

Contents

About the Author	xi
Prologue and Acknowledgments.....	xiii
Introduction	xvii
Chapter 1. “Addition”	1
I. Legislative Use of “Addition”	1
II. Administrative Definition of “Addition”.....	7
III. Judicial Interpretation of “Addition”	8
A. Passive Point Sources	9
1. Additions From Circulated or Recirculated Water	11
a. Net/Gross Rule	11
b. Dams and Recirculation.....	14
c. EPA’s “Outside World” Theory of Addition	18
2. Additions From Stormwater Runoff	19
3. Additions From Water Transfers.....	24
a. Early Decisions	25
b. EPA’s Interpretive Memorandum and Water Transfer Rule	30
c. Post-Interpretive Memorandum and Water Transfer Rule Decisions	47
B. Indirect Additions.....	54
1. Indirect Additions From Land or Groundwater	54
2. Indirect Additions From the Air	55
C. Section 404 Decisions.....	66
1. Redeposit	68
2. Incidental Fallback.....	71
3. The Outside World, and the Unitary Navigable Waters Theories	73
IV. Conclusion.....	75

Chapter 2. "Pollutant"	77
I. Legislative and Administrative Definitions of Pollutant and Related Terms	79
A. Statutory Definitions	79
1. Pollutant	79
2. Toxic Pollutant.....	80
3. Pollution	80
B. Legislative History	81
II. Judicial Interpretations of Pollutant	83
A. Substances Held to Be a Pollutant or Not to Be a Pollutant.....	83
1. Held to Be a Pollutant	83
2. Held Not to Be a Pollutant	85
B. Listed Substances and Listed Categories of Substances	85
1. Waste Categories and Material Categories	87
a. Biological Materials.....	88
b. Consumer Products.....	91
i. Munitions	92
ii. Pesticides.....	93
iii. Water Supply Treatment Residue.....	98
iv. Conclusion.....	99
C. Discharged Into Water.....	101
D. Must a Pollutant Cause Pollution?	103
E. Must a Pollutant Be of Human Origin?.....	107
F. Potential Conflicts With Other CWA Sections	107
1. Section 311: Spills of Oil and Hazardous Materials.....	108
2. Section 404: Dredged and Fill Material	109
G. Potential Conflicts With Other Statutes.....	114
1. Atomic Energy Act	115
2. FIFRA.....	116
3. Refuse Act	117
III. Conclusion.....	118

Chapter 3. “Navigable Waters”	121
I. The Traditional Legal Meaning of Navigable Waters	125
II. Congressional Action: Statutory Definition and Legislative History of Navigable Waters	127
A. Statutory Definition.....	127
B. Legislative History	127
1. Section 402.....	127
2. Section 404.....	134
III. Administrative Action: Regulatory Definitions of Navigable Waters and Wetlands	139
A. Navigable Waters	139
B. Wetlands.....	143
IV. Judicial Interpretation of Navigable Waters Under the CWA	144
A. Tributaries and Wetlands	146
1. Tributaries.....	146
2. Wetlands.....	148
3. <i>Pre-Riverside Bayview</i> Decisions.....	148
a. Tributaries.....	149
b. Wetlands	149
4. <i>Riverside Bayview</i> and Subsequent Decisions	151
a. Tributaries.....	153
b. Wetlands	153
5. <i>SWANCC</i> and Subsequent Decisions.....	155
a. Tributaries.....	158
b. Wetlands	160
6. <i>Rapanos</i> and Subsequent Decisions.....	161
7. The Agencies’ Response to <i>SWANCC</i> and <i>Rapanos</i>	170
B. Isolated Waters.....	173
C. Groundwater	177
D. EPA’s Unitary Navigable Waters Theory and Water Transfer Rule	188
V. Conclusion.....	193

Chapter 4. “Point Source”	195
I. Congressional Action: The Statutory Definition and Legislative History of Point Source.....	195
A. Statutory Definition.....	195
B. Legislative History of Point Source.....	199
C. The CWA’s Structure: Point Source/Nonpoint Source Distinction	202
1. Regulation of Point Sources	203
2. Regulation of Nonpoint Sources	204
3. Regulation of Stormwater and Storm Sewers.....	207
4. Point Source/Nonpoint Source Distinction Left Unclear.....	209
II. Administrative Interpretations of Point Source.....	209
III. Judicial Interpretations of Point Source	213
A. Preliminary Matters	213
B. Held to Be Point Sources	214
C. Held Not to Be Point Sources	216
D. Easy Decisions, Difficult Decisions.....	217
E. Stormwater Runoff Decisions.....	218
1. Runoff	218
2. Getting Beyond Semantics: Dropping the Point Source/Nonpoint Source Distinction	220
3. The Factors Test	221
a. The Human Activity Factor	222
b. The Number of Sources Factor	224
c. The Artificial System Factor	227
d. The Nature of the Polluting Activity Factor	229
e. The Appropriate Control Factor	230
F. Non-Stormwater Runoff Decisions.....	231
1. The Curious Tales of Dams and Ditches	232
2. Vehicles on or in Land, Water, and Air	234
3. People and Other Animals	236

4. CAFOs, Fish-Raising Facilities, and Other Agricultural Discharges	239
IV. Conclusion.....	241
Chapter 5. Lessons In Statutory Interpretation	245
I. Conclusions Regarding Statutory Interpretation Generally	249
A. Depth of Legal Analysis Increases With Level of Court.....	249
B. Environmentally Positive Results Decrease With Level of Court	250
C. Courts Commonly Use Only a Small Number of Interpretive Devices	252
D. Uses of Interpretive Devices Change Over Time....	255
E. Interpretive Devices Are Not All Outcome-Neutral	259
II. Comparative Statutory Interpretation: How and Why the Methods Used to Interpret Each Element Differ.....	261
A. How the Natures of the Elements Differ	261
B. How the Methods Used to Interpret Each Element Differ.....	262
1. Addition	262
2. Pollutant	265
3. Navigable Waters	267
4. Point Source	271
III. Conclusions	273
Table A: Decisions Interpreting the Elements of the Water Pollution Offense.....	277
Table B: Judicial Interpretations of Each Element	290
Table B: Addition.....	291
Table B: Pollutant.....	292
Table B: Navigable Waters.....	294
Table B: Point Source	298
Appendix I: EPA's Regulatory Definition of "Navigable Waters" 40 C.F.R. §122.2.....	301