

CONTENTS

<i>Acknowledgments</i>		<i>xv</i>
	Introduction	1
Chapter 1	The Ebb and Flow of Public Perceptions of Wetlands	5
Chapter 2	Administrative Law: The Short Course	15
	What are agencies and who made them the boss?	17
	What exactly does an agency do?	22
	How are regulations made?	23
	What's the difference between a regulation and mere guidance?	25
	Navigating from statute to regulation to guidance	25
	I'm mad as hell and not going to take it anymore:	
	How to challenge agency actions	28
	<i>Executive Branch</i>	28
	<i>Legislative Branch</i>	29
	<i>The Media</i>	29
	<i>Judicial Branch</i>	30
	CONSTITUTIONAL CONSIDERATIONS	30
	STATUTORY STANDING	32
	RIPENESS	33
	CHEVRON DEFERENCE	33
Chapter 3	What's a Wetland (for purposes of Clean Water Act jurisdiction)?	35
	The initial interpretation of "waters of the United States":	
	We've always done it this way.	37
	<i>United States v. Riverside Bayview Homes</i> :	
	Unanimity on adjacent wetlands	39
	<i>Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers</i> : A split decision on "isolated" waters	44

	<i>Rapanos v. United States</i> : A trifurcation of confusion	48
	Post- <i>Rapanos</i> response	52
	The constitutional limits of the Clean Water Act	54
Chapter 4	Dredge and Fill: The Importance of Precise Definitions	57
	A lesson for young lawyers: Read the statute.	57
	Does landclearing require a Clean Water Act permit?	58
	Does dredging (and sidecasting) require a Clean Water Act permit?	59
	Neatness counts: Exploiting a loophole	61
	The inevitable blowback: The regulated community responds.	62
	Deep plowing or deep ripping? The <i>Borden Ranch</i> case	64
	Fill, baby, fill	65
	Mountaintop removal and nationwide permit 21	67
	Strange things done in the midnight sun:	
	Gold mining waste as fill	69
Chapter 5	Strange Bedfellows: The U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers	73
	The misnamed 404(b)(1) Guidelines:	
	More than mere guidance	75
	The heart of the Guidelines: The alternatives analysis	76
	<i>Fund for Animals v. Rice</i> : The alternatives analysis in practice	78
	Defining the project purpose of a golf course:	
	Jack Nicklaus takes a mulligan.	79
	Mississippi casinos: Is gambling a water-dependent activity?	81
	Sweedens Swamp and the market-entry theory:	
	“It depends on what the meaning of the word ‘is’ is.”	84
	The mitigation MOA: Resolving the buy-down and sequencing dispute	86
	The old Corps returns: The EPA vetoes the Yazoo River Project	89
Chapter 6	No Net Loss: Lies, Damned Lies, and Statistics	93
	The starting point: A nation of farmers	94
	If you build it, they will come.	95
	The other illegal alien problem: Invasive species	97
	Agricultural sticks and carrots: Swampbuster and the Wetlands Reserve Program	100

	Offsetting development impacts: Compensatory mitigation	101
	The Cajun solution: Eat a nutria, save a wetland.	102
	Net gains on agricultural lands	104
	Paper gains, real losses: The failure of permittee-responsible compensatory mitigation	105
	No net loss: Mission accomplished?	109
Chapter 7	Wetland Mitigation Banking: Banking on Entrepreneurs	111
	What is wetland mitigation banking?	112
	The legal status of mitigation banking (the early years)	114
	Pembroke Pines: The first sale of credits from an entrepreneurial mitigation bank	115
	The 1995 mitigation banking guidance	117
	Congress provides a market (and ratifies the guidance).	119
	How much can I sell a wetland credit for?	120
	The good, the bad, and the ugly	123
	<i>Panther Island Mitigation Bank (Florida)</i>	123
	<i>Mud Slough (Oregon)</i>	124
	<i>Black River Basin Mitigation Bank (South Carolina)</i>	124
	<i>Woodbury Creek (New Jersey)</i>	125
	They're only in it for the money (and other criticisms of mitigation banking).	126
Chapter 8	In-lieu Fee Mitigation: Money for Nothing?	129
	What is in-lieu fee mitigation?	129
	The legal status of in-lieu fee mitigation (the early years)	132
	"Educational" mitigation	133
	Conflict of interest: Agency as regulator and competitor?	134
	Timing in life is everything.	135
	But they're the good guys!	136
	The 2000 in-lieu fee guidance	137
	Tracking in-lieu fee performance (or the lack thereof)	138
Chapter 9	Leveling the Mitigation Playing Field	141
	An initial attempt at standards for permittee-responsible mitigation: The Halloween guidance	141
	You could have at least called . . .	142
	Lack of public input: Perhaps ill-advised, but legal	143
	Out of chaos comes order: The National Mitigation Action Plan	144
	Congress (re-)enters the fray.	145

Proposed compensatory mitigation rule	146
O'Hare Airport and the return of CorLands	147
Reconsidering in-lieu fee mitigation	149
Finally, the final rule emerges.	151
Sequencing and avoidance	151
Equivalency in mitigation plans	152
Nonequivalency in the timing of the use of mitigation credits	153
The mitigation hierarchy	155
But is the compensatory mitigation regulation good for the environment?	156
Chapter 10 Wetland Enforcement: The Ultimate Discretionary Act	159
Who is the lead enforcement agency?	159
Every day is a new day: The continuing violation theory	161
Hobson's choice: No pre-enforcement review of administrative orders	163
After-the-fact permits: All is forgiven.	164
Administrative penalties: Adjudication by the agencies	165
Civil penalties: Potentially real money, rarely invoked	166
Settlements, supplemental environmental programs, and other payments	168
Criminal penalties: Muddy jackboots?	169
The least sympathetic defendants	171
Citizen suits: Backing up the government	172
Enforcement of permit conditions: A gap in citizen suits	172
Enforcement of third-party mitigation providers: Does responsible mean liable?	173
Chapter 11 Regulatory Takings in the Wetland Context	177
Preliminary hurdles: Ripeness	178
Choosing a forum: U.S. District Court or the U.S. Court of Federal Claims	180
The <i>Penn Central</i> factors	181
Applying the <i>Penn Central</i> factors: The <i>Florida Rock</i> saga	181
Of rats, rabbits, and reasonable investment-backed expectations	183
<i>Lucas v. South Carolina Coastal Council</i> : No need to balance factors	184
The irrelevance of <i>Lucas</i>	186
Reasonable investment-backed expectations revisited	187

The most sympathetic takings plaintiffs	188
How should the Corps weigh the risks of a takings case?	189
Chapter 12 Concluding Thoughts and Recommendations	191
Epilogue: Where Are They Now?	199
<i>Appendix</i>	209
Clean Water Act (excerpts)	209
EPA Regulations 40 CFR Part 230 (excerpts)	211
Corps Regulations 33 CFR Parts 320–332 (excerpts)	214
Clean Water Act Guidance Document (excerpts)	220
<i>Endnotes</i>	223
<i>Selected References and Further Reading</i>	229
<i>Index</i>	245