Permanent Remedies and On-Site Treatment | 12-68 |
| | [b] Considerations for Alternative Remedies | 12-68 |
| | [3] Degree of Cleanup | 12-70 |
| | [4] Standards for On-Site Cleanups | 12-73 |
| | [5] Standards Applicable to Off-Site Transfers | 12-75 |
| § 12.08 | Natural Resource Damages | 12-76 |
| | [1] Introduction: The Statutory and Regulatory Scheme | 12-76 |
| | [a] Statutory Basis | 12-76 |
| | [b] Regulatory Implementation | 12-80 |
| | [i] Designation of the Trustee | 12-81 |
| | [ii] Assessment of Damages | 12-81 |
| | [c] What Constitutes a Natural Resource? | 12-82 |
| | [2] Natural Resource Damage Defenses | 12-84 |
| | [a] Limitation on Costs | 12-84 |
| | [b] Date of Injury to Natural Resource | 12-84 |
| | [c] Statute of Limitations | 12-86 |
| | [d] Environmental Impact Statement or Permit Language | 12-87 |
| | [e] The Trustee’s Authority | 12-89 |

CHAPTER 13

**Enforcement and Initiatives Under the
Comprehensive Environmental Response,
Compensation and Liability Act**

| | | |
|---------|--|-------|
| § 13.01 | Government Enforcement | 13-3 |
| | [1] Overview of EPA Enforcement | |
| | Approaches | 13-3 |
| | [2] Fund-Financed Actions | 13-4 |
| | [3] Unilateral Remediation Orders Under | |
| | Section 106 | 13-6 |
| | [a] Introduction | 13-6 |
| | [b] The Statutory Scheme | 13-7 |
| | [c] Government Enforcement Policy | |
| | Under Section 106 | 13-9 |
| | [i] Introduction | 13-9 |
| | [ii] What the EPA Looks for Before | |
| | Issuing a Section 106 | |
| | Order | 13-13 |
| | [d] “Sufficient Cause” | 13-14 |
| | [e] The Consequence of Section 106 | |
| | Noncompliance | 13-18 |
| | [f] Claims for Reimbursement | |
| | from the Fund | 13-20 |
| | [4] Challenges to Agency Listing Procedure | 13-20 |
| | [a] Procedural Obstacles to Judicial | |
| | Review | 13-21 |
| | [b] Deferential Standard of Review | 13-22 |
| | [c] Challenges on Technical Grounds | 13-23 |
| | [5] Emerging Defenses | 13-24 |
| | [a] The Government’s Advantage | 13-24 |
| | [b] Leveling the Legal Playing | |
| | Field—Divisibility of Harm | 13-25 |
| | [c] Unreasonable Response Costs | 13-33 |
| | [d] Oversight Costs | 13-34 |
| | [e] Retreat from Judicial Deference | 13-35 |
| | [6] Administrative Reform and Enforcement | 13-35 |
| | [a] Orphan Shares—Reform | |
| | and Reality | 13-36 |
| | [b] Partial NPL De-Listing | 13-37 |
| | [c] Allocation Pilot Projects | 13-38 |
| § 13.02 | Litigation Strategies | 13-39 |
| | [1] Government Litigation Strategies | 13-39 |
| | [2] Defendant’s Litigation Strategy | 13-41 |
| § 13.03 | Negotiated Settlements and Consent | |
| | Decrees Under CERCLA | 13-45 |
| | [1] Overview | 13-45 |

TABLE OF CONTENTS

xxvii

| | | | |
|---------|-----|---|--------|
| | [2] | Statutory Framework | 13-46 |
| | | [a] Statutory Incentives to Settle | 13-46 |
| | | [i] Covenant Not to Sue | 13-46 |
| | | [ii] Contribution Protection | 13-48 |
| | | [iii] Other Actions | 13-49 |
| | | [iv] Nonsettlor Rights | 13-50 |
| | | [b] Lodging and Public Comment | 13-50 |
| | | [c] Intervention Issues | 13-50 |
| | | [i] Timeliness | 13-51 |
| | | [ii] Protectable Interest | 13-51 |
| | | [d] Effects of Settlement Agreement | 13-52 |
| | [3] | The EPA’s Model Consent Decree | 13-52 |
| | | [a] Introduction | 13-52 |
| | | [b] Provisions of the Model Consent Decree | 13-53 |
| | | [c] Changes Effected by the Revised Model Consent Decree | 13-54 |
| | | [d] Section 113(f)(3)(b) Contribution Claim Changes | 13-56 |
| | [4] | Negotiating the Consent Decree | 13-56 |
| | | [a] Contribution Protection and Opposition from Other Defendants | 13-61 |
| | | [i] “Equitable Share” or “Amount of Settlement”? | 13-62 |
| | | [ii] Government or Private Party Plaintiff? | 13-62 |
| | | [iii] Bar Orders Precluding Section 107 Cost Recovery Claims | 13-64 |
| | | [b] Settlement Litigation by Nonsettlers | 13-65 |
| § 13.04 | | Private Claims for Relief Under CERCLA | 13-68 |
| | [1] | Express Claim for Relief | 13-68 |
| | [2] | Claims for Contribution and Claims for Cost Recovery | 13-69 |
| | | [a] Distinction Between Claims | 13-69 |
| | | [b] Pre- <i>Aviall</i> Caselaw | 13-71 |
| | | [c] <i>Aviall</i> and Post- <i>Aviall</i> Cases | 13-72 |
| | | [d] Right of Contribution | 13-81 |
| | | [e] Orphan Shares | 13-83 |
| | | [f] Allocation Standards | 13-89 |
| | | [g] PRP Allocation | 13-98 |
| | [3] | Consistency with the National Contingency Plan | 13-100 |
| | | [a] Substantial or Strict Compliance with the NCP | 13-100 |
| | | [b] Which NCP Applies? | 13-103 |
| | [4] | Tactics and Strategy | 13-104 |
| | | [a] Pleadings | 13-104 |

ENVIRONMENTAL ENFORCEMENT

| | | | |
|---------|-----|---|--------|
| | [b] | Third and Multiparty Practice | 13-105 |
| | [c] | Bifurcation | 13-107 |
| | [d] | Marshalling the Evidence. | 13-108 |
| [5] | | Response Costs Recoverable Under Section 107 | 13-109 |
| [6] | | Related Claims for Relief. | 13-110 |
| [7] | | Award of Attorneys' Fees | 13-116 |
| | [a] | Supreme Court Resolution of Conflicting Decisions Against General Recovery | 13-116 |
| | [b] | Distinctions Among Grants of Attorneys' Fees in Citizen Suits Under Sections 107, 113, and 310 of CERCLA | 13-117 |
| § 13.05 | | Moving Toward the Future: Common Sense and Brownfields Initiatives | 13-119 |

CHAPTER 14**Civil Enforcement Under the Emergency Planning
and Community Right-to-Know Act (EPCRA)**

| | | | |
|---------|-----|--|---------|
| § 14.01 | | Overview | 14-2 |
| § 14.02 | | Statutory and Regulatory Framework | 14-5 |
| | [1] | The Reporting Requirements | 14-5 |
| | [a] | Emergency Notification | 14-5 |
| | [b] | Material Safety Data Sheet | 14-8 |
| | [c] | Emergency and Hazardous Chemical Inventory Forms. | 14-9 |
| | [d] | Toxic Chemical Release Forms (Form R) | 14-11 |
| | [e] | Other Information Requirements | 14-15 |
| | [f] | Public Access to Chemical Safety Information. | 14-16 |
| | [2] | Statutory Enforcement Provisions | 14-17 |
| | [a] | Statutory Penalties for EPCRA Violations. | 14-17 |
| | | [i] Reporting Violations | 14-17 |
| | | [ii] Trade Secret Claim Violations. | 14-20 |
| | [b] | Who Enforces EPCRA. | 14-20.1 |
| § 14.03 | | Defenses. | 14-20.2 |
| | [1] | Defenses to Liability. | 14-20.2 |
| | [2] | Defenses in Citizen Suits Under EPCRA | 14-31 |
| § 14.04 | | EPCRA Civil Penalty Policies | 14-34 |
| | [1] | The Form R Penalty Policy | 14-34 |

TABLE OF CONTENTS

xxix

| | | |
|---------|---|-------|
| [a] | The Basic Form R Penalty | 14-34 |
| [b] | Adjustments Factors | 14-36 |
| | [i] Culpability | 14-36 |
| | [ii] Voluntary Disclosure | 14-37 |
| | [iii] History of Prior Violations | 14-37 |
| | [iv] Delisted Chemicals | 14-38 |
| | [v] Attitude | 14-38 |
| | [vi] “Other Factors as Justice May Require” | 14-38 |
| | [vii] Settlement with Conditions | 14-39 |
| | [viii] Ability to Pay | 14-39 |
| [2] | Penalty Policy for Other EPCRA Requirements | 14-40 |
| | [a] Introduction | 14-40 |
| | [b] Calculating the Base Penalty | 14-40 |
| | [i] The “Nature” of the Violation | 14-40 |
| | [ii] The “Extent” of the Violation | 14-41 |
| | [iii] The “Gravity” of the Violation | 14-43 |
| | [iv] “Circumstances” and the Base Penalty Matrices | 14-44 |
| | [c] Assessment of Multi-Day Penalties | 14-46 |
| | [d] Individual Adjustment Factors | 14-46 |
| | [i] Ability to Pay | 14-47 |
| | [ii] Prior History of Violations | 14-47 |
| | [iii] Degree of Culpability | 14-47 |
| | [iv] Economic Benefit or Savings | 14-48 |
| | [v] Other Matters as Justice May Require | 14-48 |
| | [vi] Business Size | 14-48 |
| | [vii] Attitude | 14-49 |
| | [viii] Supplemental Environmental Projects | 14-49 |
| | [ix] Voluntary Disclosure | 14-49 |
| § 14.05 | Applying the EPCRA Penalty Policies | 14-50 |

CHAPTER 15

Citizen Suits, and the Award of Attorneys’ Fees in Environmental Litigation

| | | |
|---------|------------------------------------|------|
| § 15.01 | Overview | 15-2 |
| § 15.02 | Citizen Suits | 15-5 |
| | [1] Legislative Intent | 15-5 |
| | [2] Statutory Provisions | 15-6 |

ENVIRONMENTAL ENFORCEMENT

| | | | |
|---------|-------|--|-------|
| | [a] | The Clean Water Act | 15-8 |
| | [b] | The Clean Air Act | 15-12 |
| | [c] | The Resource Conservation and Recovery Act | 15-17 |
| | [d] | Emergency Planning and Community Right-to-Know Act | 15-25 |
| | [e] | Toxic Substances Control Act | 15-27 |
| | [f] | Comprehensive Environmental Response, Compensation and Liability Act | 15-28 |
| | [3] | Preservation of Existing Remedies (Savings Clauses) | 15-29 |
| | [4] | Who May Sue | 15-30 |
| | [5] | Who May Be Sued | 15-30 |
| | [6] | Where Suit May Be Brought | 15-32 |
| | [7] | Private Intervention in Government Litigation | 15-33 |
| § 15.03 | | Litigation Strategies | 15-35 |
| | [1] | Suits Against the Administrator | 15-35 |
| | [2] | Supplemental Claims for Relief | 15-37 |
| | [3] | Plaintiffs' Strategies | 15-40 |
| | [a] | Selection of Targets | 15-40 |
| | [b] | Thorough Investigation | 15-40 |
| | [c] | Maximize Number of Counts | 15-40 |
| | [d] | Timing of Litigation | 15-40 |
| | [e] | Relationship with Regulatory Agency | 15-41 |
| | [f] | Standing | 15-41 |
| | [g] | Pleading the Violation | 15-41 |
| | [h] | Increased Risk of Injury | 15-41 |
| | [i] | Aggressive Conduct | 15-42 |
| | [j] | Getting to Judgment | 15-43 |
| | [4] | Defense Strategies | 15-43 |
| | [a] | General Considerations | 15-43 |
| | [b] | Control of Reactions | 15-43 |
| | [c] | Dealing in Candor | 15-43 |
| | [d] | Using the Sixty- or Ninety-Day Window | 15-43 |
| | [e] | Fighting the Allegations of Wrongdoing | 15-44 |
| | [f] | Technical Defenses | 15-45 |
| | [i] | Lack of Standing | 15-45 |
| | [ii] | Lack of Notice | 15-55 |
| | [iii] | When Suit May Be Brought Immediately Upon Notice | 15-58 |
| | [iv] | Statute of Limitations | 15-59 |
| | [v] | Wholly Past Violations | 15-60 |
| | [vi] | Mootness | 15-68 |
| | [vii] | Diligent Prosecution | 15-70 |

TABLE OF CONTENTS

xxxi

| | | |
|--------------|--|-------|
| | [viii] Prior Resolution | 15-76 |
| | [ix] Abstention and Primary Jurisdiction Doctrine | 15-76 |
| | [x] Upset Defense to Clean Water Act Prosecutions | 15-79 |
| | [g] Judicial Involvement | 15-79 |
| | [h] Impleading the Environmental Agency | 15-80 |
| | [i] Keeping an Eye on the Ball | 15-80 |
| [5] | Settlement and Relief | 15-80 |
| | [a] Negotiated Settlement | 15-80 |
| | [b] Litigated Relief | 15-81 |
| | [c] Relief Requested | 15-81 |
| § 15.04 | The Award of Attorneys' Fees | 15-83 |
| | [1] Introduction | 15-83 |
| | [2] Non-Statutory Exception for Award of Attorneys' Fees | 15-83 |
| | [3] General Statutory Exceptions | 15-84 |
| | [4] Statutory Provisions for the Award of Attorneys' Fees | 15-85 |
| | [5] Party Eligible for Award | 15-86 |
| | [6] The Size of the Attorney's Fee | 15-91 |
| | [7] Fees of Non-Testifying Experts | 15-95 |
| | [8] Award of Fees for Preparation of Fee Application | 15-95 |
| | [9] Procedures for Obtaining Attorneys' Fees | 15-96 |
| § 15.05 | Conclusion | 15-98 |
| INDEX | | I-1 |

