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
Ü	[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	1-17
	[c] Abstention	1-26
	[4] Double Jeopardy	1-28
§ 1.05	The Government's Pre-Litigation Enforcement	
3	Authority	1-31
§ 1.05A	Agency Decisions and Rule Making	1-34
3 1.0011	[1] The Administrative Record	1-35
	[2] Threshold Barriers to Review	1-42
	[a] Standing	1-42
	[i] Procedural Aspects of	1 12
	Standing	1-42
	[ii] Proof of Standing	1-43
	[iii] Organizational Standing	1-43
	[iv] Standing in Climate	1-43
		1-44
	Change Cases	1-44

X		ENVIRONMENTAL ENFORCEMENT	
	[3] [4]	[b] Exhaustion.[c] RipenessThe Final Agency Action Requirement.Judicial Deference to Agency Action	1-45 1-46 1-48 1-51
§ 1.06 § 1.07	Citize The C	en Suits	1-57
§ 1.08	The I	Politics of Environmental Enforcement	1-60 1-62 1-62
§ 1.09	[2] Conc	The Novel Coronavirus: A Case Study lusion	1-62 1-65
		CHAPTER 2	
	Т	The Statutory Power to Investigate	
§ 2.01	Overv [1]	view	2-2
	F0.1	Interrogatories	2-2
	[2]	Statutory Reporting Requirements	2-2 2-3
§ 2.02	[3] The S [1]	Intrusive Inspections and Searches Statutory Framework Comprehensive Environmental Response,	2-5
		Cleanup and Liability Act	2-5
		[a] Section 104(e) Information Requests	2-5
		[b] Power to Inspect	2-12
		[c] Sanctions	2-13 2-13
	[2]	[d] Administrative Subpoenas	2-15
	[2]	[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
	F. 6.3	[d] Sanctions	2-31
	[5]	Emergency Planning and Community	2.26
		Right-to-Know Act	2-36
		[a] Providing Information	2-36
	[6]	[b] Sanctions	2-39
	[6]	Frank R. Lautenberg Chemical Safety for	
		the 21st Century Act (Toxic Substances	2-40
		Control Act)	Z -4 U

	TABLE OF CONTENTS	X1
	[a] Inspections	2-41 2-42
	Information Provisions	2-42
	CHAPTER 3	
D	ealing with Government Investigatory Demand	ls
§ 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	3-9
	[4] Warrantless Inspection Pursuant to Statutory	2.40
	Authority	3-18
§ 3.04	Scope of Response to an Information Request	3-23
	[1] What Kind of Information Must Be	2 22
	Provided?	3-23
	[a] Financial Information	3-23
	[i] Financial Records	3-23
	[ii] Financial Information from	2.24
	Parent Entities	3-24
	[b] Redundant Information	3-25
	[2] Scope of Investigation by Recipient	3-25
	[3] Assertions of Confidentiality and	2.20
	Privilege	3-29
	[a] Trade Secrets	3-29
	[b] Privilege	3-30
	[i] Attorney-Client Privilege	3-32
	[ii] Attorney Work-Product	3-38
	[iii] Self-Critical Analysis	3-42
	[4] Can the Government Speak with a	2 44
e 2.05	Facility's Employees?	3-44 3-46
§ 3.05	"Reasonable Basis"	3-46
	[2] The Paperwork Reduction Act	3-40
§ 3.06	Application of Sanctions for Insufficient Response	3-49
§ 3.00 § 3.07	The Takings Issue	3-55
§ 3.07 § 3.08	Combining Statutes for Tougher Results	3-57
§ 3.08 § 3.09	Handling the Investigatory Stage	3-58
8 3.03	[1] Mixed Questions of Law, Fact and Tactics	3-58
	[1] MINOR QUOSITORIS OF ERW, I dot and Tactics	5-50

xii	ENVIRONMENTAL ENFORCEMENT	
	[2] Written Requests for Information	3-58
	and Regulated Activities	3-59
0.2.10	[4] Inspections and Administrative Searches	3-59
§ 3.10	Conclusion	3-61
	CHAPTER 4	
	Penalties and Penalty Policies	
§ 4.01	Introduction	4-3
3	[1] Overview	4-3
	[2] Distinguishing Civil and Criminal	
	Penalties	4-8
	[3] The Environmental Appeals Board [4] Chapter Preview	4-10 4-11
§ 4.02	[4] Chapter Preview	4-11
g 4.02	[1] General Description of the Problem	4-12
§ 4.03	Statutory Criteria	4-12
§ 4.03	The 1984 EPA Generic Policy on	7-21
y 1.01	Civil Penalties	4-23
§ 4.05	The BEN Model: Determining Economic Benefit	. 25
3	of Noncompliance	4-24
§ 4.06	The ABEL Model: Determining the Ability	
3	to Pay	4-29
§ 4.07	Statute-Specific Penalty Policies	4-31
· ·	[1] Clean Air Act Penalty Policies	4-31
	[a] Clean Air Act Stationary Source	
	Penalty Policy	4-31
	[i] Economic Benefit of	
	Noncompliance	4-31
	[ii] Gravity Component	4-32
	[b] Supplementary Clean Air Act	
	Penalty Policies	4-34
	[c] Judicial Decisions	4-38
	[2] The RCRA Civil Penalty Policy	4-40
	[a] Gravity	4-41
	[b] Economic Benefit of	
	Noncompliance	4-43
	[c] Adjustment Factors	4-43
	[i] Good Faith Efforts to Comply	4-43
	[ii] Degree of Willfulness and/or	4 44
	Negligence	4-44
	[iii] History of Noncompliance	4-44
	[iv] Ability to Pay	4-44
	[v] Other Unique Factors	4-45
	[3] The Clean Water Act Civil Penalty	4-45
	Policies	4-43

		[a]	The General Clean Water Act	
			Penalty Policy	4-45
			[i] Clean Water Act Penalty	
			Calculation	4-47
			[ii] Economic Benefit	4-47
			[iii] Gravity Component	4-47
			[iv] Gravity Component Adjustment Factors	4-51
			[v] Other Considerations	4-51
		[b]	The Clean Water Act Dredge and	7-32
		[0]	Fill Penalty Policy	4-53
		[c]	Judicial Decisions	4-55
	[4]		CERCLA and EPCRA Penalty	
		Po	olicies	4-58
		[a]	Emergency Planning and	
			Notification	4-58
			[i] Nature of the Violation	4-59
			[ii] Extent Level	4-61
			[iii] Gravity Level	4-62 4-62
			[iv] Circumstances	4-62
			[vi] Penalty Factors Relating to	4-03
			the Violator	4-63
		[b]	Toxic Chemical Emissions Reports	4-65
		[c]	CERCLA De Minimis and De	
			Micromis Waste Contributors	4-71
		[d]	Calculating Amount of Civil Penalty	
			Settlement and Punitive Damages	
			for Failure to Comply with an	
0 4 00	D.	14 3 414	Administrative Order	4-72
§ 4.08		-	gation Through Environmental Benefit	175
	Pr	ojects .		4-75
			CHAPTER 5	
TD.		D 4	0 1	
			aining Orders, Preliminary Injunc	
and S	Stays	Penan	ng Appeal in Environmental Litiga	ttion
§ 5.01	Intro	duction		5-2
§ 5.02	Rules	s Gover	rning Interlocutory Injunctive Relief	5-4
§ 5.03			Injunctions	5-6
	[1]	Stand	dards for Granting Relief	5-6
		[a]	The Second Circuit.	5-6
		[b]	The Ninth Circuit	5-7
	563	[c]	Other Circuits	5-8
	[2]		Nature of Irreparable Injury	5-9
		[a]	Proof of Irreparable Harm	5-12

TABLE OF CONTENTS

xiii

xiv		ENVIRON	MENTAL ENFORCEMENT	
		[c] Bala	ure to Prove Irreparable Harm uncing the Public Interest blems in Demonstrating Irreparable	5-15 5-16
			njury in Air and Water Cases	5-18
		[e] NEF	PA Cases	5-19
	[3]		he Burden of Proving Irreparable	
		Injury		5-22
		[a] Gen	eral Rule	5-22
		[b] Ana	lysis of Supreme Court	
		Α	authority	5-22
		[c] Stati	atory Basis	5-27
		[d] Imm	inent Endangerment Provisions	5-3(
	[4]	Innovative	Applications of Injunction in	
		the Env	ironmental Context	5-35
	[5]	Injunctions	Against Regulatory Agencies	5-36
§ 5.04	Proce	dures for Ob	taining a Preliminary	
	In	unction		5-37
	[1]	Timing		5-37
	[2]	Required I	Documents	5-37
	[3]	Affidavits.		5-38
	[4]		oorting Material	5-38
	[5]	Live Testin	nony	5-39
	[6]	Use of Dis	covery	5-39
	[7]		ed or Accelerated Proceedings	5-39
§ 5.05	Strate	gy on Motio	ns for a Preliminary	
	In	unction:		5-4(
	[1]	Movant's 7	Tactical Advantages	5-4(
	[2]	Ascertainir	ng the Necessity of a Hearing	5-40
	[3]	Movant's 1	Preparation	5-40
	[4]	Beating the	e Trial Calendar	5-4(
	[5]	Responden	t's Tactics	5-41
§ 5.06	Tem		ining Orders	5-42
	[1]		the Temporary Restraining	

Ex Parte Grants of TROs.....

Protection Against Ex Parte Grants.....

Emergency Nature of the TRO

Findings and Conclusions.....

Security for Preliminary Injunctions

Temporary Restraining Orders.....

of Appellate Review.....

Other Aspects of Preliminary Injunctions and

Motions for Stays Pending Appeal and Scope

[2]

[3]

[4]

[1]

[2]

[3]

§ 5.07

§ 5.08

5-42

5-44

5-45

5-46

5-47

5-47

5-47

5-48

5-51

TABLE OF CONTENTS

CHAPTER 6

The Criminal Process in Environmental Regulation

§ 6.01	Overv	riew: T	he Inte	erface Between Environmental		
	La	w and	Crimir	nal Justice	6-2	
	[1]	Uniq	ue Cha	racteristics of the Criminal		
					6-4	
	[2]	The	Prosecu	utor	6-4	
	[3]			Jury	6-5	
	[4]			on Defense Counsel	6-7	
§ 6.02				vironmental Crimes	6-9	
·	[1]	Intro	duction	1	6-9	
	[2]			pment of the Environmental		
	Criminal Statutes					
	[3]			Statutes	6-10	
	. ,	[a]		Clean Air Act	6-10	
			[i]	Development of the Statute	6-10	
			įίί]	Clean Air Act Amendments		
				of 1990	6-12	
		[b]	The (Clean Water Act	6-16	
		F - J	[i]	Development of the Statute	6-16	
			ΪίΪ	Clean Water Act of 1987	6-17	
		[c]		Resource Conservation and		
		F-3		ecovery 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		
			F.1	"Derived-From Rule"	6-30.2	
		[d]	Regu	lation of Chemicals	6-32	
		[]	[i]	The Federal Insecticide,		
			[-]	Fungicide and Rodenticide		
				Act	6-32	
			[ii]	The Toxic Substances	0 32	
			[]	Control Act	6-34	
		[e]	Supe	rfund	6-36.1	
		[f]		rting Violations	6-37	
§ 6.03	The F			ens Rea	6-42	
3 0.05	[1]			l	6-42	
	[2]			nd RCRA	6-54	
	$\begin{bmatrix} 2A \end{bmatrix}$			and the Clean Water Act	6-61	
	[4/1]	1110113	neu a	and the Civili Witter Act	0-01	

xvi	ENVIRONMENTAL ENFORCEMENT	
	[3] The Negligence Standard	. 6-64
	[4] Exceptions to <i>Mens Rea</i> ; the Misdemeanor	
	[a] Public Welfare Statutes	. 6-66
	[b] Responsible Corporate Officers	
	[c] Willful Blindness	. 6-73
	[5] Mistake of Fact and Mistake of Law	. 6-74
	[6] Corporate Liability for Individual Actions	
§ 6.04	[7] State Approaches to <i>Mens Rea</i> 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	
	[3] Conducting the Pretrial Defense	
	[4] The Use of Scientific Data	
	[5] Competing Tensions	7-10
	[6] Structuring the Approach to the	7.10
0.7.00	Prosecutor	
§ 7.02	Representation of the Corporate Client	
	[1] General Considerations	. 7-17
	[2] Violations Committed During the	. 7-17
	Corporate Response	
	[4] Search and Seizure—Criminal	. 1-23
	Investigation at the Gate	. 7-26
	[5] The Grand Jury	
	[6] The Corporate Response	
	[7] Relationship with the Corporation's	. 12)
	Employees	. 7-33
	[a] Nontarget Employees	
	[b] Targeted Employees	
	[8] Department of Justice Guidelines on	, , ,
	Prosecuting Corporations	. 7-37
§ 7.03	Disposition of the Criminal Case	
~	[1] Disposition and Global Considerations	
	[a] The Question: To Plead or	
	Not to Plead	7-42.3
	[b] The Federal Sentencing Guidelines	
	[c] Global Settlements	. 7-46

		TABLE OF CONTENTS	xvii
	[2] N [3] P [4] S [5] S	d] Parallel Civil and Criminal Enforcement Proceedings Need for Confidentiality Plea Bargaining Structuring the Settlement of a Criminal Case Subsequent Civil Proceedings a] Suspension and Debarment [i] Statutory Provisions [ii] The Regulatory Framework b] SEC Disclosure c] Bad Actor Disqualifications	7-47 7-54 7-55 7-55 7-56 7-56 7-58.1 7-62
§ 7.04	Significa	ance of Criminal Prosecution.	7-65
		CHAPTER 8	
		he Whys, Whens and Hows of Environmental Self-Auditing	
§ 8.01 § 8.02	What Is [1]	an Environmental Audit?	8-3 8-7 8-7
		and Auditing	8-8
§ 8.03	The Ben	Compliance Auditefits of Effective Environmental Auditing	8-9 8-10
g 8.03	[1] In	ntroduction	8-10
	[3] E	Civil Penalties	8-10
		Auditing	8-11
	[4] E	Exercising "Environmental Triage"	8-12
		a] Tort Liability	8-13
	_	b] Criminal Liability	8-13
	[5] N	Aitigation of Penalties as a Result of an Existing Audit Program	8-13
	Г	a] EPA Policy	8-14
	L	[i] History of EPA	011
		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 d] Self-Auditing Benefits Under	8-24
	_	Existing Federal Statute	8-24
	[e] Self-Auditing Benefits Under Existing Federal Statute	8-26

xviii		ENVIRONMENTAL ENFORCEMENT	
		[f] State Self-Auditing Privilege and	
		Immunity Legislation [i] Typical Audit Privilege	8-26
		Legislation	8-27
		[ii] Typical Audit Immunity	0-27
		Legislation	8-28
	[6]	Benefits Listed by the General	0 20
	[~]	Accounting Office	8-28
§ 8.04	How	to Conduct an Effective Environmental	0 20
3		ıdit	8-29
	[1]	Dangers of Ineffective Auditing	8-29
	[2]	Principles of Effective Environmental	
		Auditing	8-29
	[3]	Who Should Conduct the Audit?	8-30
		[a] Independent Auditors	8-30
		[b] The Use of Counsel	8-31
	[4]	The Actual Performance of the Audit	8-33
		[a] Overview of Concerns	8-33
		[b] The Audit Process	8-34
		[c] Management Commitment: Designing the Scope of the Audit and the	
		Use of Checklists	8-34
		[d] Review of Available	0 5 .
		Institutional Records	8-35
		[e] The Auditor's Areas of Concern	8-36
		[f] Prior Directives, Orders, and	
		Consent Decrees	8-37
		[g] Discharge of Wastewater	8-37
		[h] Air Emissions	8-38
		[i] Treatment, Storage, and	
		Disposal of Hazardous Wastes	8-38
		[j] Above and Below Ground	
		Storage Tanks	8-40
		[k] Toxic Substances	8-40
		[l] Superfund	8-40
		[m] Reporting Requirements	8-40
	[5]	Making Sure the Documents Are Accurate	8-41
	[6]	Employee Interviews: Getting the Facts	8-42
	[7]	The Facility Inspection	8-42
	[8]	Verification of Data	8-44
	[9]	Writing the Environmental Audit Report	8-46
	[10]	Review Reconciliation and Implementation	8-48
§ 8.05		mizing the Risks Associated with	
		vironmental Auditing	8-49
	[1]	The Risks	8-49
	[2]	Maintaining, to the Greatest Extent Possible,	
		the Confidentiality of the Audit	8-49
	[3]	The Attorney-Client Privilege	8-50

	TABLE OF CONTENTS	xix
	[a] The Requisite Elements of the	
	Privilege	8-50
	[b] Waiver of the Privilege	8-52
	[c] The Limits of the Privilege	8-54
	[d] Recommended Practices for	
	Document Creation, Handling,	
	Distribution, and Storage	8-55
	[4] The Work Product Doctrine	8-56
	[5] The Self-Evaluation Privilege	8-63
	[a] Judicial Development	8-63
0.00	[6] The Risk of Waiver Through Prosecution	8-64
§ 8.06	Environmental Compliance Procedures	0.65
	Beyond Auditing	8-65
	[1] Auditing and Environmental Management	8-65
	[a] Line Management Attention to	0.65
	Compliance	8-65
	[b] Integration of Environmental Policies,	8-66
	Standards, and Procedures [c] Auditing, Monitoring, Reporting,	8-00
	[c] Auditing, Monitoring, Reporting, and Tracking	8-66
	[i] Frequent Auditing	8-66
	[ii] Continuous On-Site	0-00
	Monitoring	8-66
	[iii] Internal Reporting	8-66
	[iv] Tracking Response Status	8-67
	[v] Redundant Checks	8-67
	[d] Employee Training	8-67
	[e] Incentives for Compliance	8-67
	[f] Discipline for Noncompliance	8-67
	[2] The "ISO 14000" Standards	8-68
	[3] EMS Software	8-75
	[4] The CERES Principles	8-76
§ 8.07	Dealing with the Public and the Press	8-79
	[1] Community Involvement	8-79
	[2] Dealing with the Press	8-79
§ 8.08	Conclusion	8-83
	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	9-14
	[3] National Pollutant Discharge Elimination	0.20
	System Permits	9-20

	[4] State Pollutant Discharge Elimination	
	System Permits	9-20.1
	[5] Technology-Based and Water-Quality-Based	
	Standards	9-22
	[a] Technology-Based Standards	9-22
	[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	2.21
	Discharges	9-31
	[a] Stormwater from Industrial	
	Activities	9-32
	[b] Municipal Separate Sewer Systems	9-33
	[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	9-43
	[5] Settlement	9-45
	[6] Governmental Policy	9-45
	[7] Criminal Enforcement	9-45
§ 9.08	Oil Spills	9-47
§ 9.09	Civil Enforcement Under the Clean Water Act	9-50
	[1] Varied Enforcement	9-50
	[2] Discretion in Enforcement	9-50
	[3] Federal Enforcement	9-51
	[4] Administrative Enforcement	9-52
	[5] Court Injunctions	9-54
	[6] Emergency Power	9-55
	[7] Citizen Suits	9-56
§ 9.10	Defenses	9-58
	[1] Introduction	9-58
	[2] Initial Considerations	9-58
	[a] Permit Writing	9-58
	[i] Mixing Zones	9-61
	[ii] Biologically Available Metals	9-62
	[iii] Minimum Levels of	
	Quantification for Discharge	
	Permit Limits	9-63

			TABLE OF CONTENTS	XX1
			[iv] Cooling Water Intake	
			Structures	9-64
		[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]	Bypa	asses and Upsets	9-70
		[a]	Upsets	9-70
		[b]	Bypasses	9-73
	[4]	Sam	pling Error	9-74
	[5]		Permit Shield	9-76
	[6]		ation-Counting Issues	9-77
	[7]		ating the Penalty	9-80
	[8]		enses 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	
		F J	Than Federal Provisions	9-84
	[9]	Inad	equate Defenses	9-84
	[-1	[a]	Good Faith Effort Not a	, , ,
		[4]	Reliable Defense	9-84
		[b]	Economic or Business Necessity	, 01
		[o]	Not a Defense	9-85
		[c]	Impossibility	9-85
		[°]	impossiomey	7 00
			CHAPTER 10	
	Civil	Enfo	rcement Under the Clean Air Act	
§ 10.01	Intro	duction		10-1
§ 10.02			Air Act's Alphabet Soup:	10 1
3 10.02			NESHAPs, and SIPs	10-3
	[1]		AQS	10-3
	[2]		HAPs	10-5
	[3]			10-7
§ 10.03			Air Act's Title V Permit Program	10-9
δ 10.03	[1]		nits and Parameters	10-13
	[2]		ying the Fears of Business	10-13
§ 10.04			Gathering	10-13
8 10.04	111101	111411011	Gunoring	10-1/

xxii		ENVI	RONMENTAL ENFORCEMENT	
§ 10.05	Federa		orcement Provisions	10-25 10-27
	[2]		inistrative Penalties	10-29
	[3]		Citations	10-31
	[4]		ral Court Action.	10-32
	[5]		ial Review	10-33
	[6]		er Federal Enforcement Tools	10-34
0.10.06	[7]	Civil	Penalty Policies	10-40
§ 10.06			der the Clean Air Act	10-53
§ 10.07	Clima	te Cha	nge Enforcement	10-62
			CHAPTER 11	
			forcement Under the Resource ervation and Recovery Act	
			·	
§ 11.01				11-2
§ 11.02			ment of Hazardous Waste	11-5
	[1]		Waste	11-5
	[2]		rdous Waste	11-7
	[3] [4]		Subpart C Characteristics	11-8 11-9
	[5]		Part 261 Subpart D Lists	11-11
	[6]	Speci	ial Provisions for Certain	11-11
	[o]		azardous Waste	11-13
	[7]		rators of Hazardous Waste	11-15
	F. J	[a]	Generators' Manifest Requirements	11-17
		[b]	Generators' Pre-Transport	
			Requirements	11-18
		[c]	Generators' Recordkeeping and	
			Reporting	11-19
		[d]	Exports by Generators	11-20
	[8]		sporters of Hazardous Waste	11-21
	[9]		Owners or Operators	11-21
		[a]	On-Site Generators Storing	11.01
		F1 3	Wastes Less Than Ninety Days	11-21
	F1.03	[b]	All Other Owners and Operators	11-22
	[10]		ective Action	11-23 11-24
		[a]	Applicability	11-24
		[b]	Corrective Action	11-24
		[c]	Corrective Action Management	11-24
		[0]	Units	11-25
		[d]	Temporary Units	11-26
		[e]	What Is a Facility for Corrective	11 20
		٢٠٦	Action Purposes?	11-26
		[f]	Corrective Action and Contribution	11-27
	[11]		Disposal Restrictions	11-27

	TABLE OF CONTENTS	xxiii			
§ 11.03	Regulation of Underground Storage Tanks	11-29			
§ 11.04					
§ 11.05	Federal Enforcement	11-35			
	[1] Compliance Orders, Administrative				
	Penalties and Injunctive Relief	11-38			
	[2] Civil Penalties	11-39			
	[a] Gravity	11-39			
	[b] Economic Benefit of				
	Noncompliance	11-40			
	[c] Adjustment Factors	11-41			
	[i] Good Faith Efforts to Comply	11-41			
	[ii] Degree of Willfulness and/or				
	Negligence	11-41			
	[iii] History of Noncompliance	11-42			
	[iv] Ability to Pay	11-42			
	[v] Other Unique Factors	11-42			
	[3] Interim Status Corrective Action	11-42			
	[4] Consent Orders	11-42			
	[5] Criminal Action	11-44			
	[6] The Likelihood of Enforcement	11-45			
	[7] What to Expect in a RCRA Investigation	11-47			
§ 11.06	State Reinforcement	11-48			
	[1] The Statutory Requirements	11-48			
	[2] The RCRA Grant Program	11-48			
§ 11.07	Defenses	11-50			
	[1] Statutory Defenses	11-51			
	[2] Definitional Defenses	11-52			
	[3] Procedural Defenses	11-54			
	[4] Regulatory Exclusions	11-57			
	[5] Other Defenses	11-57			
	[a] Recycling	11-57			
	[b] Safe Storage	11-59			
	[c] Compliance with Other Statutes	11-59			
	[d] The Household Waste Exclusion	11-60			
§ 11.08	Citizen Suits	11-61			
	CHAPTER 12				
Structu	are of the Comprehensive Environmental Res	nonco			
Structu	Compensation, and Liability Act	sponse,			
§ 12.01	Overview of CERCLA	12-3			
5 12.01	[1] Introduction	12-3			
	[2] Hastily Drafted Legislation	12-4			
	[3] Basic Structure of CERCLA	12-10			
	[a] Five Basic Components	12-10			
	[b] Liability: Strict, Retroactive, and	12 10			
	Perhaps Joint and Several	12-11			
	1 officepo south and beverai	14 11			

xxiv	ENVIRONMENTAL EN	FORCEMENT
	[i] Strict Liability	y 12-12
	[ii] Retroactive L [iii] Joint and Sev	iability
		RCLA 12-15
	[4] Causation	
§ 12.02	The National Priorities List	
·	[1] Introduction	
	[2] How Sites Are Listed	12-23
	[a] The State Role in S	Site Selection 12-24
	[b] The Hazard Rankin	g System 12-25
	[c] Listing Because of	
	[d] Delisting After Clea	
§ 12.03	The National Contingency Plan.	
§ 12.04	The Heart of CERCLA—Section	
·	[1] Parties Liable	
	[a] Current Owners and	
		Lessees 12-36
	[ii] Banks and Fi	
		5 12-38
	[iii] Past Owners	12-41
	[b] Liability of Arrange	
		12-44
	[c] Liability of Transpo	orters 12-48
	[d] Statutory and Comr	
	Approaches to F	inding Additional
	Solvent Parties.	
	[i] Parent and Su	
	Corporation	ns
		CLA Statutory
	Liability .	
	[iii] "Indirect" CE	CRCLA Liability
	Through D	
	Common I	Law 12-58
	[e] Continuity of Enter	prise – Mere
	Continuation Tes	st in Detail 12-65
§ 12.05	Defenses	
	[1] Standard Statutory Defens	
	[a] Act of God	
	[b] Act of War	
	[c] Third Party Defense	
	[2] Other Statutory Defenses	
	[a] The Innocent Purch	
	[b] Secured Creditor De	
	[c] The Consumer Prod	
	[d] The Scope of "Rele	
	[e] The Petroleum Excl	
	[f] The Pesticide Exclu	
	[g] Federally Permitted	Release 12-66.12

		TA	ABLE OF CONTENTS	XXV
		[h]	Naturally Occurring Substances	12-66.13
		[i]	Statute of Limitations	12-66.13
			Recycling	12-66.20
	[3]		nall Business Liability Relief and	
			wnfields Revitalization Act	12-66.21
		[a]	Liability Defenses for "De Micromis"	
			Waste and Municipal Solid	
			Waste	12-66.22
			Ability to Pay	12-66.23
			Contiguous Property Defense	12-66.23
			Bona Fide Prospective Purchaser	12-66.25
		[e]	Amendments to the Innocent	
			Landowner Defense	12-66.27
		[f]	Limits on Federal Response Actions	
			at Sites Subject to Response	
			Actions Pursuant to State Law	12-66.30
§ 12.06			onse	12-66.32
	[1]		d Damages	12-66.32
	[2]		val and Remediation Costs	12-66.34
	[3]		ght and Indirect Costs	12-66.35
	[4]		t	12-66.36
	[5]		nining the Necessity of	
			ponse Costs	12-66.37
§ 12.07			lards for Response Actions	12-67
	[1]		iction	12-67
	[2]		ory Basis	12-67
		[a]	Preference for Permanent Remedies	
		F1 3	and On-Site Treatment	12-68
		[b]	Considerations for Alternative	10 (0
	507	Б	Remedies	12-68
	[3]		e of Cleanup	12-70
	[4]		rds for On-Site Cleanups	12-73
	[5]		rds Applicable to Off-Site Transfers	12-75
§ 12.08		ral Resou	rce Damages	12-76
	[1]		action: The Statutory and	10.76
		_	gulatory Scheme	12-76
			Statutory Basis	12-76
			Regulatory Implementation	12-80
			[i] Designation of the Trustee	12-81
			[ii] Assessment of Damages	12-81
		[c]	What Constitutes a Natural	12.02
	[2]	Madana	Resource?	12-82
	[2]		l Resource Damage Defenses	12-84
			Limitation on Costs	12-84 12-84
			Date of Injury to Natural Resource	
			Statute of Limitations	12-86
		[d]	Environmental Impact Statement	12 07
		[_]	or Permit Language	12-87
		[e]	The Trustee's Authority	12-89

ENVIRONMENTAL ENFORCEMENT

CHAPTER 13

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

§ 13.01			t Enforcement	13-3
	[1]		rview of EPA Enforcement	12.2
	[2]		pproaches	13-3
	[2]		d-Financed Actions	13-4
	[3]		ateral Remediation Orders Under	12.6
			ection 106	13-6
		[a]	Introduction	13-6
		[b]	The Statutory Scheme	13-7
		[c]	Government Enforcement Policy	
			Under Section 106	13-10
			[i] Introduction	13-10
			[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]	Chal	lenges to Agency Listing Procedure	13-21
	[,]		Procedural Obstacles to Judicial	15 21
		լայ	Review	13-21
		[b]	Deferential Standard of Review	13-21
		[c]		13-23
	[5]		Challenges on Technical Grounds	
	[5]		rging Defenses	13-25
		[a]	The Government's Advantage	13-25
		[b]	Leveling the Legal Playing	12.26
			Field—Divisibility of Harm	13-26
		[c]	Unreasonable Response Costs	13-33
		[d]	Oversight Costs	13-34
		[e]	Retreat from Judicial Deference	13-35
	[6]	Adm	ninistrative 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	Litig	ation S	trategies	13-39
·	[1]		ernment Litigation Strategies	13-39
	[2]		endant's Litigation Strategy	13-41
§ 13.03			Settlements and Consent	
0			Under CERCLA	13-45
	[1]		rview	13-45
	L*J	J . VI		10 10

	TABLE OF CONTENTS			
	[2]	Statutory Framework. [a] Statutory Incentives to Settle. [i] Covenant Not to Sue. [ii] Contribution Protection.	13-46 13-46 13-48	
		[iii] Other Actions	13-49 13-50 13-50 13-50	
		[i] Timeliness	13-51 13-51	
		[d] Effects of Settlement Agreement	13-52	
	[3]	The EPA's Model Consent Decree	13-52	
		[a] Introduction[b] Provisions of the Model Consent	13-52	
		Decree	13-53	
		Model Consent Decree	13-54	
		[d] Section 113(f)(3)(b) Contribution	10.56	
	F 4 3	Claim Changes	13-56	
	[4]	Negotiating the Consent Decree [a] Contribution Protection and Opposition	13-56	
		from Other Defendants [i] "Equitable Share" or "Amount	13-61	
		of Settlement"?	13-61	
		Party Plaintiff? [iii] Bar Orders Precluding Section 107 Cost	13-62	
		Recovery Claims [b] Settlement Litigation by	13-64	
		Nonsettlors	13-64	
§ 13.04		tte Claims for Relief Under CERCLA	13-68	
	[1] [2]	Express Claim for Relief	13-68	
		Cost Recovery	13-69	
		[a] Distinction Between Claims	13-69	
		[b] Pre-Aviall Caselaw	13-71	
		[c] Aviall and Post-Aviall Cases	13-72	
		[d] Right of Contribution	13-81	
		[e]Orphan Shares[f]Allocation Standards	13-83 13-89	
		[f] Allocation Standards	13-89	
	[3]	Consistency with the National		
		Contingency Plan	13-100	
		with the NCP	13-100	
	E 43	[b] Which NCP Applies?	13-103	
	[4]	Tactics and Strategy	13-103 13-103	

xxviii		ENVIRONMENTAL ENFORCEMENT	
		[b] Third and Multiparty Practice[c] Bifurcation[d] Marshalling the Evidence	13-104 13-107 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
		General Recovery [b] Distinctions Among Grants of	13-116
		Attorneys' Fees in Citizen Suits Under Sections 107, 113, and 310	
§	13.05	of CERCLA	13-118
		Brownfields Initiatives	13-119
		CHAPTER 14	
	Civi	Enforcement Under the Emergency Plan	ning
		d Community Right-to-Know Act (EPCRA	0
§	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[c] Emergency and Hazardous Chemical	14-8
		Inventory Forms	14-9
		(Form R)	14-11
		[e] Other Information Requirements [f] Public Access to Chemical Safety	14-15
		Information	14-16
		[2] Statutory Enforcement Provisions	14-17
		Violations	14-17
		[i] Reporting Violations [ii] Trade Secret Claim	14-17
		Violations	14-20
0	1 4 02	[b] Who Enforces EPCRA	14-20.1
Š	14.03	Defenses.	14-20.2
		[1] Defenses to Liability	14-20.2
e	14.04	Under EPCRA	14-31
8	14.04	EPCRA Civil Penalty Policies	14-34 14-34

	TABLE OF CONTENTS	xxix
§ 14.05	[a] The Basic Form R Penalty. [b] Adjustments Factors. [ii] Culpability. [iii] Voluntary Disclosure. [iiii] History of Prior Violations. [iv] Delisted Chemicals. [v] Attitude. [vi] "Other Factors as Justice May Require". [viii] Ability to Pay. [2] Penalty Policy for Other EPCRA Requirements. [a] Introduction. [b] Calculating the Base Penalty. [ii] The "Nature" of the Violation. [iii] The "Extent" of the Violation. [ivi] "Circumstances" and the Base Penalty Matrices [c] Assessment of Multi-Day Penalties. [d] Individual Adjustment Factors. [ii] Ability to Pay. [iii] Prior History of Violations. [iiii] Degree of Culpability. [iv] Economic Benefit or Savings. [v] Other Matters as Justice May Require [vi] Business Size. [vii] Attitude. [viiii] Supplemental Environmental Projects. [ix] Voluntary Disclosure Applying the EPCRA Penalty Policies CHAPTER 15 Citizen Suits, and the Award of Attorneys' Fees in Environmental Litigation	14-34 14-36 14-36 14-37 14-38 14-38 14-39 14-40 14-40 14-40 14-41 14-43 14-44 14-45 14-45 14-47 14-47 14-48 14-48 14-48 14-49 14-49 14-50
§ 15.01 § 15.02	Overview	15-3 15-5
	[1] Legislative Intent	15-5 15-6

		[a]		n Water Act	15-9
		[b]		n Air Act	15-12
		[c]		ource Conservation and	
			Recov	ery Act	15-17
		[d]		cy Planning and Community	
			Right-	to-Know Act	15-25
		[e]	Toxic Su	bstances Control Act	15-28
		[f]	Compreh	ensive Environmental	
				nse, Compensation	
				ability Act	15-28
	[3]			Existing Remedies	
		(S	avings Cla	uses)	15-30
	[4]	Who	May Sue.		15-30
	[5]	Who	May Be S	ued	15-31
	[6]	Whe	e Suit Ma	y Be Brought	15-32
	[7]	Priva	te Interven	tion in Government	
		L	tigation		15-33
§ 15.03	Litig				15-35
	[1]	Suits	Against th	e Administrator	15-35
	[2]	Supp	lemental C	laims for Relief	15-37
	[3]	Plair	tiffs' Strate	egies	15-40
		[a]	Selection	of Targets	15-40
		[b]		Investigation	15-40
		[c]	Maximiz	e Number of Counts	15-40
		[d]	Timing o	f Litigation	15-40
		[e]		hip with Regulatory	
				y	15-41
		[f]	_		15-41
		[g]		the Violation	15-41
	[4]	[h]		Risk of Injury	15-41
		[i]		ve Conduct	15-42
		[jj		o Judgment	15-43
				ies	15-43
		[a]		Considerations	15-43
		[b]	Control o	of Reactions	15-43
		[c]	Dealing i	n Candor	15-43
		[d]		e Sixty- or Ninety-Day	
				ow	15-43
		[e]		the Allegations of	
		. ,		gdoing	15-44
		[f]	Technica	Defenses	15-44
				ck of Standing	15-45
				ck or Inadequacy of	
				Notice	15-57
				nen Suit May Be Brought	
				Immediately Upon Notice	15-60
				tute of Limitations	15-62
				olly Past Violations	15-62
				ootness	15-70

TABLE OF CONTENTS				xxxi
			[vii] Diligent Prosecution	15-72
			[viii] Prior Resolution	15-81
			[ix] Abstention and Primary	
			Jurisdiction Doctrine	15-81
			[x] Upset Defense to Clean Water	
			Act Prosecutions	15-82.2
		[g]	Judicial Involvement	15-82.3
		[h]	Impleading the Environmental	
			Agency	15-82.3
		[i]	Keeping an Eye on the Ball	15-82.3
	[5]	Settle	ement and Relief	15-82.3
		[a]	Negotiated Settlement	15-82.3
		[b]	Litigated Relief	15-82.4
		[c]	Relief Requested	15-82.5
§ 15.04		Award	of Attorneys' Fees	15-83
	[1]		duction	15-83
	[2]		Statutory Exception for Award of	
			torneys' Fees	15-83
	[3]		ral Statutory Exceptions	15-84
	[4]		tory Provisions for the Award of	4.5.0.5
	5.53		torneys' Fees	15-85
	[5]		Eligible for Award	15-87
	[6]		Size of the Attorney's Fee	15-91
	[7]		of Non-Testifying Experts	15-95
	[8]		rd of Fees for Preparation of	15.05
	F03		e Application	15-95
0 15 05	[9]		edures for Obtaining Attorneys' Fees	15-96
§ 15.05	Conc	lusion .		15-98
INDEX				I-1