

Pace University

DigitalCommons@Pace

---

Pace Law Faculty Publications

School of Law

---

2016

## Plain Meaning, Precedent, and Metaphysics: Lessons in Statutory Interpretation from Analyzing the Elements of the Clean Water Act Offense

Jeffrey G. Miller

*Elisabeth Haub School of Law at Pace University*

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Environmental Law Commons](#), [Legislation Commons](#), [Natural Resources Law Commons](#), and the [Water Law Commons](#)

---

### Recommended Citation

Jeffrey G. Miller, Plain Meaning, Precedent, and Metaphysics: Lessons in Statutory Interpretation from Analyzing the Elements of the Clean Water Act Offense, 46 *Envtl. L. Rep.* 10297 (2016), <http://digitalcommons.pace.edu/lawfaculty/1033/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

## ARTICLES

# Plain Meaning, Precedent, and Metaphysics: Lessons in Statutory Interpretation From Analyzing the Elements of the Clean Water Act Offense

by Jeffrey G. Miller

Jeffrey Miller is Professor of Law Emeritus, Pace Law School.

---

### Summary

---

This Article, the fifth in a series of five, completes the author's detailed analysis of how federal courts have interpreted each element of the Clean Water Act (CWA) offense. Compiling statistics across the four prior articles, it draws conclusions about statutory interpretation in general, finding that the depth of legal analysis increases with the level of court; that environmentally positive results decrease with the level of court; that courts use only a small number of canons and other interpretive devices; that their uses of interpretive devices change over time; and that interpretive devices are not all outcome-neutral. The author also draws other lessons about statutory interpretation that are specific to each element, and to the language and history of the CWA.

This Article completes the discussion of statutory interpretation of the elements of the Clean Water Act (CWA)<sup>1</sup> offense: (1) any addition (2) of any pollutant (3) to navigable waters (4) from any point source (5) by any person, except in compliance with a CWA permit.<sup>2</sup> It augments the author's other recently published analyses for *ELR News & Analysis* of those elements.<sup>3</sup>

Many of the overarching observations made here are common sense. For instance, although law review editors might demand a citation for the conclusion that plain meaning and precedent are the most commonly used statutory interpretation devices, most lawyers, judges, and legal scholars would agree with that assertion from their experiences, without further authority. After all, most text means what it says and if there is precedent that particular text means what it says, so much the better. This Article provides strong, quantified evidence to verify the common-sense proposition. The Article's database is too narrow to provide proof positive, but there is no reason to believe that the conclusion is a function of that database. Studies of the interpretation of the CWA as a whole or of other statutes will undoubtedly reach the same conclusion and establish the proposition as a fact. Where text has no clear meaning or is ambiguous, plain meaning won't help much; and if the interpretation is a matter of first impression, precedent may not help much either. In those situations, other interpretive devices must be used.

Other observations made here are similarly common sense. For instance, consider the conclusion that, for the most part, plain meaning predominates as a canon of statutory construction for the initial interpretations of a particular statutory text, but over time, precedent predominates. At the outset, there is no precedent available for most text, but hopefully there is plain meaning. Over time, as precedent becomes available, it supplements or even supplants plain meaning. The data set studied in these articles demonstrates that conclusion well. It contains three data sub-

- 
1. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607. Section 301(a), 33 U.S.C. §1311(a), sets out the CWA offense.
  2. Section §301(a) prohibits the "discharge of any pollutant" except in compliance with a CWA permit. Section 502(12), 33 U.S.C. §1362(12), defines "discharge of a pollutant" as the multi-element offense printed in the text. The statute defines "pollutant" in §502(6), "navigable waters" in §502(7), "point source" in §502(5), and "person" in §502(14). It does not define "addition." (The author's series of articles (see note 3, below) do not examine the fifth element, "person," because it has not given rise to significant litigation or controversy.)
  3. Jeffrey G. Miller, *Plain Meaning, Precedent, and Metaphysics: Interpreting the "Addition" Element of the Clean Water Act Offense*, 44 ELR 10770 (Sept. 2014); *Plain Meaning, Precedent, and Metaphysics: Interpreting the "Pollutant" Element of the Federal Water Pollution Offense*, 44 ELR 10960 (Nov. 2014); *Plain Meaning, Precedent, and Metaphysics: Interpreting the "Navigable Waters" Element of the Clean Water Act Offense*, 45 ELR 10548 (June 2015); and *Plain Meaning, Precedent, and Metaphysics: Interpreting the "Point Source" Element of the Clean Water Act Offense*, 45 ELR 11129 (Dec. 2015).

sets where the proposition proves true and one data subset where it does not, and provides a logical and demonstrable reason why the outlying data subset does not conform to the general conclusion. Again, the database is too narrow to provide proof positive of the proposition, but there is no reason to believe that it is a function of the composition of the database.

Finally, some of the observations made here relate entirely to the interpretations of the particular texts studied. For instance, consider the issue of why courts have interpreted the element “navigable waters” twice as often as they have interpreted any of the other elements of the CWA offense. This Article concludes the reason is that the ratio of decisions under CWA §402, 33 U.S.C. §1342, to decisions under CWA §404, 33 U.S.C. §1344, is strongly weighted toward §404 in decisions interpreting the navigable waters element, but not in decisions interpreting the other elements. This observation and its consequences are entirely functions of the composition of the database examined. The observation may prove useful in understanding the interpretation of this and other CWA text in which both CWA §§402 and 404 operate, but the observation is unlikely to be useful beyond interpreting the CWA. At the same time, asking analogous questions about interpretations of other statutory texts may lead to similarly illuminating observations.

The author’s four earlier articles examining the elements of the CWA offense consider 258 decisions—all of the reported decisions between 1974 and 2013 interpreting the first four elements<sup>4</sup> of the water pollution offense that the author could locate.<sup>5</sup> There may be others, especially in unofficial reporters. If others exist, however, they are infrequently cited and hence are not important decisions for these interpretive issues. In any event, the universe of the opinions analyzed is broad enough to support the conclusions reached in the earlier articles and to support or suggest the conclusions reached in this Article. It should be noted that because many of the decisions interpret more than one element of the offense, the total number of judicial interpretations analyzed in the four earlier articles is 347.<sup>6</sup> Some of the pertinent data from the judicial interpretations are summarized in Table B at the end of this Article.<sup>7</sup> Some of that data is objective—for example, a decision in a case brought under CWA §§402 or 404. Some of the data is reasonably objective—for example, a decision

uses five identified interpretive devices. Unless a decision actually announces and labels each interpretive device it uses, however, different readers may occasionally draw different conclusions on both the number and the identity of the devices a decision uses. The author is reasonably certain of his count and identification of the interpretive devices used in the decisions, but is more sure that his count and identification are consistent throughout.

The reader may be assuming that an interpretive device is a canon of statutory construction. Most are, but interpretive devices and canons of construction do not always coincide. The issue is complicated because there is no agreement on the number or wording of canons of construction. Prof. William Eskridge documents the William Rehnquist Court’s use of 87 canons to interpret federal statutes.<sup>8</sup> Prof. Bryan Garner and the late Justice Antonin Scalia discuss 53 canons in their book on the interpretation of legal text and reject 13 ideas that others, including Eskridge, recognize or use as canons.<sup>9</sup> Because there is no agreement on the universe of canons, some of the interpretive devices discussed here may not appear in any existing catalogue of canons, particularly the metaphor and metamorphosis devices.

Moreover, canons of construction are directive, that is, they suggest what a particular statutory phrase means. For instance, the plain meaning canon instructs us to interpret a statute to mean exactly what it says. Some interpretive devices, however, are not directive. For instance, the metaphor device does not direct a particular meaning, but suggests a way of visualizing an abstract legal issue or proposition to make it more understandable. The article on “Addition” observes that metaphors have been quite important in decisions interpreting that element.<sup>10</sup> In those decisions, the uses of metaphor are striking and memorable, more so than the uses of canons of construction in the decisions. This Article considers why metaphors have been important in interpreting the “addition” element but not the other elements.

The legitimacy of the canons of construction has been subject to academic dispute for some time. Karl N. Llewellyn noted more than half a century ago that for every canon that may apply in a given situation, there is an opposite canon, leading to the question whether the canons have any value in statutory interpretation.<sup>11</sup> Because there is no canon instructing a court how to decide which of two competing, opposite canons governs in a particular situation, the canons may be seen as just handy devices for courts to justify the interpretive results to which they are independently inclined. The canons are sometimes

4. The articles do not examine the fifth element, “person,” because it has not given rise to significant litigation or controversy.

5. See the decisions listed in Table A at the end of this Article.

6. Count the numbers of judicial interpretations for each element listed in Table B at the end of this Article: 63 for Addition, 70 for Pollutant, 142 for Navigable Waters, and 72 for Point Source. Add the sums to derive the total number of judicial interpretations (347) in the 258 decisions listed in Table A.

7. Table B is displayed in four subparts, one each for Addition, Pollutant, Navigable Waters, and Point Source. The data is drawn from but is slightly different than the data in the Tables B from the earlier articles cited *supra*, note 3. One difference between the subparts in Table B to this Article and the Tables B in the previously published articles is that the former use a commonly numbered list of interpretive devices set forth on the first page of Table B herein, rather than the differently numbered lists in each of the earlier tables.

8. WILLIAM N. ESKRIDGE, *DYNAMIC STATUTORY CONSTRUCTION* 323-33 (1987).

9. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012). Compare with the more extensive universe of canons identified by Eskridge.

10. See *supra* note 3, 44 ELR 10793-94.

11. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons of How Statutes Are to Be Constructed*, 3 VAND. L. REV. 395, 401 (1950). For a more contemporary criticism of the same nature, see Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806 (1983).

described as devices to identify legislative intent when statutory language is ambiguous, raising both practical and separation-of-powers concerns.

The practical concern is whether legislative intent can exist beyond the enacted language of a statute. The usual pieces of evidence cited for legislative intent are the remarks of individual members of the U.S. Congress on the floors of the U.S. House of Representatives or the U.S. Senate, or groups of such members in committee and subcommittee reports, usually written by staff. However, remarks by individual members of Congress, by definition, do not identify the intent of Congress as a whole. Nor do reports of committees or subcommittees. The only unquestionable indication of legislative intent is the wording of the statute. The separation-of-powers concern is another side of the first concern. Gleaning congressional intent from statements by individual members of Congress, groups of members, or congressional staff allows them to usurp the Article I authority of Congress.

Legislative intent is even murkier when statutory wording is deliberately ambiguous, poorly masking political compromise. Judicial interpretation of deliberately ambiguous statutory language must inevitably come down on one side or another of the congressional compromise. Do courts thereby usurp the Article I authority of Congress? This dilemma helps explain the enduring use of canons of construction, despite their recognized shortcomings. A court must decide the case before it, even when the applicable statute is ambiguous. Unless a judge throws up her hands and protests she has no basis to interpret the statute,<sup>12</sup> the judge has only the means judges have used for decades, indeed for centuries, to make such resolutions: the canons of construction.<sup>13</sup>

The observations made in Part I of this Article relate to statutory interpretation in general. What interpretive devices do the courts use and when do they use them? Do the interpretive devices used affect outcomes? Do the interpretive devices used change over time? If so, does the change represent evolution in jurisprudence generally or the evolution and maturation of judicial interpretations of the statutory text at issue? We might expect both. The lessons discussed in Part II of this Article are comparative. The four elements of the water pollution offense studied in the earlier articles are very different in nature. Do those differences cause courts to approach interpreting each of the elements in singular manners? We might expect that as well.

Much of the analysis in this Article is based on comparing numbers of decisions or judicial interpretations in the decisions calculated for different purposes. For instance, it concludes that legal analysis is deeper as a case ascends up

the judicial appellate chain, based, in large part, on the numbers of devices that the U.S. Supreme Court, circuit courts of appeals, and district courts used to interpret the elements. The Article states the results of these number counts, but does not reproduce the author's mathematical calculations. Footnotes explain how the author made those calculations from data in Tables A and B. The reader can verify the numbers by making the same calculations.<sup>14</sup> Indeed, the reader may be able to make other entirely different, but pertinent, calculations and observations from the data.

## I. Conclusions Regarding Statutory Interpretation Generally

### A. Depth of Legal Analysis Increases With Level of Court

In theory, the scrutiny of a legal issue should become more intense as a case works its way up the appellate ladder. At each step in the appeal process, the number of contested legal issues usually decreases, while focus on the remaining issues usually becomes narrower and more precise. Moreover, an appellate court has the advantage of both the analyses of the legal issues by the parties before it and by the courts and parties in the courts below. When the appellate court is the Supreme Court and the federal circuits have split on the issue before the Court, these analyses could include the opinions of several federal circuits and several district courts, as well as briefs by the parties before them. And, of course, the Supreme Court will also have the advantage of analyses in amici briefs and in a brief from the Solicitor General, representing the United States as a party or as amicus.<sup>15</sup> The circuit courts may occasionally have the benefit of briefs by amici and the Solicitor General, but the Supreme Court almost always does.

A logical indication of the depth of judicial analysis of an issue is the number of interpretive devices a court uses in its opinion analyzing the issue. In general, a decision using multiple interpretive devices exhibits a greater depth of legal analysis than a decision using only one or two interpretive devices to resolve the issue. Not surprisingly, the numbers of devices courts used in decisions interpreting an element of the CWA offense increased as the level of the courts rendering them increased. Thus, while courts on average used 2.7 interpretive devices to analyze an element,<sup>16</sup> Supreme Court

12. See *United States v. Robison*, 521 F. Supp. 2d 1247 (N.D. Ala. 2007), in which a senior judge threw up his hands and instructed the clerk to reassign the case for trial because *Rapanos v. United States*, 547 U.S. 715, 36 ELR 20116 (2006), and its progeny made it impossible for him to interpret the CWA offense element "navigable waters."

13. See Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647 (1992); Lawrence C. Marshall, *The Canons of Statutory Construction and Judicial Constraints: A Response to Macey and Miller*, 45 VAND. L. REV. 673 (1992).

14. In doing so, however, the reader must be careful to observe the difference between numbers of decisions in Table A and numbers of judicial interpretations in decisions in Table B.

15. Supreme Court Rule 37.4 authorizes the Solicitor General to file an amicus brief without either the consent of the parties or a motion approved by the Court. In addition, the Court often requests the Solicitor General to file an amicus brief in cases in which the government is not a party. REBECCA MEA SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 5, 18, 142-45 (1992). For a fascinating discussion of the role of the Solicitor General generally, see LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1988).

16. To calculate the average number of interpretive devices used in all judicial interpretations of the elements, add the number of interpretive devices shown in Column F of Table B for every element by all levels of court and



analyses used an average of 4.5 interpretive devices, circuit court analyses used an average of 3.0 interpretive devices, and district court analyses used an average of 2.3 interpretive devices.<sup>17</sup> By this objective measure, legal analysis of the contested statutory interpretation becomes deeper as the level of the interpreting court increases.

## B. Environmentally Positive Results Decrease With Level of Court

Environmentally positive results in the context of the decisions analyzed in these articles are interpretations of an element of the CWA offense finding jurisdiction rather than denying jurisdiction—for example, interpreting an element expansively as opposed to narrowly. Finding jurisdiction authorizes greater control of water pollution, usually an environmentally positive result, while denying jurisdiction restricts control of water pollution, usually an environmentally negative result.<sup>18</sup> Overall, courts reached environmentally positive results in 76% of the interpretations examined here.<sup>19</sup> District courts reached environmentally positive results in 80% of the interpretations examined here, circuit courts in 70%, and the Supreme Court in 54%.<sup>20</sup>

Do not assume, from the decreasing percent of environmentally positive interpretations as the level of court increases, that appellate courts generally and the Supreme Court in particular, are hostile to water pollution control or environmental protection. The author's earlier analysis of Supreme Court opinions under the CWA determined that although the Supreme Court's CWA decisions were statistically unfavorable to water pollution control, they did not demonstrate that the Court had an anti-environmental bias.<sup>21</sup>

For instance, many of the Court's decisions were based, in whole or in part, on deference to the U.S. Environmental Protection Agency's (EPA's) interpretation of the CWA, a general doctrine of administrative law rather than one specific to the CWA or environmental protection. In such decisions, the Court asks only if the statute is ambiguous

on the contested issue and, if so, whether the administering agency's interpretation of the statute on that issue is a reasonable one.<sup>22</sup> When courts reach environmentally negative results based on deference to EPA's interpretation of its statute, it is the Agency's interpretation of the CWA that is environmentally negative rather than the Court's interpretation; the Court is merely affirming that while EPA's interpretation may not be the only reasonable one, it is at least among the set of reasonable interpretations.<sup>23</sup>

If the increasing percent of negative environmental interpretations of the elements observed as cases move up the judicial chain is not caused by hostility toward clean water by appellate courts, perhaps the increasingly negative environmental results are caused by the greater depth of legal analysis, which also occurs as cases move up the judicial chain. That suggestion can be tested by comparing the environmental results of lower court interpretations exhibiting greater depths of analysis with lower court interpretations generally, removing the variable of court level from the analyses. District court interpretations, of which 76% have positive environmental results, have only 67% positive environmental results when they use five or more interpretive devices.<sup>24</sup> Similarly, circuit court interpretations, of which 70% have environmentally positive results, have only 50% environmentally positive results when they use six or more interpretive devices.

This finding confirms that there is a correlation between increasing depth of analysis and increasing environmentally negative outcome. What does this correlation mean? One possibility is that it requires greater depth of analysis to reach an environmentally negative result. That does not make intuitive sense. The more likely possibility is that courts feel compelled to provide greater justification to the public for environmentally negative results interpreting a statute designed to protect the environment than for environmentally positive results interpreting that statute.

## C. Courts Commonly Use Only a Small Number of Interpretive Devices

As discussed above, there is no agreed-upon catalogue of interpretive devices or canons of statutory construction. Despite a large but indeterminate number of devices avail-

divide by the number of interpretations for all elements by all levels of court (347), as shown in Table B.

17. To calculate the average number of interpretive devices used in judicial interpretations by a particular level of court, add the number of interpretive devices shown in Column F of Table B for every decision interpreting every element by that level of court and divide the sum by the number of decisions interpreting all of the elements by that level of court, as shown on Table B.
18. While in theory there may be situations in which the reverse is true, the author does not believe any of the decisions analyzed in this Article present such situations.
19. To calculate the percent of environmentally positive results for all interpretations, count the pluses (+) in Column C of Table B for all elements by all levels of court (260) and divide the sum by the total number of interpretations (347).
20. To calculate the percent of environmentally positive interpretations of the elements by a particular level of court, count the pluses (+) for interpretations by that level of court in Column C of Table B for all elements and divide that sum by the total number of interpretations by that level of court for all elements as shown on Table B.
21. Jeffrey G. Miller, *The Court's Water Pollution Jurisprudence: Is the Court All Wet?*, 24 VA. ENVTL. L.J. 125 (2005).

22. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 14 ELR 20507 (1984); *Mead Corp. v. United States*, 533 U.S. 218 (2001).

23. The author's earlier article concluded, however, that while the Court may be agnostic on environmental protection, it is increasingly antagonistic toward citizen participation in administrative and enforcement processes, which in turn has led to increasingly environmentally negative results.

24. To calculate the percent of positive environmental results for decisions by a particular level of court using a particular number of interpretive devices, add the total number of decisions with positive results, indicated with a plus (+) in Column C on Table B for all elements by that level of court also showing the desired number of interpretive devices used in Column F on Table B, for that level of court and divide that sum by the total number of decisions by that level of court for all elements. The Article uses six or more devices for circuit court decisions and five or more devices for district court decisions because circuit courts use more interpretive devices than district courts. Because this comparison is between average decisions and those using the largest numbers of devices, it was appropriate to use a larger cutoff for circuit court decisions than for district court decisions.

able, the decisions studied in these articles used only 25 devices to interpret the elements of the CWA.<sup>25</sup> But even that number is deceptively large, for the courts used all but a few of the 25 infrequently. Courts used the 25 devices a total of 940 times in the 347 judicial interpretations decisions studied.<sup>26</sup> But in 47% of the 940 times that courts use an interpretive device, they used only two: precedent (268 times), and plain meaning (175).<sup>27</sup> The Article labels these the primary devices (used more than 105 times each), at least for the purposes of these analyses.

The courts used one of only seven additional devices in another 42% of the 940 total uses: broad interpretation (104 uses); deference to agency interpretation (93); structure of the statute (70); legislative history (67); avoid absurd results (32); harmonize with other statutes (30); and avoid constitutional issues (11).<sup>28</sup> The Article labels these the secondary devices (each used between 10 and 105 times). Courts used the remaining 16 interpretive devices between one and nine times.<sup>29</sup> The Article labels these the tertiary or incidental devices. The courts' use of the tertiary devices is limited in another way. They used 14 of the 16 tertiary devices to interpret only one or two of the four elements.<sup>30</sup> These 14 narrowly used devices constitute more than one-half of the 25 total devices used and more than two-thirds of the 16 tertiary devices used.

With all of the interpretive devices available, why would courts use so few of them in these decisions? Why would they use only nine of the 25 more than 1% of the time?<sup>31</sup> Why would they use almost one-half of the devices to interpret only one or two of the four elements? The answers to these questions lie in the nature of interpretive devices. Most, by their very wordings, are of limited applicability. For instance, courts used the two tertiary devices "interpret exceptions narrowly" and "if a rule has an exception, in the absence of the exception, the rule applies" a total of

14 times.<sup>32</sup> The courts' limited use of these devices follows from the fact they come into play only to interpret statutory exceptions. Because only two of the four elements studied have exceptions, and they are narrow, courts are not likely to use these devices frequently enough to place them in the primary or secondary groups of devices.

Other tertiary interpretive devices are of similar limited applicability. For instance, courts used the rule of lenity only twice.<sup>33</sup> That, too, is understandable, for lenity applies only in criminal prosecutions. Although the interpretation of any of the four elements may be at issue in a criminal prosecution, the limited number of criminal prosecutions compared to other types of legal actions in the interpretations studied (31 of 347),<sup>34</sup> significantly lessens the likelihood of lenity being a primary or secondary interpretive device in these decisions.

Similarly, the canon of interpreting a statute to avoid constitutional issues is used only 11 times.<sup>35</sup> It applies only when a constitutional issue is evident, and in the cases analyzed here, the only constitutional issue apparent is with regard to federal Commerce Clause jurisdiction to regulate pollution in navigable waters—the "navigable waters" element of the CWA offense.<sup>36</sup> Likewise, the interpretive device of honoring federalism was used only five times.<sup>37</sup> As with avoiding constitutional issues, it applies only when the constitutional or traditional boundary between federal and state powers might be impinged. Again, in these decisions, federalism is most likely to be involved at the intersection of federal and state jurisdiction under the Commerce Clause. Other tertiary interpretive devices are of similarly limited applicability.<sup>38</sup>

Many of the other canons of construction catalogued by Eskridge, Justice Scalia, and Garner are by their nature simply not susceptible to use interpreting the elements of the water pollution offense. For instance, the seventh canon listed by Eskridge, "[m]ay" is usually precatory, whereas "shall" is usually mandatory,<sup>39</sup> is irrelevant to interpretation of the elements of the CWA offense because none of the elements or their statutory definitions use either "may" or "shall." Although the author makes no systematic attempt here to narrow the canons identified

25. The devices are listed in Table B Explanation for Columns in Table B for Each Element, and are shown in Column E of Table B.

26. To calculate the number of times the interpretations used interpretive devices (940), count the numbers in Column F of Table B for each element and add the four totals.

27. To calculate the number of judicial interpretations using a primary interpretive device, count the numbers of times each of interpretive devices 23 and 22 (precedent and plain meaning) is listed in Column F of Table B for all elements. To calculate the percent that figure represents of the total number of interpretations using a particular interpretive device, divide that figure by the total number of times an interpretive device was used (940).

28. To calculate the number of judicial interpretations using secondary interpretive devices, count the number of times each of interpretive devices 1, 4, 5, 7, 16, 21, and 24 is listed in Column E of Table B for all elements. To calculate the percent that figure represents of the total number of times the interpretations used an interpretive device, divide that figure by the total number of times an interpretive device was used (940).

29. To calculate the number of interpretations using tertiary interpretive devices, count the number of times each of interpretive devices 2, 3, 6, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, and 25 is listed in Column E of Table B for any element.

30. Count the number of interpretations for which both (1) interpretive device 1 or 2 appears in Column F of Table B for all elements; and (2) one or more of the tertiary interpretive devices is listed in Column E of Table B for any element.

31. Because none of the tertiary devices was used more than nine times, the use of any of them was less than 1% of the total of 940 uses of interpretive devices in these decisions, as calculated above.

32. Count the number of times interpretive device 11 or 12 is listed in Column E of Table B for all elements.

33. Count the number of times interpretive device 17 is listed in Column E of Table B for any element.

34. Count the number of times "Crim." is listed in Column D of Table B for any element.

35. Count the number of times interpretive device 5 is listed in Column E of Table B for any element.

36. Interpretive device 5 is listed in Column E in Table B 10 times for navigable waters, and only once for any other element.

37. Interpretive device 15 is listed in Column E of Table B only for navigable waters.

38. For instance, the canon of interpreting waivers applies only when a statutory provision includes a waiver. There are no waivers in any of the elements of the CWA. In the judicial interpretation decisions analyzed in these articles, the issue arises in the context of parties waiving their rights to litigate a legal issue by entering a consent decree. *United States v. Rueth Dev. Co.*, 335 F.3d 598 (7th Cir. 2003). The canon of interpreting a statute to harmonize with other statutes applies only when two statutes overlap or possibly collide.

39. See ESKRIDGE, *supra* note 8, at 323.

by those authorities to canons that may be susceptible to interpreting the elements of the CWA offense, many other canons they identify are irrelevant to those elements.<sup>40</sup> In conclusion, only a handful of the interpretive devices are generally useful; many canons are useful only in limited situations not at issue when interpreting the elements of the CWA offense.

#### D. Uses of Interpretive Devices Change Over Time

Neither the identity nor the order of the frequency of use of the primary interpretive devices changed between the earliest and latest sets of interpretations.<sup>41</sup> In the earliest set of interpretations, the two most used devices and the numbers of their uses were precedent (42) and plain meaning (37).<sup>42</sup> In the latest set of interpretations, the two most used devices and their numbers of uses were precedent (58) and plain meaning (38).<sup>43</sup>

During the same period, however, the order and the frequency of use of the secondary interpretive devices changed considerably. In the earliest set of interpretations, the numbers of uses for the secondary interpretive devices were legislative history (26 uses), broad interpretation (25),

structure of the statute (17), deference (10), harmonize with other statutes (6), and avoid absurd results (2).<sup>44</sup> In the latest set of interpretations, the numbers of uses for the secondary interpretive devices were deference (24 uses), broad interpretation (17), structure (15), avoid absurd results (6), harmonize with other statutes (8), and legislative history (5).<sup>45</sup> Between the earliest and latest sets of interpretations, legislative history moved from the most used of the secondary devices to the least used and deference moved from the fourth most used to the most used. Although broad interpretation was the second most used device in both periods, its use declined from 24 in the earliest period to 17 in the latest period.

The most remarkable change over time is the drastic decline in the use of legislative history to interpret the elements, coupled with a less substantial decline in the use of the broad interpretation canon. In the earliest set of decisions, courts used legislative history in 25 interpretations, while in the latter period, they used legislative history in only five interpretations. Use of the broad interpretation canon declined from 25 to 17 interpretations between the same periods. The two are causally linked because legislative history emphasizes that “navigable waters” should be interpreted broadly.<sup>46</sup> Without reading the legislative history, courts will not know that Congress intended them to interpret the navigable waters term broadly. Thus, uses of the legislative history and broad reading devices go hand-in-hand. While the courts’ use of both of these devices declined, the use of precedent between the two periods increased from 42 to 58, the use of plain meaning increased from 37 to 38, and the use of deference increased from 10 to 24. Although the increases in the uses of precedent and deference may in part reflect the substitution of these devices for the recently disfavored legislative history and broad interpretation devices, the increases also represent the growth over time of the number of precedents to cite and the number of EPA interpretations to which deference is accorded.

These changes in the uses of interpretive methods may have caused or at least influenced the outcomes of decisions. In the earliest set of interpretations, courts reached environmentally positive results in 53 of the 67 interpretations (80%), while during the most recent set of interpretations, they reached environmentally positive results in 48 of the 67 interpretations (72%).<sup>47</sup> The drop was most remarkable in interpretations of “navigable waters,” where

40. For instance, see *id.* at 325 (the “rule against congressional interference with the president’s authority over foreign affairs and national security”); *id.* (the “rule against congressional curtailment of the judiciary’s ‘inherent powers’ or its equity powers”); *id.* at 326 (the “presumption against application of federal statutes to state and local political processes”); *id.* at 327 (the “[r]ule against state taxation of Indian tribes and reservation activities”); and *id.* at 328 (the “rule against extraterritorial application of U.S. law”).

41. The earliest and latest sets of interpretations used in this analysis are the 20% of the judicial interpretations that are the first in time and the 20% of the judicial interpretations that are the latest in time interpreting each element. The earliest and latest sets of interpretations cannot be reduced to periods of years for all elements because they are calculated by percentages of interpretations of each element rather than by years. Even for a particular element, the uniform percentages of early and late decisions sometimes does not conform to particular years, in which case district court decisions are dropped until the requisite percentage is reached. For ease of identification, these judicial interpretations are highlighted in Table B. The highlighted interpretations are visually easy to distinguish as the earliest and latest for each court, except for the Supreme Court’s interpretations of “pollutant,” all of which are highlighted. The first Supreme Court interpretation of pollutant is in the earliest set of interpretations and the second and third are in the latest set of interpretations. For addition, there are 12 early and 12 late interpretations. The earliest are 100, 107, 108, 110, 111, 116, 123, 125, 238, 245, 247, and 249; and the latest judicial interpretations are 5, 12, 18, 24, 26, 27, 37, 136, 145, 152, 154, and 160. For pollutant, there are 14 early and 14 late judicial interpretations. The earliest are 10, 11, 105, 110, 117, 120, 122, 124, 235, 236, 238, 241, 246, and 247; and the latest are 3, 27, 40, 53, 130, 133, 146, 152, 157, 159, 166, 167, 169, and 170. For navigable waters, there are 27 early and 27 late judicial interpretations. The earliest are 108, 109, 112, 114, 115, 116, 118, 120, 121, 126, 127, 235, 236, 237, 239, 241, 243, 248, 249, 250, 252, 253, 254, 255, 256, 257, and 258; and the latest interpretations for navigable waters are 1, 15, 16, 19, 21, 22, 23, 24, 25, 26, 29, 30, 128, 129, 130, 131, 132, 134, 135, 137, 139, 142, 143, 144, 147, 151, 156, 19, 21, 22, 23, 24, 25, 26, 29, 30, 128, 129, 130, 131, 132, 134, 135, 137, 139, 142, 143, 144, 147, and 153. For point sources, there are 14 early and 14 late judicial interpretations. The earliest interpretations are 108, 110, 111, 113, 116, 119, 123, 240, 241, 242, 244, 247, 251, and 259; and the latest judicial interpretations for point source are 2, 12, 13, 14, 17, 19, 20, 22, 27, 138, 140, 141, 148, and 149.

42. Count the number of times interpretive devices 23, 22, and 16 (precedent, plain meaning, and legislative history) are listed in Column E of Table B for all elements for the earliest set of interpretations identified in note 41.

43. Count the number of times interpretive devices 23 and 22 (precedent and plain meaning) are listed in Column E of Table B for all elements for the latest set of interpretations identified in note 41.

44. Count the number of times interpretive devices 16, 4, 24, 6, 21, and 1 (legislative history, broad interpretation, structure of the statute, deference, harmonize with other statutes, and avoid absurd results) are listed in Column E of Table B for all elements in the earliest set of interpretations identified in note 41.

45. Count the number of times interpretive devices 7, 4, 24, 1, 21, and 16 (deference, broad interpretation, structure of the statute, avoid absurd results, harmonize with other statutes, and legislative history) are listed in Column E of Table B for all elements in the latest set of interpretations identified in note 41.

46. See discussion of legislative history of “navigable waters” in Miller, 45 ELR 10551-54, *supra* note 3.

47. Calculate the number of times (+) is listed in Column C of Table B for all elements for the earliest and latest sets of interpretations identified



environmentally positive results dropped from 25 (92%) to 19 (70%) between the same periods.<sup>48</sup> In these interpretations of navigable waters, the use of legislative history dropped from 16 in the earliest interpretations to one in the latest ones and the use of broad interpretation dropped from 17 in the earliest interpretations to eight in the latest ones.<sup>49</sup> As noted above, congressional admonition to interpret an element broadly is more prominent in the legislative history of navigable waters than in the legislative history of the other elements.<sup>50</sup> The precipitous decline in judicial cognizance of these congressional voices for the liberal construction of the CWA offense's elements generally, and of navigable waters in particular, appears to have caused the decline in the courts' environmentally positive interpretations of the elements between the earlier and later decisions.

The decline in the use of legislative history to interpret the elements generally and navigable water particularly is attributable directly to attacks on the legitimacy of legislative history as an interpretive device by the new textualists, led by Justice Scalia.<sup>51</sup> Their main argument is that the intent of Congress is embodied in the statute itself rather than in committee reports or remarks of individual legislators.<sup>52</sup> Even if statements by individual members or groups of members can be taken at face value,<sup>53</sup> they represent only the intent of individual members or members of committees (or of the majorities of their members), not of Congress itself. If the intent of Congress is represented only in the statute it enacted, then the plain meaning of its text is the primary and most important interpretive device.<sup>54</sup>

in note 41 and divide by the total number of the earliest and latest sets of interpretations.

48. Calculate the number of times (+) is listed in Column C of Table B for the Navigable Waters element for the earliest and latest sets of interpretations identified in note 41. Divide the sums by 27, the number of interpretations of Navigable Waters in each period.
49. Count the number of times interpretive device 4 is used in Column E of Table B for all elements, for the earliest and latest sets of interpretations identified in note 41.
50. Compare discussions in Miller, 45 ELR 10548, 10551-54 with Miller, 44 ELR 10770, 10773; Miller, 44 ELR 10960, 10962-63; and Miller, 45 ELR 11129-31, *supra* note 3.
51. See ESKRIDGE, *supra* note 8, at 207-38; SCALIA & GARNER, *supra* note 9, at 391-96.
52. See SCALIA & GARNER, *supra* note 9, at 369-90. See also *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279-80 (1996) (Scalia, J., concurring in part and concurring in the judgment); *United States v. Estate of Romani*, 523 U.S. 517, 535-37 (1998) (Scalia, J., concurring); *Blanchard v. Bergeron*, 489 U.S. 87, 97-99 (1989) (Scalia, J., concurring); *Thompson v. Thompson*, 484 U.S. 174, 191-92 (1998) (Scalia, J., concurring).
53. Query whether individual members of Congress voting to enact the CWA in 1972 intended a particular meaning for addition or for the other elements and, if they did, whether we can trust the members to have disclosed their true intent in their floor remarks or otherwise. Would they have voted against the 200-page-long CWA if they did not agree with its definition of one of the elements? If not, was their intent to have another definition? What interpretive value is their intent?
54. Justice Scalia tells us plain meaning is the basic and most important canon. SCALIA & GARNER, *supra* note 9, at 56-58, 69-77. Although not a textualist, Eskridge agrees. ESKRIDGE, *supra* note 8, at 223. Others contend plain meaning is the starting place for any interpretation of a statute and hence is not a canon of construction; the canons come into play only if there is no plain meaning. See ABNER J. MIKVA & ERIC LANE, *LEGISLATIVE PROCESS* 689 (3d ed. 2009).

While this criticism of legislative history suggests caution against overreliance on it, the criticism does not warrant abandoning it altogether. The criticism is not the only or necessarily the best analysis of the subject.<sup>55</sup> And when applied to the CWA, it has an unduly negative impact, for it ignores the overwhelming legislative support for the statute and its broad interpretation.<sup>56</sup> Of course, Justice Scalia is averse to the broad interpretation canon as well.<sup>57</sup>

The other conspicuous changes in the numbers of uses of the interpretive devices between the early and late periods are the relative uses of plain meaning and precedent. In the earlier period, courts used precedent in 42 interpretations and plain meaning in 37. In the later period, courts used precedent in 58 interpretations, an increase of 16, and plain meaning in 38 interpretations, an increase of one.<sup>58</sup> The much greater increase in the use of precedent than in the use of plain meaning reflects the growing body of precedent available to support interpretation of the elements. At the outset of CWA litigation, almost by definition, there was no precedent (except for navigable waters) to draw on and close examination of the plain meaning, legislative history, and structure of the statute were the primary means available to courts to interpret it. Indeed, in 1980 (eight years after the enactment of the CWA), there were only 30 precedents interpreting a few issues under the four elements, and 20 of them were precedents for interpreting navigable waters.<sup>59</sup>

After several decades of CWA litigation, however, there are now more than 347 interpretations of the elements<sup>60</sup> illuminating multiple aspects, enabling courts in many cases to decide issues based on precedent alone. Indeed, the number of decisions using only one interpretive device grew from 16 in the earliest set of interpretations to 24 in the latest set, and 15 of the 24 later interpretations use precedent as the sole device, while only four of the earlier 16 interpretations did so.<sup>61</sup> The scant increase in the use of plain meaning over time does not reflect jurisprudential disfavor of that device—indeed, it is the preferred analytical tool of the same new textualists who advocate the abandonment of legislative history. Rather, it indicates a steady use of plain meaning in contrast to the great increase in the

55. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

56. To enact the CWA, Congress voted by a supermajority to override President Richard Nixon's veto. See *Rapanos v. United States*, 547 U.S. 715, 787, 36 ELR 20116 (Stevens, J., dissenting).

57. SCALIA & GARNER, *supra* note 9, 364-66 ("The false notion that remedial statutes should be liberally construed" is one of their "Thirteen Falsities Exposed.").

58. Compare the number of times interpretive devices 22 and 23 (plain meaning and precedent) are listed in Column E of Table B for all elements, for the earliest and latest sets of interpretations identified in note 41.

59. Count the number of judicial interpretations dated 1980 or before in Column B of Table B for all elements.

60. While these articles examine 258 reported decisions with 347 judicial interpretations of the elements through 2013, the number of precedents has continued to grow after that date.

61. Compare the number of times 1 is listed in Column F of Table B for all elements in the earliest interpretations and the latest interpretations identified above, and compare the number of times in those interpretations that the sole device listed in Column E is 23 (precedent).



use of precedent as the number of precedents available for use increases.

### E. Interpretive Devices Are Not All Outcome-Neutral

One apparent question arising from this study is whether use of particular interpretive devices leads to predominantly positive or negative environmental results. Because the devices were not designed only to interpret environmental statutes, however, the question is a broader one. Are particular interpretive devices designed to lead to predominately expansive or restrictive interpretations of statutes? Comparing the percentage of all interpretations studied reaching environmentally positive results with the percentage of interpretations reaching environmentally positive results using particular interpretive devices may shed some light on this issue. Overall, the decisions studied in these articles reached environmentally positive results or expansive interpretations in 76% of their interpretations of the four elements.

Predictably, environmentally positive results or expansive interpretations were similar for decisions using the precedent and plain meaning devices: 76% for precedent and 73% for plain meaning.<sup>62</sup> Because these two primary interpretive devices were used in most of the decisions studied, their positive environmental results or expansive interpretations could not differ markedly from the overall environmental results of all the decisions. In that respect, their use interpreting the elements is environmentally neutral. The only frequently used device that reached environmentally positive results or expansive interpretations significantly more often than the average is broad interpretation, used in decisions reaching environmentally positive results in 83% of the times used.<sup>63</sup> That should be no surprise, for the canon explicitly calls for expansive interpretations of remedial statutes.

Most of the other devices reached positive environmental results or expansive interpretations in less than 75% of their uses. That is consistent with the earlier conclusion that courts used more interpretive devices to reach environmentally negative decisions or restrictive statutory interpretation than to reach environmentally positive decisions. Devices used to achieve environmentally positive results or restrictive interpretations 50% or less of the time, however, may depart sufficiently from the norm to be examined as potential environmentally negative or restrictive devices. They are: rule of the last antecedent, used four times, 50% environmentally positive results; avoid

constitutional issues, used 11 times, 45% environmentally positive results; *ejusdem generis*, used five times, 40% environmentally positive results; equity, used once, 0% environmentally positive results; *expressio unius*, used three times, 33% environmentally positive results; honor federalism, used five times, 40% environmentally positive results; rule of lenity, used twice, 50% environmentally positive results; *noscitur a sociis*, used twice, 50% environmentally positive results; and harmonize with other statutes, used 31 times, 42% environmentally positive results.<sup>64</sup>

Courts used most of these devices so infrequently that there is insufficient data to analyze. Two of the devices, however, are secondary interpretive devices: avoid constitutional issues and harmonize with other statutes. These two devices are similar in that they invite or justify abandoning plain meaning, precedent, or even the integrity of the text being interpreted, here the CWA, in favor of the effectiveness of another text, such as the U.S. Constitution or another statute. As applied in a case arising under the CWA, they are conceptually environmentally negative devices and the results of their use in fact yield environmentally negative decisions in a significant percentage of cases. This analysis applies as well to some of the tertiary interpretive devices, for instance, honor federalism. That canon too invites abandoning the plain meaning of a statute in favor of an interpretation more favorable to states' rights.

## II. Comparative Statutory Interpretation: How and Why the Methods Used to Interpret Each Element Differ

### A. How the Natures of the Elements Differ

The compositions of the elements of the CWA offense are very different. "Addition" is abstract and, because it is the action element, is arguably the most important element. Yet, the CWA does not define addition. The statute defines "pollutant" as an exclusive list of 19 materials or categories of materials, with two exceptions.<sup>65</sup> Some of the listed materials are not commonly thought of as pollutants, for example, rock and sand; and many of the categories of materials are very broad, for example, "biological material" and "industrial waste." "Navigable waters" has a long history as a term of art developed by the Supreme Court to establish federal jurisdiction under the Commerce Clause<sup>66</sup> over waters used in the past for navigation, used presently for navigation, or usable in the future for navigation, with reasonable improvements.<sup>67</sup> The statute, however, defines navigable waters with the short phrase "waters of the United States,"<sup>68</sup> having no apparent meaning and no apparent connection with navigability. "Point source" has no com-

62. To calculate the percent of environmentally positive results using interpretive device 22 or 23 (plain meaning and precedent), count the total number of times that 22 or 23 is listed in Column E of Table B for all elements, count the number of times those interpretations have a plus (+) in column C of Table B for all elements and divide the second sum by the first sum.

63. Although the decisions using the devices of metaphor and interpret waivers narrowly reached environmentally positive results 100% of the time, courts used metaphor only five times and the waiver device only twice, too few to signal that they may be positively oriented interpretive devices. Calculate the percent of environmentally positive results using interpretive device 4 (broad interpretation) in the same manner as for interpretive devices 22 or 23 (plain meaning and precedent), but substituting interpretive device 4 for interpretive devices 22 or 23.

64. Calculate the percent of environmentally positive results using any of these interpretive devices (3, 5, 6, 8, 9, 14, 15, 17, 20, 21) in the same manner as for interpretive device 22 or 23.

65. CWA §502(6), 33 U.S.C. §1362(6).

66. U.S. CONST. art. III, cl. 8.

67. Miller, 45 ELR 10548, 10550-55, *supra* note 3.

68. CWA §502(7), 33 U.S.C. §1362(7).

mon meaning, but is a legislative construct in the CWA. The statute defines point source as a “discernible, confined and discrete conveyance,” including a nonexclusive list of 11 examples, and providing two exclusions.<sup>69</sup> Two of the definitions include lists, but they use lists differently. The definition of pollutant limits pollutants to listed materials and categories of materials, while the definition of point source is a “conveyance” and includes a non-limiting list of examples.

The compositions of these elements are so diverse that courts naturally use different approaches to interpret them. This part of the Article will explore those differences.

## B. How the Methods Used to Interpret Each Element Differ

### I. Addition

Addition is the action element in the offense. Because offenses are actions, addition is the central element of the offense. Because addition is the only element without a statutory definition, a regulatory definition, or even legislative history bearing directly on its meaning, it is likely to be the most difficult of the elements to interpret. This likelihood is increased because addition is an abstract idea rather than a concrete thing, like sand, a conveyance, or water (words used in the statutory definitions of the other elements).

Indeed, the author found addition the most difficult of the elements to interpret in these articles. One tangible sign of the difficulty was that the author was able to summarize in two paragraphs interpretations with environmentally positive and environmentally negative results in the articles examining pollutant or point source,<sup>70</sup> but not in the articles examining addition or navigable waters.<sup>71</sup> The articles on addition and navigable waters are comparable in length, and both are appreciably longer than the articles on the other two elements. Because the article on navigable waters analyzes twice as many judicial interpretations as the article on addition, however, their comparable lengths suggests that addition is the more difficult of the two terms to interpret. Of course, there is no agreed-upon scale of difficulty for interpreting different statutory texts, as there is for performing different dives in diving competitions. However, several observations made from the data set studied in these articles lend objective weight to the suggestion that addition is the most difficult element of the CWA offense to interpret.

First, when an element is difficult to interpret, courts can be expected to use more interpretive tools than when an element is easy to interpret. The relative difficulty in interpreting the elements, therefore, is reflected by the average number of devices courts have used to interpret them: 3.0 devices for interpreting addition, 2.8 for point source, 2.6

for navigable waters, and 2.5 for pollutant.<sup>72</sup> Alternatively, the greater number of devices the courts used to interpret addition could reflect the relatively greater percent of environmentally negative decisions interpreting addition than interpreting the other elements and the courts’ apparent need to provide greater justification for environmentally negative than for environmentally positive decisions.<sup>73</sup> Although these numbers are not hugely different, together with the other observations made here, they suggest that addition is the most difficult element to interpret.

Next, there are fewer judicial interpretations of addition than interpretations of any of the other elements. There are 63 judicial interpretations of addition; 70 of pollutant; 142 of navigable waters; and 72 of point source. Why does the lower number of addition interpretations suggest relative difficulty of interpretation? Because addition is not defined and is abstract, parties have a hard time framing legal issues based on it, harder than framing issues based on better-defined and less-abstract elements. With fewer parties making an issue of the addition element, fewer court decisions interpret it. The differences between the numbers of interpretations of addition, pollutant, and point source are not huge, but, again, when supported by other factors, they are suggestive that addition is the most difficult element to interpret.

Next, addition is the only element for which courts used the interpretive devices of metaphor and metamorphosis.<sup>74</sup> Neither are canons of construction.<sup>75</sup> They do not instruct us how to interpret an element; rather, they provide visual images to help understand abstract ideas. This does not help us decide which of several interpretations of addition is correct, as some canons of construction, such as legislative history, may do directly. But it does help to understand possible interpretations of addition. Metamorphosis is the phenomenon by which one thing becomes another, as a caterpillar slowly morphs into a butterfly in the cocoon. Often, metamorphosis is fanciful, as a man becoming a beetle in Kafka’s novel, *Metamorphosis*, or a man becoming a rhinoceros in Ionesco’s play, *The Rhinoceros*.

Thus, in *United States v. Deaton*, the court wrote “once that material was excavated from the wetland, its redeposit in that same wetland *added* a pollutant where none had been before.”<sup>76</sup> Several decisions, following arguments by the government, posit that bottom sediment dredged from

69. CWA §502(14), 33 U.S.C. §1362(14).

70. Miller, 44 ELR 10963-64; 45 ELR 11136-37, *supra* note 3.

71. Miller, 44 ELR 10770-807; 45 ELR 10548-88, *supra* note 3.

72. To calculate the average number of devices used to interpret a particular element, add the number of interpretive devices used in Column F of Table B for the interpretations of that element and divide that sum by the number of interpretations for that element listed on Table B.

73. Only 68% of the decisions interpreting addition were environmentally positive, while 77% of the decisions interpreting pollutant, 77% of the decisions interpreting navigable waters, and 75% of the decisions interpreting point source were environmentally positive. To calculate the percent of environmentally positive interpretations of an element, count the number of interpretations of that element with a (+) in Column C of Table B for all levels of court and divide the sum by the total number of interpretations of that element.

74. See Column E of Table B for interpretive devices 18 and 19 (metaphor and metamorphosis).

75. Neither Eskridge nor Justice Scalia and Garner identify them as canons of construction in their books on the canons. See ESKRIDGE, *supra* note 8; SCALLIA & GARNER, *supra* note 9.

76. 209 F.3d 331, 335-36, 30 ELR 20508 (4th Cir. 2000). The whole passage reads:

a wetland suddenly morphs into a pollutant when it is replaced in the same wetland,<sup>77</sup> a fanciful metamorphosis enabling there to be an addition of a pollutant to the wetland and therefore a violation of the CWA. The use of a fanciful metamorphosis in these interpretations, although elegant, suggests that the argument that a violation has occurred may be equally fanciful.

Another interpretive fiction suggested by EPA is the notion that all navigable waters are one, the so-called unitary navigable waters theory. The theory initially sounds plausible, alluding to the scientific notions of the hydrological cycle and the hydrosphere, in which all waters<sup>78</sup> are connected. But the totality of navigable waters is far from either the hydrological cycle or the hydrosphere. Both the hydrological cycle and the hydrosphere include water vapor in the atmosphere, clouds, precipitation, non-navigable surface water, groundwater, and water beyond the control of the United States, while EPA does not claim that any of them are navigable water under CWA §502(7) or any other CWA text. While EPA's unified navigable water fantasy appears to relate to the definition of "navigable waters," its sole purpose is to establish that when a person withdraws polluted water from one body of navigable water and discharges it into a less polluted body of navigable water, he does not add pollutants to the second body of water because both bodies are the same navigable water. Indeed, EPA claims the notion flows from the addition element.<sup>79</sup>

Whenever EPA's interpretations depart so far from the wording of the CWA, they are suspect as pure fantasy. This is illustrated by the metaphors associated with EPA's arguments. For instance, to illustrate the abstract idea of addition (or non-addition), the Supreme Court used the metaphor of taking "a ladle of soup from a pot, lift[ing] it above the pot, and pour[ing] it back into the pot" to suggest how a discharger could remove polluted water from a water body and pour it back into the same water body without adding anything to the water body.<sup>80</sup> The better metaphor

in this situation would be two soup pots on the same stove, one with split pea soup and another with chicken noodle soup. Lifting a ladle of split pea soup and placing it into the chicken noodle soup adds pollutants to the chicken noodle soup (imagine green chicken noodle soup), even though both vessels are soup pots, both are filled with soup, and both are on the same stove. Several other decisions used metaphors in their analysis of addition.<sup>81</sup>

## 2. Pollutant

The definition of pollutant is an exclusive list of specific substances, such as rock and sand, and broad categories of substances, such as "biological materials." The exclusivity of the list, the specific nature of the materials listed, and the broad nature of the listed categories of materials suggest that plain meaning will be the predominant device used to interpret the element, the interpretation of the pollutant element will be relatively easy, and the results will be largely environmentally positive.

Courts used precedent and plain meaning more than any other devices to interpret all of the elements. But while they generally used precedent more than plain meaning, courts used plain meaning in 49 of the 70 interpretations of pollutant, and used precedent in only 36 of them. While courts also used plain meaning more than precedent to interpret addition, they did so only by a very slight margin.<sup>82</sup> Moreover, courts used only one interpretive device in 25 of their 70 interpretations of pollutant, and 16 of those 25 interpretations used plain meaning.<sup>83</sup>

The predominance of plain meaning in the interpretation of pollutant is a strong indication that the element is relatively easy to interpret. This is confirmed by the relatively smaller number of devices the courts used to interpret pollutant than to interpret the other elements. As noted earlier, the courts used 25 interpretive devices to interpret the four elements. But courts did not use all 25 of the devices to interpret any one of the elements; they used 12 devices to interpret pollutant, 13 to interpret addition, 18 to interpret point source, and 20 to interpret navigable waters.<sup>84</sup>

As discussed above, decisions interpreting more difficult text use more interpretive devices than decisions interpreting less difficult text. The average number of devices used to interpret pollutant is less than the average number of devices used to interpret the other elements: 2.5 for pollutant, 2.8

The idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable, at least when an activity transforms some material from a non-pollutant into a pollutant, as occurred here. In the course of digging a ditch across the Deaton property, the contractor removed earth and vegetable matter from the wetland. Once it was removed that material became "dredged spoil," a statutory pollutant and a *type* of material that up until then was not present on the Deaton property. It is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state. What is important is that once that material was excavated from the wetland, its redeposit in that same wetland *added* a pollutant where none had been before.

The court did not explain why earth and vegetable matter were less threatening before they were removed from the ditch bottom than when they were replaced there.

77. See Miller, 44 ELR 10770, n.23, *supra* note 3.

78. Or almost all. Some pockets of groundwater have been isolated from other waters for millions of years. But it was once surface water, as perhaps it could be again in the far-off future.

79. See Miller, 44 ELR 10781-94; 45 ELR 10578-80, *supra* note 3.

80. South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 34 ELR 20021 (2004) (quoting Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York, 273 F.3d 481, 492 (2d Cir. 2001)). Both decisions rejected the concept of unitary navigable waters, see Miller, 44 ELR at

10782-83, *supra* note 3. Both decisions questioned or rejected the concept that discharging a polluted navigable water into a pristine navigable water did not add a pollutant to the pristine water. See the author's earlier article on Addition, 44 ELR at 10782-83, 10788-90, *supra* note 3.

81. See Miller, 44 ELR 10770, n.241, *supra* note 3.

82. Courts used plain meaning 52 times and precedent 51 times to interpret addition. They used plain meaning 22 times and precedent 131 times to interpret navigable waters. And they used plain meaning 42 times and precedent 63 times to interpret point source. To calculate how many decisions interpreting an element used a particular interpretive device, see *supra* note 27.

83. Count the number of decisions with only interpretive device 22 in Column E of Table B for pollutant.

84. To calculate the number of different devices used to interpret an element, count the number of different devices (numbers 1 to 25) in Column E of Table B for that element.



for point source, 2.6 for navigable waters, and 3.0 for addition. Moreover, courts used only one device to interpret pollutant in 25 of the 70 interpretations of the term.<sup>85</sup> Indeed, the sole device in 16 of the 25 interpretations of pollutant was plain meaning, while precedent was the dominant sole device used to interpret the other elements.<sup>86</sup>

The positive environmental results of decisions interpreting the elements of the CWA offense are 78% for pollutant, 75% for point source, 77% for navigable waters, and 68% for addition.<sup>87</sup> As explained above, courts use more interpretive devices to decide difficult cases and to decide cases with environmentally negative results. Many of the environmentally negative results interpreting pollutant were in decisions in which the pollutant was pervasively regulated by another statute.<sup>88</sup>

The differences in none of these comparisons are great enough by themselves to prove the point. But together they are persuasive that pollutant is relatively easy to interpret and that plain meaning drives its interpretation.

### 3. Navigable Waters

Because navigable waters is a term of art the Supreme Court developed in a dozen decisions over a century and a half to define the extent of federal Commerce Clause jurisdiction over waterways, precedent has driven the interpretation of that element from the outset. Courts used precedent to decide whether waters were navigable under the CWA from the first decisions addressing the issue.<sup>89</sup> There was no comparable body of earlier precedent to help interpret the other elements. Courts have used precedent far more often than plain meaning to interpret navigable waters: 131 times as opposed to 22 times. But courts used plain meaning somewhat more than precedent to interpret the other elements: 153 times as opposed to 144 times.<sup>90</sup> This may change over time as more precedent becomes available to interpret the other elements.

Because the interpretation of navigable waters is so precedent-driven, the author organized much of the analysis in his earlier article on navigable waters by comparing the analyses and outcomes of lower court interpretations in groups, starting with lower court interpretations occurring before any Supreme Court ruling on the subject,

proceeding with lower court interpretations between successive Supreme Court rulings, and ending with lower court interpretations after the latest Supreme Court ruling. There were noticeable differences between the analyses and outcomes of the later groups of interpretations, reflecting the influence of the latest Supreme Court precedent.<sup>91</sup>

For the same reasons, courts have used constitutionally based devices to interpret the phrase. Indeed, courts used the canons “construe statutes narrowly to avoid constitutional issues” and “honor federalism” to interpret navigable waters and did not use them to interpret other elements of the CWA offense.<sup>92</sup>

Despite the fact that the Supreme Court already had defined navigable waters in some detail, Congress defined the term in the CWA as the “waters of the United States,” a term having no obvious or traditional meaning. Why would Congress have done so? The relevant committee reports and floor statements of the drafters of the statute are quite clear on this: Congress defined the term as the waters of the United States to cast aside the straitjacket of the traditional meaning of navigable waters and replace it with a broader term reaching the full extent of Congress’ power over waters under the Constitution.<sup>93</sup> An interpreter of navigable waters as it appears in the CWA would be aware of this if she has read the relevant legislative history, but would be puzzled by it if she has not. At the same time, the legislative history does not explain why Congress failed to jettison the term navigable waters altogether and directly use the term waters of the United States as the element of the CWA offense.

It is noted above that the use of legislative history to interpret the elements of the CWA offense declined precipitously between the earliest and latest sets of interpretations because courts questioned its efficacy.<sup>94</sup> That decline is most aggravated for interpretations of navigable waters. In the earliest set of interpretations, courts used legislative history in 16 interpretations of navigable waters and in 11 interpretations of the other elements. In the latest set of interpretations, courts used legislative history in one interpretation of navigable waters and in three interpretations of the other elements.<sup>95</sup>

There was a parallel decline in the courts’ use of the canon of broad interpretation in decisions interpreting navigable waters. In the earliest set of interpretations, courts used broad interpretation in 17 interpreting navigable waters, while in the latest set of interpretations, they used it in eight interpretations of navigable waters. In decisions interpreting the other elements, however, courts used broad interpretation steadily in both sets of interpretations, using it in seven interpretations during the earliest period

85. To calculate the percent of interpretations in which the courts used only one device to interpret a particular element, count the number of decisions with a 1 in Column F of Table B for that element and divide the sum by the total of decisions interpreting that element. Courts used only one device in 24% of the 62 interpretations of addition, 17% of the 71 interpretations of point source, and 28% of the 136 interpretations of navigable waters.

86. Count the number of decisions with a 1 in Column F of Table B for addition and divide the sum by the total of decisions interpreting addition (62).

87. To calculate the percent of positive environmental results of decisions interpreting any element, count the number of interpretations of that element with a plus (+) in Column C of Table B for that element and divide the sum by the number of interpretations of that element.

88. See Miller, 44 ELR 10960, *supra* note 3, nn. 49-57.

89. See Column E of Table B for Navigable Waters and note the earliest court of appeals and district court decisions, using interpretive device 23 (precedent).

90. Count the number of times interpretive devices 22 or 23 (plain meaning and precedent) are used in Column E of Table B for each of the elements addition, pollutant, and point source and add the three sums.

91. See Miller, 45 ELR 10548, *supra* note 3, at 10558-71.

92. Compare the number of times interpretive devices 5 and 15 (interpret statutes to avoid constitutional issues and honor federalism) are used in Column E of Table B for navigable waters and for addition, pollutant, and point source.

93. See the author’s earlier article on interpreting navigable waters, 45 ELR at 10551-54, *supra* note 3.

94. See *supra* note 41.

95. Count the number of decisions listing interpretive device 16 in Column E of Table B for each element in the earliest and latest sets of decisions.



and in eight interpretations in the latest set.<sup>96</sup> The decline in the use of broad interpretation for navigable water can be directly attributed to the decline in the use of legislative history generally, because the legislative history of navigable waters explicitly and repeatedly urges that the phrase be broadly interpreted and earliest decisions cited that history as a reason to broadly interpret the term.

The most striking difference between interpretations of navigable waters and interpretations of the other elements, however, is between the numbers of interpretations of each element: 63 for addition, 70 for pollutant, 142 for navigable waters, and 72 for point source. The numbers of interpretations of pollutant and point source, the two elements with list-based definitions, are very close, while the number of interpretations of addition is slightly less. But the number of interpretations of navigable waters is approximately twice the number of interpretations of any of the other elements. Navigable waters is the numerical leader of the elements in other respects. The number of Supreme Court interpretations of navigable waters in the CWA doubles the numbers of the Court's interpretations of any of the other elements: two for addition, three for pollutant, six for navigable waters, and two for point source.<sup>97</sup> However, this is probably a function of the underlying differences in the total numbers of interpretations of the different elements.

The courts also employed more canons of construction to interpret navigable waters (20 canons used) than to interpret addition (13), pollutant (12), or point source (17). While this partly reflects the much larger number of interpretations of navigable water than of the other elements, it also reflects the difficulty courts have had in reconciling the congressional desire that courts interpret navigable waters broadly, as suggested by the congressional definition of navigable waters as the waters of the United States, with the continued congressional use of the more restrictive navigable waters as the element of the CWA offense.

What, then, accounts for the far greater number of interpretations of navigable waters than interpretations of any of the other elements? The answer is not evident from the nature of the term, its definition, or its legislative history. Instead, the answer lies in the predominance of interpretations of navigable waters in cases arising under §404, compared to the far lesser importance of interpretations of the other elements in cases arising under §404. Of the 142 interpretations of navigable waters, 81 or 57% were in cases arising under §404, while of the 208 interpretations of the other elements, 64 or 32% were in cases arising under §404.<sup>98</sup> Indeed, when the number of interpretations in cases brought under §404 are subtracted from the total

number of interpretations of each element, the numbers of the remaining interpretations, almost all in cases brought under §402,<sup>99</sup> are far more similar: 42 for addition, 40 for pollutant, 61 for navigable waters, and 59 for point source.<sup>100</sup>

Significantly, cases brought under §404 do not raise serious issues under some of the other elements. For instance, the courts are unanimous that earthmoving equipment used in filling wetlands are point sources<sup>101</sup> and that fill material is a "pollutant."<sup>102</sup> The addition element has not been a fruitful target for challenge in decisions in cases brought under §404.<sup>103</sup> This leaves §404 defendants little to argue, except that the periodically dry wetlands they are developing are not navigable waters. From the outset, it was counterintuitive to many that wetlands, particularly those that are dry much of the year, are navigable waters.<sup>104</sup> Hence, the majority of decisions in cases brought under §404 focused on navigable waters, 61% or 81 of 142, while a minority of interpretations in cases brought under §404 focused on one of the other elements in the CWA offense, 31% or 64 of 205.<sup>105</sup>

Another partial explanation for the greater number of interpretations of navigable waters than of the other elements results from EPA's regulatory treatment of the element. For the other elements, EPA either did not promulgate a regulatory definition (addition) or promulgated definitions that differed only slightly from the statutory definitions (pollutant and point source).<sup>106</sup> EPA did not promulgate a regulatory definition of navigable waters, but instead promulgated a definition of waters of the United States, the congressional definition of navigable waters. By doing so, EPA attempted to redirect attention from the historical use and meaning of the term navigable waters to the apparently broader statutory waters of the United States definition. Moreover, EPA's definition of waters of the United States is very long and detailed, extending far beyond the traditional understanding of navigable waters.<sup>107</sup> This signaled the government's intention to implement the CWA's permit programs, particularly the §404 program, beyond the traditional understanding of navigable waters, inviting additional litigation.

Many of the factors discussed above suggest restrictive rather than expansive interpretations of navigable waters:

99. Some decisions are under the CWA §401, 33 U.S.C. §1341, the Oil Pollution Act (OPA), 33 U.S.C. §§2701-2761, ELR STAT. OPA §§1001-7001, and the National Environmental Policy Act (NEPA), 42 U.S.C. §§4321-4370f, ELR STAT. NEPA §§2-209.

100. Subtract the number of §404 decisions listed for each element from the total number of decisions listed for each element.

101. See Miller, 45 ELR 11129, 11145-46, *supra* note 3.

102. See Miller, 44 ELR 10960, 10974-77, *supra* note 3.

103. See Miller, 44 ELR 10770, 10778-79, 10790-91, *supra* note 3.

104. Indeed, neither the wording nor the legislative history of §404 as it was enacted in 1972 mention wetlands nor hint that the section was intended to protect wetlands from filling. See Miller, 45 ELR 10548, 10554-56, *supra* note 3.

105. Compare the number of §404 interpretations in Column H of Table B for navigable waters with the numbers of §404 decisions for addition, pollutant, and point source. To calculate the percent of §404 decisions under an element, divide the total of §404 interpretations decisions for that element by the total number of interpretations for that element.

106. 40 C.F.R. §122.2.

107. *Id.*

96. Count the number of decisions listing interpretive device 4 in Column E of Table B for each element in the earliest and latest sets of decisions.

97. See the numbers of Supreme Court decisions for each element in Table A or B.

98. Count the number of §404 interpretations listed for each element in Column H of Table B. To calculate the relevant percentages, divide the number of §404 interpretations for each element by the total number of interpretations for each element.

the use of the canons of “honor federalism” and “interpret statutes narrowly to avoid constitutional issues” exclusively to interpret navigable waters; virtually abandoning use of legislative history to interpret the element; and curtailing the use of the canon of “broad construction” while the legislative history of navigable waters urged use of that canon. The cumulative impact of these factors is the decline in environmentally positive results interpreting navigable waters from 25 or 97% in the earliest set of interpretations to 19 or 70% in the latest set of interpretations,<sup>108</sup> while the percent of environmentally positive interpretations of all of the elements between those periods remained virtually the same.<sup>109</sup>

#### 4. Point Source

Because the term point source has no inherent meaning, the plain meaning canon of construction is not of much use interpreting the phrase. On the other hand, the CWA’s definition of point source is the most grammatically complex and detailed of its definitions of the elements. The statute defines it as a “discernible, confined and discrete conveyance,” followed by a non-exclusive list of 11 examples and ending with two exclusions. Plain meaning can be used to interpret the statutory definition, as can interpretive devices centering on lists and exclusions. The complexity of the definition reflects the fact that the term point source is a legislative construct with no previous meaning. That complexity suggests relatively more interpretive devices may be susceptible to use in understanding it than in understanding the other elements.

Because the statutory definition of point source includes a long list of examples, cases in which discharges are through a listed example are usually easy to decide. Indeed, more than one-half the decisions interpreting point source use two or fewer interpretive devices and two or fewer precedents.<sup>110</sup> Where a case does not involve a discharge through a listed conveyance, however, the term point source may be particularly difficult to interpret both because of the complexity of the definition and because it is the only element in the offense to have an opposite in the CWA, a “non-point source.” The CWA provides very different programs to control discharges from point sources and nonpoint sources,<sup>111</sup> but it provides no definition of nonpoint source

and draws no distinct line between the two. Although by its construction, nonpoint source is the opposite of a point source, that does not tell us whether a nonpoint source is something other than a conveyance or is a conveyance that is not discernible, confined, and discrete, or both.

Both the statute and its legislative history suggest that Congress could not draw a clear line between point and nonpoint sources.<sup>112</sup> Both suggest that precipitation runoff and agricultural waste are usually discharged by nonpoint sources, but not always.<sup>113</sup> Although the statute and its legislative history suggest only these two differences between point and nonpoint sources, most of the discharges of pollutants that courts have held to be from nonpoint sources had nothing to do with either precipitation runoff or agricultural wastes.<sup>114</sup>

The complexity of the statutory definition of point source lends itself to use of a wide variety of devices to interpret it. For instance, interpretive devices bearing on lists and exceptions, including *ejusdem generis*, *expressio unius*, and *noscitur a sociis*, are susceptible for use interpreting only elements that have lists and exceptions, pollutant and point source. But the list in the definition of point source is exclusive, while the list in the definition of pollutant is inclusive. The existence of statutory programs to address pollution from both point sources and nonpoint sources suggest the structure of the statute should be commonly used to interpret the point source definition to direct the pollutant discharges at issue into one program or the other. Courts used the structure of the statute interpretive device in 18 interpretations of point source.<sup>115</sup>

Because of the grammatical complexity of the statutory definition of point source, and because Congress and EPA failed to draw a distinct line between point and nonpoint sources, cases in which there is no discharge through a listed example may be unusually difficult to decide. Indeed, courts used 18 of the 25 interpretive devices to construe point source. They used only 13 devices to interpret addition and 12 to interpret pollutant. Although courts used 20 devices to interpret navigable water and 18 to interpret point source, it took them 142 interpretations to do so for navigable water, but only 71 to do so for point source, using an average of 2.8 devices to interpret point source and an average of 2.6 devices to interpret navigable waters.

The failure of Congress or EPA to draw a discernible line between point sources and nonpoint sources also explains why courts are only a few steps away from adopting a factors test to help them distinguish between the two in situations involving precipitation flow or agricultural wastewater.<sup>116</sup> The same factors test may be just as useful in many other situations.<sup>117</sup>

108. To calculate the percent of positive environmental decisions for the earliest and latest sets of interpretations of navigable waters, see *supra* note 48. To calculate the percent of positive environmental decisions for the earliest and latest sets of interpretations of other elements, repeat the same procedure using the number of positive results in Column C of Table B for element and dividing by the total number of interpretations in that set of decisions shown *supra* in note 41.

109. To calculate the percent of positive environmental decisions for the earliest or latest set of interpretations of all elements, count the number of positive results marked by (+) in Column C of Table B for that set of interpretations and divide by 67 (the number of the earliest interpretations for all elements).

110. Count the number of times that 1 or 2 is listed in Column E of Table B for point source (41 of the 72 interpretations listed for point source in that column).

111. See Miller, 45 ELR 11129, 11131-33, *supra* note 3.

112. *Id.* at 11129-34.

113. *Id.*

114. *Id.* at 11145-48.

115. Count the number of times (24) that interpretive device appears in Column E for Navigable Waters in Table B.

116. See Miller, 45 ELR 11129, 11139-44, *supra* note 3.

117. *Id.*

### III. Conclusions

Studying the interpretations of the four elements of the CWA offense informs us of their meanings. Assuming that those elements are reasonably representative of other statutory text, this study also provides lessons on statutory interpretation itself. Courts used a total of only 25 interpretive devices in the course of 342 interpretations of the elements, using only nine of them in 10 or more interpretations. On average, courts used 2.6 devices in each interpretation; slightly more than 25% of the interpretations used only a single device.

Most of the time courts used a single device, they used plain meaning or precedent. Indeed, plain meaning and precedent were the predominant devices courts used throughout the interpretations, with plain meaning generally dominating at the outset of interpretations, when few precedents were available, and precedent generally dominating later, as the number of precedents available increased. This was not true for the interpretation of navigable waters, for which precedents were available from the outset and which dominated its interpretation throughout.

Other changes in the devices used by courts occurred over time—for instance, the use of legislative history decreased precipitously over time as developing jurisprudence questioned its legitimacy. Courts used a maximum of nine devices in any interpretation, and used five or more devices in only slightly more than 15% of the interpretations. The number of devices used in an interpretation increased as the level of court and the depth of legal analysis increased. The Supreme Court used twice as many devices in its average opinion as district courts used in their average opinions. The Supreme Court rarely used a single interpretive device, while district courts used a single device in nearly one-third of their interpretations.

A few of the interpretive devices inherently encourage expansive interpretations of statutory text (for example, interpret remedial statutes broadly to achieve their goals), while others inherently encourage restrictive interpretations (for example, interpret statutes to avoid constitutional issues or to harmonize with other statutes). In the context of environmental statutes, expansive and restrictive interpretations translate into environmentally positive or environmentally negative decisions. It seems likely that these patterns would be observed interpreting a great deal of other statutory text.

Statutory texts may be different in nature; even the elements of the same offense studied in these articles are different in nature. Those differences result in courts using different analyses and devices to interpret the elements. A simple example is that statutory text with a list of covered items invites questions whether the list is inclusive or exclu-

sive and, if it is inclusive, whether the item at issue in the case is on the list or, if not, whether the item is similar to or different from the items listed. These questions and their associated canons of construction simply do not apply to statutory text lacking a list of covered items.

Differences in the natures of texts analyzed also lead to the ease or difficulty of interpreting the texts, as is evident from the differences in the natures of the CWA elements studied in this series of articles. For instance, pollutant, with its exclusive list of specific materials and broad categories of materials, is relatively easy to interpret by determining whether the material at issue in a case is on the list or within a category of material on the list. On the other hand, addition, which is undefined and abstract, is relatively difficult to interpret. Although there is no scale of difficulty for interpreting statutory texts, several objective factors comparing the judicial interpretations of the addition and pollutant elements of the CWA suggest that addition is more difficult to interpret than pollutant.

More sophisticated analyses comparing the interpretations of different statutory texts or different parts of a statutory text may help understand the text or its interpretation. For instance, in the author's earlier article on navigable waters, he suggested that one of the reasons there are so many more decisions interpreting that element than any of the other elements is that courts were comfortable interpreting it from the outset of CWA litigation: Courts had been interpreting the term for a century and a half in other contexts, whereas they had no prior familiarity with the other elements of the CWA offense.<sup>118</sup> This suggestion seemed plausible and the Court's historic development of the meaning of navigable waters certainly explained a great deal about judicial interpretation of that phrase.

On closer examination, however, the real reason there are so many more decisions interpreting navigable waters than interpreting any of the other elements of the CWA offense is that there are twice as many decisions in cases brought under CWA §404 questioning the existence of navigable waters as there are questioning the existence of any other element. That, in turn, probably results from the comparative strength of legal challenges to the meaning of navigable waters in §404 cases, compared to legal challenges to the meanings of the other elements. This factor is not apparent from analyzing navigable waters decisions alone, but becomes discernible only from understanding all four elements and the decisions analyzing them. The author recognized the importance of §404 in interpreting navigable waters when he wrote the third article in this series, but did not recognize its full importance until he had finished analyzing the meanings of all four elements and wrote this comparative analysis.

---

118. See Miller, 45 ELR 10548, *supra* note 3.

**Table A: Decisions Interpreting the Elements of the Water Pollution Offense**

	Element Interpreted <sup>a</sup>
<b>U.S. Supreme Court Decisions</b>	
1. Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, 133 S. Ct. 710, 43 ELR 20004 (2013)	3
2. Decker v. Northwest Env'tl. Def. Ctr., 133 S. Ct. 1326, 43 ELR 20062 (2013)	4
3. Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, 557 U.S. 261, 39 ELR 20133 (2009)	2
4. Rapanos v. United States, 547 U.S. 715, 36 ELR 20116 (2006)	3
5. S.D. Warren Co. v. Maine Bd. of Env'tl. Prot., 547 U.S. 370, 36 ELR 20089 (2006)	1
6. South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 34 ELR 20021 (2004)	1, 3, 4
7. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 31 ELR 20382 (2001)	3
8. International Paper Co. v. Ouellette, 479 U.S. 481, 17 ELR 20327 (1987)	3
9. United States v. Riverside Bayview Homes, Inc. 474 U.S. 121, 16 ELR 20086 (1985)	3
10. Weinberger v. Barcelo-Romero, 456 U.S. 305, 12 ELR 20538 (1982)	2
11. Train v. Colorado Pub. Interest Research Grp., 426 U.S. 1, 6 ELR 20549 (1976)	2
<b>U.S. Circuit Court of Appeals Decisions</b>	
12. Natural Res. Def. Council v. County of Los Angeles, 673 F.3d 880, 41 ELR 20109 (9th Cir. 2011), <i>rev'd on other grounds</i> , 133 S. Ct. 710, 43 ELR 20180 (2013)	1, 4
13. Northwest Env'tl. Def. Ctr. v. Brown, 640 F.3d 1063, 41 ELR 20178 (9th Cir. 2011)	4
14. National Pork Producers Council v. U.S. EPA, 635 F.3d 738, 41 ELR 20115 (5th Cir. 2011)	4
15. United States v. Donovan, 2011 WL 5120605, 42 ELR 20328 (3d Cir. 2011)	3
16. Precon Dev. Corp. v. U.S. Army Corps of Eng'rs, 633 F.3d 278, 41 ELR 20071 (4th Cir. 2011)	3
17. Greater Yellowstone Coalition v. Lewis, 628 F.3d 1143, 41 ELR 20059 (9th Cir. 2010)	4
18. West Virginia Highlands Conservancy, Inc. v. Huffman, 625 F.3d 159, 40 ELR 20014 (4th Cir. 2010)	1
19. United States v. Agosto-Vega, 617 F.3d 541, 40 ELR 20222 (1st Cir. 2010)	3, 4
20. Peconic Baykeeper, Inc. v. Suffolk Cnty., 600 F.3d 180, 40 ELR 20098 (2d Cir. 2010)	4
21. United States v. Milner, 583 F.3d 1174, 39 ELR 20232 (9th Cir. 2009)	3
22. Cordiano v. Metacoon Gun Club, Inc., 575 F.3d 199 (2d Cir. 2009)	3, 4
23. United States v. Bailey, 571 F.3d 791, 39 ELR 20148 (8th Cir. 2009)	3
24. Friends of Everglades v. South Fla. Water Mgmt. Dist., 570 F.3d 1210, 39 ELR 20118 (11th Cir. 2009)	1, 3
25. Ohio Valley Env'tl. Coal. v. Aracoma Coal Co., 556 F.3d 1717 (4th Cir. 2009)	3
26. United States v. Cundiff, 555 F.3d 200, 39 ELR 20025 (6th Cir. 2009)	1, 3
27. National Cotton Council of Am. v. U.S. EPA, 553 F.3d 927, 39 ELR 20006 (6th Cir. 2009)	1, 2, 4
28. Oregon Natural Desert Ass'n v. U.S. Forest Serv., 550 F.3d 778, 39 ELR 20297 (9th Cir. 2008)	4
29. United States v. Lucas, 516 F.3d 316, 38 ELR 20041 (5th Cir. 2008)	3, 4
30. United States v. Robinson, 505 F.3d 1208, 37 ELR 20265 (11th Cir. 2007)	3
31. Northern Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 37 ELR 20202 (9th Cir. 2007)	3
32. United States v. Moses, 496 F.3d 984, 37 ELR 20206 (9th Cir. 2007)	3
33. San Francisco Baykeeper v. Cargill Salt Div., 481 F.3d 700 (9th Cir. 2007)	3
34. United States v. Johnson, 467 F.3d 56, 36 ELR 20218 (1st Cir. 2006)	3
35. United States v. Gerke Excavation, Inc., 464 F.3d 723, 36 ELR 20200 (7th Cir. 2006)	3, 4
36. Northern Cal. River Watch v. City of Healdsburg, 457 F.3d 1023, 36 ELR 20163 (9th Cir. 2006)	3
37. Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 451 F.3d 77, 36 ELR 20111 (2d Cir. 2006)	1, 3
38. United States v. Hubenka, 438 F.3d 1026, 36 ELR 20043 (10th Cir. 2006)	3
39. Baccarat Freemont Dev., LLC v. U.S. Army Corps of Eng'rs, 425 F.3d 1150, 35 ELR 20212 (9th Cir. 2005)	3
40. Fairhurst v. Hagener, 422 F.3d 1146 (9th Cir. 2005)	2
41. Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133, 35 ELR 20175 (10th Cir. 2005)	1, 4
42. United States v. Gerke Constr., Inc., 412 F.3d 804 (5th Cir. 2005), <i>judgment vacated on other grounds</i> , 548 U.S. 901 (2006)	4
43. Waterkeeper Alliance, Inc. v. U.S. EPA, 399 F.3d 486, 35 ELR 20049 (2d Cir. 2005)	1
44. Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 34 ELR 20104 (11th Cir. 2004)	3, 4

a. 1 = Addition; 2 = Pollutant; 3 = Navigable Waters; and 4 = Point Source.



	Element Interpreted <sup>a</sup>
45. United States v. Phillips, 367 F.3d 846 (9th Cir. 2004)	3
46. Greenfield Mills, Inc. v. Macklin, 361 F.3d 934, 34 ELR 20022 (7th Cir. 2004)	1
47. In re Needham, 354 F.3d 340 (5th Cir. 2003)	3
48. No Spray Coal., Inc. v. City of New York, 351 F.3d 602, 34 ELR 20007 (2d Cir. 2003)	1
49. Treacy v. Newdunn Assocs., LLP, 344 F.3d 407 (4th Cir. 2003)	3
50. United States v. Rueth Dev. Co., 335 F.3d 598 (7th Cir. 2003)	3
51. United States v. Deaton, 332 F.3d 698 (4th Cir. 2003)	3
52. Alabama Rivers Alliance v. Federal Energy Regulatory Comm'n, 325 F.3d 290 (D.C. Cir. 2003)	1
53. Northern Plains Res. Council v. Fidelity Exploration & Dev. Co., 325 F.3d 1155 (9th Cir. 2003)	2
54. Kentuckians for Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003)	2
55. League of Wilderness Defenders v. Forsgren, 309 F.3d 1181 (9th Cir. 2002)	4
56. Altman v. Town of Amherst, N.Y., 47 F. App'x 62 (2d Cir. 2002)	2
57. Community Ass'n for Restoration of Env't v. Henry Bosma Dairy, 305 F.3d 943 (9th Cir. 2002)	3, 4
58. United States v. Krillich, 303 F.3d 784 (7th Cir. 2002)	3
59. Fishermen Against Destruction of Env't v. Closter Farms, Inc., 300 F.3d 1294 (11th Cir. 2002)	4
60. Association to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007 (9th Cir. 2002)	2, 4
61. Miccosukee Tribe of Indians of Fla. v. South Fla. Water Mgmt. Dist., 280 F.3d 1364, 32 ELR 20475 (11th Cir. 2002)	1
62. Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001)	1, 3
63. Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, 261 F.3d 810, 32 ELR 20011 (9th Cir. 2001)	1, 2, 3, 4
64. Rice v. Harken Exploration Co., 250 F.3d 264, 31 ELR 20599 (5th Cir. 2001)	3
65. Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 31 ELR 20535 (9th Cir. 2001)	2, 3
66. Froebel v. Meyer, 217 F.3d 928, 30 ELR 20746 (7th Cir. 2000)	4
67. United States v. Deaton, 209 F.3d 331, 30 ELR 20508 (4th Cir. 2000)	1, 2
68. Driscoll v. Adams, 181 F.3d 1285, 29 ELR 21387 (11th Cir. 1999)	2, 3
69. United States v. TGR Corp., 171 F.3d 762, 29 ELR 21059 (2d Cir. 1999)	3
70. Resource Investments, Inc. v. U.S. Army Corps of Eng'rs, 151 F.3d 148, 28 ELR 21407 (10th Cir. 1998)	2
71. National Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 28 ELR 21318 (D.C. Cir. 1998)	1
72. Waste Action Project v. Dawn Mining Corp., 137 F.3d 1426, 28 ELR 21035 (9th Cir. 1998)	2
73. United States v. Wilson, 133 F.3d 251, 28 ELR 20299 (4th Cir. 1997)	1, 2, 3
74. United States v. West Indies Transp., Inc., 127 F.3d 299, 28 ELR 20202 (3d Cir. 1997)	4
75. North Carolina v. Federal Energy Regulatory Comm'n, 112 F.3d 1175, 27 ELR 20929 (D.C. Cir. 1997)	1
76. Chemical Weapons Working Grp., Inc., v. U.S. Dep't of Army, 111 F.3d 1485, 27 ELR 21130 (10th Cir. 1997)	1, 2
77. United States v. Eidson, 108 F.3d 1336, 27 ELR 20853 (11th Cir. 1997)	2, 3
78. Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 27 ELR 20622 (1st Cir. 1996)	1, 3
79. Hughey v. JMS Dev. Corp., 78 F.3d 1523, 26 ELR 20924 (11th Cir. 1996)	2
80. Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc., 73 F.3d 546, 26 ELR 20522 (5th Cir. 1996)	2
81. Leslie Salt Co. v. United States, 55 F.3d 1388, 25 ELR 21406 (9th Cir. 1995)	2
82. Concerned Area Residents for Env't v. Southview Farm, 34 F.3d 114, 24 ELR 21480 (3d Cir. 1994)	2, 4
83. Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 24 ELR 21080 (7th Cir. 1993)	3
84. Committee to Save Mokelumne River v. East Bay Mun. Util. Dist., 13 F.3d 305, 24 ELR 20225 (9th Cir. 1993)	1, 2, 4
85. United States v. Plaza Health Labs., Inc., 3 F.3d 643, 23 ELR 21526 (2d Cir. 1993)	2, 4
86. United States v. Pozgsai, 999 F.2d 719, 23 ELR 21012 (3d Cir. 1993)	2, 3
87. Hoffman Homes, Inc. v. Administrator, U.S. EPA, 999 F.2d 256, 23 ELR 21139 (7th Cir. 1993)	3
88. United States v. Schallom, 998 F.2d 196 (4th Cir. 1993)	2
89. United States v. Law, 979 F.2d 977, 23 ELR 20466 (4th Cir. 1992)	1
90. Save Our Community v. U.S. EPA, 971 F.2d 1155 (5th Cir. 1992)	1
91. Town of Norfolk v. U.S. Army Corps of Eng'rs, 968 F.2d 1438, 22 ELR 21337 (1st Cir. 1992)	2, 3
92. American Mining Cong. v. U.S. EPA, 965 F.2d 759, 22 ELR 21135 (9th Cir. 1992)	1
93. Dague v. City of Burlington, 935 F.2d 1343, 21 ELR 21133 (2d Cir. 1991)	4
94. Carr v. Alta Verde Indust., Inc., 931 F.2d 1055, 21 ELR 21005 (5th Cir. 1991)	4
95. Rybachek v. U.S. EPA, 904 F.2d 1276, 20 ELR 20973 (9th Cir. 1990)	1, 2

		Element Interpreted <sup>a</sup>
96.	Inland Steel Co. v. U.S. EPA, 901 F.2d 1491, 20 ELR 20889 (7th Cir. 1990)	3
97.	Natural Res. Def. Council v. U.S. EPA, 863 F.2d 1420, 19 ELR 20225 (9th Cir. 1988)	3
98.	National Wildlife Fed'n v. Consumers' Power Co., 862 F.2d 580, 19 ELR 20235 (6th Cir. 1988)	1, 2, 3
99.	Bersani v. U.S. Army Corps of Eng'rs, 850 F.2d 36, 18 ELR 20874 (2d Cir. 1988)	2
100.	United States v. M.C.C. of Fla, Inc., 772 F.2d 1501, 15 ELR 21091 (11th Cir. 1985)	1, 2
101.	Conant v. United States, 786 F.2d 1008, 16 ELR 20453 (11th Cir. 1986)	3
102.	Quivira Mining Co. v. U.S. EPA, 765 F.2d 126, 15 ELR 20530 (10th Cir. 1985)	3
103.	Trustees for Alaska v. U.S. EPA, 749 F.2d 549, 15 ELR 20146 (9th Cir. 1984)	4
104.	United States v. City of Fort Pierre, 747 F.2d 464, 15 ELR 20177 (8th Cir. 1984)	3
105.	Orleans Audubon Soc'y v. Lee, 742 F.2d 901, 15 ELR 20030 (5th Cir. 1984)	2, 3
106.	Utah v. Marsh, 740 F.2d 799, 14 ELR 20683 (10th Cir. 1984)	3
107.	Tennessee Valley Auth. v. Tennessee Water Quality Control Bd., 717 F.2d 992, 14 ELR 20598 (6th Cir. 1983)	1
108.	Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897, 13 ELR 20942 (5th Cir. 1983)	1, 3, 4
109.	United States v. Tilton, 705 F.2d 429, 13 ELR 20583 (11th Cir. 1983)	3
110.	National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 13 ELR 20015 (D.C. Cir. 1982)	1, 2, 4
111.	Missouri ex rel. Ashcroft v. U.S. Dep't of Army, 672 F.2d 1297, 12 ELR 20368 (8th Cir. 1982)	1, 4
112.	Deltona Corp. v. United States, 657 F.2d 1184, 11 ELR 20905 (Ct. Cl. 1981)	3
113.	Sierra Club v. Abston Constr. Co., 620 F.2d 41, 10 ELR 20552 (5th Cir. 1980)	4
114.	United States v. Texas Pipe Line Co., 611 F.2d 345, 10 ELR 20184 (5th Cir. 1980)	3
115.	United States v. Byrd, 609 F.2d 1204, 9 ELR 20757 (7th Cir. 1979)	3
116.	United States v. Earth Sci., Inc., 599 F.2d 368, 9 ELR 20542 (10th Cir. 1979)	1, 3, 4
117.	Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617, 9 ELR 20334 (8th Cir. 1979)	2
118.	Leslie Salt Co. v. Froehilke, 578 F.2d 742, 8 ELR 20480 (9th Cir. 1978)	3
119.	Natural Res. Def. Council v. Costle, 568 F.2d 1369 (D.C. Cir. 1977)	4
120.	U.S. Steel Corp. v. Train, 556 F.2d 822, 7 ELR 20419 (7th Cir. 1977)	2, 3
121.	Exxon Corp. v. Train, 554 F.2d 1310, 7 ELR 20594 (5th Cir. 1977)	3
122.	United States v. Hamel, 551 F.2d 107, 7 ELR 20253 (6th Cir. 1977)	2
123.	Appalachian Power Co. v. Train, 545 F.2d 1351, 6 ELR 20732 (4th Cir. 1976)	1, 4
124.	FMC Corp. v. Train, 539 F.2d 973, 6 ELR 20382 (4th Cir. 1976)	2
125.	American Iron & Steel Inst. v. U.S. EPA, 526 F.2d 1027, 6 ELR 20068 (3d Cir. 1975)	1
126.	California v. U.S. EPA, 511 F.2d 963 (9th Cir. 1975)	3
127.	United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 4 ELR 20784 (6th Cir. 1974)	3
<b>U.S. District Court Decisions</b>		
128.	Stillwater of Crown Point Homeowners' Ass'n v. Kovich, 2011 WL 4818511 (N.D. Ind. 2011)	3
129.	Deerfield Plantation Phase II v. U.S. Army Corps of Eng'rs, 2011 WL 2746232 (D.S.C. 2011)	3
130.	United States v. Brink, 795 F. Supp. 2d 565 (S.D. Tex. 2011)	2, 3
131.	San Francisco Baykeeper v. West Bay Sanitary Dist., 791 F. Supp. 2d 719 (N.D. Cal. 2011)	3
132.	United States v. Freedman Farms, Inc., 786 F. Supp. 2d 1016 (E.D.N.C. 2011)	3
133.	Gouger v. U.S. Army Corps of Eng'rs, 779 F. Supp. 2d 588 (S.D. Tex. 2011)	2
134.	Ohio Valley Envtl. Coal., Inc. v. Coal-Mac, Inc. v, 775 F. Supp. 2d 900, 41 ELR 20141 (S.D. W. Va. 2011)	3
135.	United States v. Vierstra, 2011 WL 1064526 (D. Idaho 2011)	3
136.	Concerned Area Residents for Env't v. Nelson Faria Dairy, Inc., 2011 WL 61882 (E.D. Wash. 2011)	1
137.	Gulf Restoration Network v. Hancock Cnty. Dev., LLC, 772 F. Supp. 2d 761 (S.D. Miss. 2011)	3
138.	Assateague Coastkeeper v. Alan & Kristin Hudson Farm, 727 F. Supp. 2d 433, 40 ELR 20208 (D. Md. 2010)	4
139.	United States v. Donovan, 2010 WL 3000058 (D. Del. 2010)	3
140.	United States v. Righter, 2010 WL 2640189 (M.D. Pa. 2010)	4
141.	National Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 699 F. Supp. 2d 209, 40 ELR 20104 (D.D.C. 2010), <i>vacated on other grounds</i> , 663 F.3d 470 (D.C. Cir. 2011)	3, 4
142.	Benjamin v. Douglas Ridge Rifle Club, 673 F. Supp. 2d 1210, 40 ELR 20283 (D. Or. 2009)	3
143.	Stephens v. Koch Foods, LLC, 667 F. Supp. 2d 768 (E.D. Tenn. 2009)	3
144.	Precon Dev. Corp. v. U.S. Army Corps of Eng'rs, 658 F. Supp. 2d 752 (E.D. Va. 2009)	3
145.	Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. EPA, 630 F. Supp. 2d 295 (S.D.N.Y. 2009)	1

	Element Interpreted <sup>a</sup>
146. Alabama Rivers Alliance, Inc. v. U.S. Army Corps of Eng'rs, 697 F. Supp. 2d 1251 (N.D. Ala. 2009)	2
147. Hernandez v. Esso Standard Oil Co. (Puerto Rico), 599 F. Supp. 2d 175 (D.P.R. 2009)	3
148. Ogeechee-Canooche Riverkeeper, Inc. v. T.C. Logging, Inc., 2009 WL 2390851 (S.D. Ga. 2009)	4
149. West Virginia Highlands Conservancy v. Huffman, 2009 WL 2705854 (S.D. W. Va. 2009), <i>aff'd</i> , 625 F.3d 159, 40 ELR 20014 (4th Cir. 2010)	4
150. Wild Fish Conservancy v. Quilcene National Fish Hatchery, 2009 WL 3380655 (W.D. Wash. 2009)	4
151. United States v. Acquest Transp., LLC, 2009 WL 2157005 (W.D.N.Y. 2009)	4
152. Peconic Baykeeper, Inc. v. Suffolk Cnty., 585 F. Supp. 2d 377 (E.D.N.Y. 2008), <i>rev'd in part</i> , 600 F.3d 180, 40 ELR 20098 (2d Cir. 2010)	1, 2, 4
153. American Petroleum Inst. v. Johnson, 541 F. Supp. 2d 165, 38 ELR 20081 (D.D.C. 2008)	3
154. United States v. Fabian, 522 F. Supp. 2d 1078, 37 ELR 20083 (N.D. Ind. 2007)	1, 3
155. United States v. Robinson, 521 F. Supp. 2d 1247 (N.D. Ala. 2007)	3
156. United States v. Bailey, 516 F. Supp. 2d 990 (D. Minn. 2007)	3
157. D'Olive Bay Restoration & Preservation Comm., Inc. v. U.S. Army Corps of Eng'rs, 513 F. Supp. 2d 1261 (S.D. Ala. 2007)	2
158. United States v. Cundiff, 480 F. Supp. 2d 940, 37 ELR 20082 (W.D. Ky. 2007)	3
159. Simbury-Avon Preservation Soc'y, LLP v. Metacon Gun Club, Inc., 472 F. Supp. 219 (D. Conn. 2007)	2, 3
160. Environmental Prot. Info. Ctr. v. Pacific Lumber Co., 469 F. Supp. 2d 803, 37 ELR 20012 (N.D. Cal. 2007)	1, 3, 4
161. National Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 2007 WL 259944, 37 ELR 20028 (D.D.C. 2007)	1
162. United States v. Lippold, 2007 WL 3232483 (C.D. Ill. 2007)	3, 4
163. Friends of Everglades v. South Fla. Water Mgmt. Dist., 2006 WL 3635465 (S.D. Fla. 2006)	1
164. United States v. Marion L. Kincaid Trust, 3 F. Supp. 2d 680 (E.D. Mich. 2006)	3
165. United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605, 36 ELR 20131 (N.D. Tex. 2006)	3
166. Tungett v. Papierski, 2006 WL 51148 (E.D. Tenn. 2006)	2
167. Florida Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 401 F. Supp. 1298 (S.D. Fla. 2005)	2
168. United States v. Adams Bros. Farming, Inc., 369 F. Supp. 2d 1166 (C.D. Cal. 2003)	3
169. City of Southacres v. Waterworth, 322 F. Supp. 992 (S.D. Tex. 2004)	2
170. National Wildlife Fed'n v. Norton, 332 F. Supp. 2d 170 (D.D.C. 2004)	2
171. North Carolina Shellfish Growers Ass'n v. Holly Ridge Assocs., LLC, 278 F. Supp. 2d 654 (E.D.N.C. 2003)	1, 2, 3, 4
172. Reynolds v. Rick's Mushroom Servs., Inc., 246 F. Supp. 2d 449 (E.D. Pa. 2003)	4
173. FD&P Enters., Inc. v. U.S. Army Corps of Eng'rs, 239 F. Supp. 2d 509 (D.N.J. 2003)	3
174. United States v. Hummel, 2003 WL 1845365 (N.D. Ill. 2003)	1
175. United States v. RGM Corp., 222 F. Supp. 2d 780 (E.D. Va. 2002)	3
176. U.S. Pub. Interest Research Grp. v. Atlantic Salmon of Maine, LLC, 215 F. Supp. 2d 239 (D. Me. 2002)	1, 2, 4
177. California Sportfishing Protecting Alliance v. Diablo Grande, Inc., 209 F. Supp. 2d 1059 (E.D. Cal. 2002)	3
178. Kentuckians for Commonwealth, Inc. v. Rivenburgh, 204 F. Supp. 2d 927 (S.D. W. Va. 2002), <i>rev'd on other grounds</i> , 317 F.3d 425 (4th Cir. 2003)	2
179. United States v. Newdunn Assocs., 195 F. Supp. 2d 751 (E.D. Va. 2002)	3
180. Greenfield Mills, Inc. v. O'Bannon, 189 F. Supp. 2d 893 (N.D. Ind. 2002), <i>aff'd in part, rev'd in part</i> , 361 F.3d 934 (7th Cir. 2004)	1, 2
181. United States v. Rueth Dev. Co., 189 F. Supp. 2d 874 (N.D. Ind. 2002)	3
182. Sierra Club & Mineral Pol'y Ctr. v. El Paso Gold Mines, Inc., 2002 WL 33932715 (D. Colo. 2002)	1, 3, 4
183. Altman v. Town of Amherst, N.Y., 190 F. Supp. 2d 467 (W.D.N.Y. 2001), <i>rev'd</i> , 47 F. App'x 62 (2d Cir. 2002)	2
184. United States ex rel. McKeown v. Port Auth. of N.Y. & N.J., 162 F. Supp. 2d 173 (S.D.N.Y. 2001)	1, 2, 4
185. United States v. Interstates Gen'l Co., 152 F. Supp. 2d 843 (D. Md. 2001)	3
186. Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169 (D. Idaho 2001)	3
187. United States v. Buday, 138 F. Supp. 2d 1282 (D. Mont. 2001)	3
188. Aiello v. Town of Brookhaven, 136 F. Supp. 2d 81 (E.D.N.Y. 2001)	3
189. American Mining Cong. v. U.S. Army Corps of Eng'rs, 120 F. Supp. 2d 23 (D.D.C. 2000)	1
190. Pronsolino v. Marcus, 91 F. Supp. 2d 1337, 30 ELR 20460 (N.D. Cal. 2000)	2
191. No Spray Coal., Inc. v. City of New York, 2000 WL 1401458 (S.D.N.Y. 2000)	1
192. Stone v. Naperville Park Dist., 38 F. Supp. 2d 651 (N.D. Ill. 1999)	4
193. United States v. Bay-Houston Towing Co., 33 F. Supp. 2d 596, 29 ELR 21011 (E.D. Mich. 1999)	1

**Element  
Interpreted<sup>a</sup>**

194.	United States v. Hallmark Constr. Co., 30 F. Supp. 2d 1033, 28 ELR 21438 (N.D. Ill. 1998)	1, 3
195.	Frobel v. Meyer, 13 F. Supp. 2d 843 (E.D. Wis. 1998)	1, 4
196.	United States v. United Homes, Inc., 1999 WL 117701 (N.D. Ill. 1999)	2
197.	United States v. Gulf Park Water Co., Inc., 972 F. Supp. 1056 (S.D. Miss. 1997)	2, 3
198.	Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300 (S.D. Iowa 1997)	3, 4
199.	Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc., 962 F. Supp. 1312, 27 ELR 21411 (D. Or. 1997)	3
200.	American Mining Cong. v. Corps of Eng'rs, 951 F. Supp. 267, 27 ELR 20589 (D.D.C. 1979)	1
201.	Georgia v. City of East Ridge, Tenn., 949 F. Supp. 1571, 27 ELR 20782 (N.D. Ga. 1996)	3
202.	RSR Corp. v. Browner, 924 F. Supp. 504, 26 ELR 21353 (S.D.N.Y. 1996)	4
203.	United States v. Lambert, 915 F. Supp. 797, 26 ELR 21116 (S.D. W. Va. 1996)	4
204.	Hudson Riverkeeper Fund, Inc. v. Harbor at Hastings Assocs., 917 F. Supp. 251, 26 ELR 21120 (S.D.N.Y. 1996)	4
205.	Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club, 1996 WL 131863 (S.D.N.Y. 1996)	2, 4
206.	Beartooth Alliance v. Crown Butte Mines, 904 F. Supp. 1168, 26 ELR 20639 (D. Mont. 1995)	1, 2, 3, 4
207.	Friends of Santa Fe Cnty. v. LAC Minerals, Inc., 892 F. Supp. 1333, 26 ELR 20135 (D.N.M. 1995)	3
208.	Molokai Chamber of Commerce v. Kukui, 891 F. Supp. 1389, 26 ELR 20303 (D. Haw. 1995)	4
209.	United States v. Banks, 873 F. Supp. 650, 25 ELR 20776 (S.D. Fla. 1995)	3
210.	Washington Wilderness Coal. v. Hecla Mining Co., 870 F. Supp. 983, 25 ELR 20661 (E.D. Wash. 1994)	3, 4
211.	Hudson River Fishermen's Ass'n v. Arcuri, 862 F. Supp. 73, 25 ELR 20460 (S.D.N.Y. 1994)	2
212.	Sierra Club v. Colorado Refining Co., 838 F. Supp. 1428, 24 ELR 20749 (D. Colo. 1993)	3
213.	Salt Pond Assocs. v. U.S. Army Corps of Eng'rs, 815 F. Supp. 766, 23 ELR 21026 (D. Del. 1993)	1
214.	Golden Gate Audubon Soc'y, Inc. v. U.S. Army Corps of Eng'rs, 796 F. Supp. 1306, 23 ELR 20267 (N.D. Cal. 1992)	3
215.	United States v. Villegas, 784 F. Supp. 6, 22 ELR 21027 (S.D.N.Y. 1991), <i>rev'd sub nom.</i> United States v. Plaza Health Labs., Inc., 3 F.3d 643, 23 ELR 21526 (2d Cir. 1993)	4
216.	United States v. Zanger, 767 F. Supp. 1030, 22 ELR 20231 (N.D. Cal. 1991)	3
217.	United States v. Sinclair Oil Co., 767 F. Supp. 2000, 21 ELR 21323 (D. Mont. 1990)	1, 4
218.	McClellan Ecological Seepage Situation v. Weinberger, 763 F. Supp. 431, 20 ELR 20870 (E.D. Cal. 1989)	3
219.	Hudson River Fishermen's Ass'n v. City of New York, 751 F. Supp. 1088, 21 ELR 20647 (S.D.N.Y. 1990), <i>aff'd without opinion</i> , 940 F.2d 649, 21 ELR 21226 (2d Cir. 1991)	2
220.	Friends of Sakonnet v. Dutra, 738 F. Supp. 623, 21 ELR 20055 (D.R.I. 1990)	4
221.	Dague v. City of Burlington, 732 F. Supp. 458, 20 ELR 21001 (D. Vt. 1989, <i>aff'd on other grounds</i> , 935 F.2d 1088 (2d Cir. 1990), <i>rev'd on other grounds</i> , 505 U.S. 557, 22 ELR 21099 (1992)	2
222.	West Virginia Coal Ass'n v. Reilly, 728 F. Supp. 1301 (D.N.J. 1989)	3
223.	United States v. Malibu Beach, Inc., 711 F. Supp. 1301, 19 ELR 21247 (D.N.J. 1989)	3
224.	Hanson v. United States, 710 F. Supp. 1105, 19 ELR 21074 (E.D. Tex. 1989)	2, 3
225.	McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182, 19 ELR 20124 (E.D. Cal. 1988)	3
226.	United States v. Larkins, 657 F. Supp. 76, 17 ELR 20783 (W.D. Ky. 1987)	3
227.	National Wildlife Fed'n v. Consumers Power Co., 657 F. Supp. 989, 17 ELR 20801 (W.D. Mich. 1987)	1, 2, 4
228.	Fishel v. Westinghouse Elec. Corp., 640 F. Supp. 442, 16 ELR 20634 (M.D. Pa. 1986)	4
229.	Kelley v. United States, 618 F. Supp. 1103, 16 ELR 20080 (W.D. Mich. 1985)	3
230.	Track 12, Inc. v. District Eng'r, 618 F. Supp. 448, 16 ELR 20163 (D. Minn. 1985)	3
231.	Higbee v. Starr, 598 F. Supp. 323 (W.D. Ark. 1984)	2
232.	United States v. Saint Bernard Parish, 589 F. Supp. 617, 14 ELR 20794 (E.D. La. 1984)	3
233.	United States v. Lambert, 589 F. Supp. 366, 14 ELR 20588 (M.D. Fla. 1984)	3
234.	United States v. Champitti, 583 F. Supp. 483 (D.N.J. 1984)	3
235.	United States v. Robinson, 570 F. Supp. 1157, 14 ELR 20056 (M.D. Fla. 1983)	2, 3
236.	United States v. Bradshaw, 541 F. Supp. 880, 12 ELR 20629 (D. Md. 1981)	2, 3
237.	Bayou Des Familles Dev. Corp. v. U.S. Army Corps of Eng'rs, 541 F. Supp. 1025, 13 ELR 20055 (E.D. La. 1982)	3
238.	National Wildlife Fed'n v. Gorsuch, 530 F. Supp. 1291, 12 ELR 20268 (D.D.C. 1982)	1, 2
239.	United States v. Lee Wood Contractors, Inc., 529 F. Supp. 119, 12 ELR 20421 (C.D. Mich. 1981)	3
240.	O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642, 12 ELR 20239 (E.D. Pa. 1981)	4
241.	United States v. Weisman, 489 F. Supp. 1331, 10 ELR 20698 (M.D. Fla. 1980)	2, 3, 4



		Element Interpreted <sup>a</sup>
242.	United States v. Oxford Royal Mushroom Prods., Inc., 487 F. Supp. 952, 10 ELR 20549 (E.D. Pa. 1980)	4
243.	American Dredging Co. v. Dutchyshyn, 480 F. Supp. 957 (E.D. Pa. 1979)	3
244.	Romero-Barcelo v. Brown, 478 F. Supp. 646 (D.P.R. 1979), <i>rev'd on other grounds sub nom.</i> Weinberger v. Barcelo-Romero, 643 F.2d 835, 11 ELR 20391 (1st Cir. 1981), <i>rev'd on other grounds</i> , 456 U.S. 305, 12 ELR 20538 (1982)	4
245.	Avoyelles Sportsmen's League v. Alexander, 473 F. Supp. 525, 11 ELR 20315 (W.D. La. 1979)	1
246.	United States v. Frezzo Brothers, Inc., 461 F. Supp. 266, 9 ELR 20139 (E.D. Pa. 1978), <i>aff'd</i> , 602 F.2d 1123, 9 ELR 20556 (3d Cir. 1979)	2
247.	South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp. 118, 8 ELR 20757 (D.S.C. 1978)	1, 2, 4
248.	Commonwealth of Puerto Rico v. Alexander, 438 F. Supp. 90, 7 ELR 20751 (D.P.R. 1977)	3
249.	United States v. Velsicol Chem. Corp., 438 F. Supp. 945 (W.D. Tenn. 1976)	1, 3
250.	Wyoming v. Hoffman, 437 F. Supp. 114, 8 ELR 20001 (D. Wyo. 1977)	3
251.	Mahelona v. Hawaiian Elec. Co., Inc., 418 F. Supp. 1328, 7 ELR 20031 (D. Haw. 1976)	4
252.	Conservation Council of N.C. v. Costanzo, 398 F. Supp. 653, 5 ELR 20666 (E.D.N.C. 1975)	3
253.	Sun Enters., Inc. v. Train, 394 F. Supp. 211 (S.D.N.Y. 1975)	3
254.	P.F.Z. Props., Inc. v. Train, 393 F. Supp. 1370 (D.D.C. 1975)	3
255.	Natural Res. Def. Council v. Callaway, 392 F. Supp. 685, 5 ELR 20285 (D.D.C. 1975)	3
256.	United States v. Phelps Dodge Corp., 391 F. Supp. 1181, 5 ELR 20308 (D. Ariz. 1975)	3
257.	United States v. GAF Corp., 389 F. Supp. 1379, 5 ELR 20581 (S.D. Tex. 1975)	3
258.	United States v. Holland, 373 F. Supp. 665, 4 ELR 20710 (M.D. Fla. 1974)	3, 4

**Table B**

Note: Table B is displayed in four subparts, one each for Addition, Pollutant, Navigable Waters, and Point Source. Each draws on, but is different from, Table B in the earlier article on that element, cited in note 3, *supra*. For instance, the subpart tables here use the common numbered list of interpretive devices below, while each of the earlier tables used different numbers for the interpretive devices.

### Explanation of Columns in Table B for Each Element

Column A. Number of decision from Table A.

Column B. Year of decision. The latest and earliest sets of decisions, see *supra* n.41, are highlighted.

Column C. Positive or negative environmental results for the element. Positive is an expansive interpretation of the element; negative is a restrictive interpretation. The absence of a (+) or (--) in the column means that the decision discussed the element but did not hold what it meant. The presence of both a (+) and a (--) in the column means that there were mixed results; for example, the interpretation was positive, but the facts did not support a positive result.

Column D. Type of Decision. Cit. S. = citizen suit. Crim. = criminal prosecution. Enf. = civil enforcement by the government. Jud. Rev. = judicial review.

Column E. Interpretive devices used for the element, from the list below.

Column F. Number of interpretive devices used for the element.

Column G. Number of precedents used to interpret the element.

Column H. Statutory section for which the element is relevant: CWA §§401, 402, 404, National Environmental Policy Act (NEPA), or Oil Pollution Act (OPA).

### Interpretive Devices

- |  |   |
|--|---|
| 1. Absurd results, avoid   | 14. <i>Expressio unius</i> , expression of one thing suggests exclusion of others         |
| 2. Administrative issues, avoid  | 15. Federalism, honor   |
| 3. Antecedent, rule of last  | 16. Legislative history   |
| 4. Broad interpretation  | 17. Lenity, rule of   |
| 5. Constitutional issues, avoid  | 18. Metaphor  |
| 6. Deference to agency interpretation of statute   | 19. Metamorphosis   |
| 7. Deference to agency interpretation of agency rule   | 20. <i>Noscitur a sociis</i> , term interpreted in context of other terms accompanying it |
| 8. <i>Ejusdem generis</i> , general term interpreted based on specific terms accompanying it | 21. Other statutes, harmonize with  |
| 9. Equity  | 22. Plain meaning   |
| 10. Every word, give meaning to  | 23. Precedent   |
| 11. Exception, interpret narrowly  | 24. Structure of statute  |
| 12. Exception proves the rule  | 25. Waiver, interpret narrowly  |
| 13. Exclusive/inclusive lists  |   |

**Table B: Addition**

A	B	C	D	E	F	G	H
<b>U.S. Supreme Court Decisions</b>							
5.	2006	+	Jud. Rev.	7, 16, 20, 22, 23, 24	6	2	§401
6.	2004	+	Cit. S.	1, 4, 7, 22, 23, 24	6	2	§402
<b>U.S. Circuit Court of Appeals Decisions</b>							
12.	2011	+	Cit. S.	13, 22, 23	3	3	§402
18.	2010	+	Cit. S.	1, 4, 7, 22, 23	5	3	§402
24.	2009	--	Cit. S.	4, 7, 16, 22, 23	5	6	§402
26.	2009	+	Enf.	7, 22, 23, 24	4	4	§404
27.	2009	+	Jud. Rev.	1, 4, 7, 13, 19	5	--	§402
37.	2006	+	Cit. S.	4, 7, 21, 22, 23, 24	6	5	§402
41.	2005	+	Cit. S.	7, 18, 22, 23, 24	5	5	§402
43.	2005	+	Cit. S.	4, 7, 22, 23, 24	5	1	§402
46.	2004	+	Cit. S.	4, 7, 22, 23, 24	5	4	§404
48.	2003	+	Jud. Rev.	21, 22	2	--	§401
52.	2002	+	Cit. S.	22, 23	2	1	§402

A	B	C	D	E	F	G	H
61.	2001	+	Cit. S.	4, 7, 16, 18, 22, 23	6	3	§402
62.	2001	+	Jud. Rev.	4, 19, 22, 23	4	5	§404
63.	2001	+	Cit. S.	21, 22, 23	3	3	§402
67.	2000	+	Enf.	4, 19, 22, 23	4	5	§404
71.	1998	--	Jud. Rev.	1, 19, 21, 22, 23, 24	6	5	§404
73.	1997	--	Crim.	1, 22, 23	3	1	§404
75.	1997	--	Jud. Rev.	20, 22, 23, 24	4	2	§401
76.	1997	--	Cit. S.	1, 4, 21, 23	2	1	§402
78.	1996	+	Cit. S.	1, 18, 22, 23	4	3	§402
84.	1993	+	Cit. S.	22, 23	2	2	§402
89.	1992	+	Crim.	22, 23	2	3	§402
90.	1992	--	Cit. S.	7, 22, 23	3	4	§404
92.	1992	+	Jud. Rev.	4, 7, 16, 22	4	--	§402
95.	1990	+	Jud. Rev.	22, 23	2	2	§402
98.	1988	--	Jud. Rev.	1, 7, 22, 23, 24	5	1	§402
100.	1985	+	Enf.	4, 23	2	1	§404
107.	1983	--	Cit. S.	23	1	2	§402
108.	1983	+	Cit. S.	3, 16, 22, 23	4	2	§404
110.	1982	--	Jud. Rev.	4, 7, 16, 22, 23, 24	6	4	§402
111.	1982	--	Cit. S.	22	1	--	§402
116.	1979	+	Cit. S.	22	1	--	§402
123.	1976	--	Jud. Rev.	22	1	--	§401
125.	1975	--	Jud. Rev.	22	1	--	§402
<b>U.S. District Court Decisions</b>							
136.	2011	--	Cit. S.	22, 23	2	1	§402
145.	2009	+	Jud. Rev.	7, 22, 23	3	4	§402
152.	2008	+	Cit. S.	21, 22, 23	3	7	§§402/404
154.	2007	+	Enf.	23	1	4	§404
160.	2007	+	Cit. S.	23	1	3	§402
161.	2007	--	Jud. Rev.	23	1	1	§404
163.	2006	+	Cit. S.	4, 7, 16, 18, 22, 23, 24	7	10	§402
171.	2003	+	Cit. S.	23	1	2	§402
174.	2003	+	Enf.	22, 23	2	6	§404
176.	2002	+	Cit. S.	22, 23	2	1	§404
180.	2002	--	Cit. S.	22, 23, 24	3	5	§402
182.	2002	+	Cit. S.	23	1	6	§404
184.	2001	--	Enf.	22	1	--	§402
189.	2000	+	Jud. Rev.	22, 23	2	1	§404
191.	2000	--	Cit. S.	21, 22, 23	3	5	§402
193.	1999	+	Enf.	23	1	6	§404
194.	1988	+	Enf.	23	1	2	§404
195.	1988	--	Cit. S.	22, 23	2	6	§§402/404
200.	1997	--	Jud. Rev.	4, 7, 16, 21, 22, 23, 24	7	6	§404
206.	1995	+	Cit. S.	22	1	--	§402
213.	1993	--	Enf.	7, 16, 22	3	--	§402

A	B	C	D	E	F	G	H
217.	1990	+	Enf.	22, 23, 24	3	3	§404
227.	1987	+	Cit. S.	22, 23	2	5	§402
238.	1982	+	Cit. S.	4, 22, 23	3	1	§402
245.	1979	+	Cit. S.	4, 16, 22	3	--	§402
247.	1978	+	Cit. S.	22, 23	2	1	§402
249.	1976	+	Enf.	22	1	--	§402

**Table B: Pollutant**

A	B	C	D	E	F	G	H
<b>U.S. Supreme Court Decisions</b>							
3.	2009	--	Jud. Rev.	1, 7, 22, 24	4	--	§404
10.	1982	+	Cit. S.	22	1	--	§402
11.	1976	--	Cit. S.	12, 16, 21, 24	4	--	§402
<b>U.S. Circuit Court of Appeal Decisions</b>							
27.	2009	+	Jud. Rev.	7, 21, 22, 23	4	6	§402
40.	2005	--	Cit. S.	1, 7, 21, 22, 23	5	3	§402
53.	2003	+	Cit. S.	7, 12, 22, 23, 24	5	6	§402
54.	2003	--	Jud. Rev.	7, 21, 24	3	--	§404
56.	2002	+	Cit. S.	7, 23	2	5	§402
60.	2002	--	Cit. S.	1, 8, 22, 23, 24	5	3	§402
63.	2001	+	Enf.	22, 23	2	2	§404
65.	2001	+	Cit. S.	1, 7, 21, 22, 23	5	1	§402
67.	2000	+	Enf.	22, 23	2	1	§404
68.	1999	+	Cit. S.	22, 23	2	1	§402
70.	1998	+	Jud. Rev.	16, 22, 24	3	--	§404
72.	1998	--	Cit. S.	7, 16, 21, 22, 23	5	1	§402
73.	1997	+	Crim.	22	1	--	§404
76.	1997	--	Cit. S.	1, 21	2	--	§402
77.	1997	+	Crim.	22	1	--	§402
79.	1996	+	Cit. S.	23	1	2	§402
80.	1996	+	Cit. S.	4, 7, 12, 13, 16, 22, 23	7	8	§402
81.	1995	+	Enf.	22	1	--	§402
82.	1994	+	Cit. S.	22	1	1	§402
84.	1993	+	Cit. S.	22	1	--	§402
85.	1993	+	Crim.	22	1	--	§404
86.	1993	+	Enf.	22	1	--	§404
88.	1993	+	Crim.	22	1	--	§402
91.	1992	--	Jud. Rev.	22	1	--	§404
95.	1990	+	Jud. Rev.	22	1	--	§402
98.	1988	+	Cit. S.	22, 23	2	1	§402
99.	1988	+	Jud. Rev.	22	1	--	§404
100.	1985	+	Enf.	16	1	--	§404
105.	1984	--	Cit. S.	22	1	--	§404
110.	1982	--	Cit. S.	7, 13, 16, 24	4	--	§402
117.	1979	+	Jud. Rev.	4, 7, 12, 16, 22, 24	6	--	§404



A	B	C	D	E	F	G	H
120.	1977	+	Jud. Rev.	12, 14, 16, 22, 24	5	--	§402
122.	1977	+	Crim.	16, 21, 22, 23, 24	5	3	§402
124.	1976	+	Jud. Rev.	22, 24	2	--	§402
<b>U.S. District Court Decisions</b>							
130.	2011	+	Enf.	22	1	--	§404
133.	2011	+	Jud. Rev.	22	1	--	§404
146.	2009	+	Jud. Rev.	22	1	--	§404
152.	2008	--	Cit. S.	7, 21, 22, 23	4	10	§402
157.	2007		Jud. Rev.	22	1	--	§404
159.	2007	+	Cit. S.	7, 22, 23	3	2	§402
166.	2006	+	Cit. S.	4, 22, 23	3	5	§404
167.	2005	+	Jud. Rev.	22	1	--	§404
169.	2004	+	Jud. Rev.	22	1	--	§404
170.	2004	+	Jud. Rev.	22	1	--	§404
171.	2003	+	Cit. S.	22, 23, 24	3	6	§§402/404
176.	2002	+	Cit. S.	22, 23	2	10	§402
178.	2002	+	Cit. S.	4, 7, 16, 22, 24	5	--	§404
180.	2002	--	Cit. S.	22, 24	2	--	§§402/404
183.	2001	--	Cit. S.	7, 21, 22, 23	4	3	§402
184.	2001	--	Cit. S.	21	1	--	§402
190.	2000	+	Jud. Rev.	4, 7, 16, 23, 24	5	5	§402
196.	1999	--	Enf.	16, 22, 23, 24	4	6	§§402/404
197.	1997	+	Enf.	22, 23	2	1	§402
205.	1996	+	Cit. S.	7, 22, 23	3	4	§402
206.	1995	+	Cit. S.	4, 22, 23	3	2	§402
211.	1994	+	Cit. S.	22	1	--	§402
219.	1990	+	Cit. S.	4, 7, 22, 23, 24	5	3	§402
221.	1989	+	Cit. S.	22, 24	2	--	§402
224.	1989	+	Enf.	23	1	1	§404
227.	1987	+	Cit. S.	7, 22, 23	3	1	§401
231.	1984	+	Cit. S.	22	1	1	§402
235.	1983	+	Enf.	22	1	--	§404
236.	1981	+	Enf.	22, 23	2	3	§404
238.	1982	+	Cit. S.	1, 4, 22, 23, 24	5	--	§402
241.	1980	+	Enf.	7, 22, 24	3	--	§404
246.	1978	+	Crim.	22	1	--	§402
247.	1978	+	Cit. S.	1, 22	2	--	§404

**Table B: Navigable Waters**

A	B	C	D	E	F	G	H
<b>U.S. Supreme Court Decisions</b>							
1.	2013	+	Jud. Rev.	23	1	2	§402
4.	2006	--	Enf.	1, 5, 7, 10, 15, 16, 22, 23, 24	9	19	§404
6.	2004	+	Cit. S.	7, 15, 22, 23, 24	5	5	§402
7.	2001	--	Jud. Rev.	1, 4, 5, 12, 15, 16, 23, 24	8	2	§404

A	B	C	D	E	F	G	H
8.	1987		Cit. S.	16	1	1	§402
9.	1985	+	Enf.	1, 4, 5, 7, 16, 22, 24	7	--	§404
<b>U.S. Circuit Court of Appeals Decisions</b>							
15.	2011	+	Enf.	23	1	5	§404
16.	2011	--	Jud. Rev.	7, 23	2	6	§404
19.	2010	+	Crim.	4, 23	2	4	§§402/404
21.	2009	--	Enf.	4, 21, 22, 23	4	5	§404
22.	2009	+	Cit. S.	4, 7, 23	3	5	§402
23.	2009	+	Enf.	23	1	6	§404
24.	2009	--	Cit. S.	1, 4, 7, 10, 15, 21, 22, 23, 24	9	10	§402
25.	2009	--	Cit. S.	7, 11, 21, 23	4	2	§402
26.	2009	+	Enf.	23	1	8	§404
29.	2008	+	Crim.	23	1	3	§404
30.	2007	--	Crim.	23	1	6	§402
31.	2007	+	Cit. S.	4, 11, 23	3	7	§402
32.	2007	+	Crim.	7, 23	2	9	§§402/404
33.	2007	--	Cit. S.	7, 13, 14, 23	4	9	§402
34.	2006	+	Enf.	23	1	3	§404
35.	2006	--	Enf.	23	1	2	§404
36.	2006	+	Cit. S.	11, 23	2	6	§402
37.	2006	+	Cit. S.	1, 7, 15, 23, 24	5	4	§402
38.	2006	+	Crim.	4, 5, 7, 10, 23	5	17	§404
39.	2005	+	Jud. Rev.	23	1	5	§404
44.	2004	+	Cit. S.	16, 23	2	3	§402
45.	2004	+	Crim.	7, 16, 17, 23	4	7	§402
47.	2003	+	Bankr.	5, 7, 22, 23	4	7	OPA
49.	2003	+	Enf.	4, 23	2	5	§404
50.	2003	+	Enf.	23, 25	2	6	§404
51.	2003	+	Enf.	5, 7, 23	3	13	§404
57.	2002	+	Cit. S.	23	1	3	§402
59.	2002	+	Enf.	23, 25	2	4	§404
62.	2001	+	Cit. S.	1, 7, 23	3	2	§402
63.	2001	+/--	Enf.	23	1	7	§404
64.	2001	--	Cit. S.	16, 21, 22, 23	4	8	OPA
65.	2001	+	Cit. S.	22, 23	2	8	§402
68.	1999	+	Cit. S.	23	1	2	§402
69.	1999	+	Crim.	4, 11, 23	3	5	§402
73.	1997	--	Crim.	5, 23	2	1	§404
77.	1997	+	Crim.	4, 23	2	9	§402
78.	1996	+	Cit. S.	1, 4, 23, 24	4	4	§402
83.	1994	--	Cit. S.	4, 7, 14, 16, 23	5	7	§402
86.	1993	+	Enf.	4, 7, 16, 22, 23, 24	6	12	§404
87.	1993	--	Jud. Rev.	7	1	--	§404
91.	1992	--	Jud. Rev.	23	1	4	§404
96.	1990	--	Enf.	1, 7, 11, 22, 23	5	5	§402

A	B	C	D	E	F	G	H
97.	1988	+	Jud. Rev.	16, 21, 22, 23	4	3	§402
98.	1988	--	Cit. S.	7, 23	2	3	§402
101.	1986	+	Enf.	4, 11, 23	3	1	§404
102.	1985	+	Jud. Rev.	4, 7, 23	3	3	§402
104.	1984	--	Enf.	1, 4, 9	3	--	§401
105.	1984	--	Jud. Rev.	6	1	--	§404
106.	1984	+	Decl. Jud.	4, 23	2	12	§404
108.	1983	+	Cit. S.	4, 7, 16, 23	4	8	§404
109.	1983	+	Enf.	16, 22, 23	3	1	§404
112.	1981	+	Taking	4, 23	2	7	§404
114.	1980	+	Enf.	23	1	1	§402
115.	1979	+	Enf.	4, 16, 23	3	4	§404
116.	1979	+	Enf.	4, 16, 23	3	2	§402
118.	1978	+	Enf.	1, 4, 16, 21, 23	5	2	§404
120.	1977	+	Jud. Rev.	3, 4, 7, 10, 13	5	--	§402
121.	1977	--	Jud. Rev.	7, 12, 16, 21, 22, 23, 24	7	1	§402
126.	1975	+	Jud. Rev.	16, 23	2	2	§402
127.	1974	+	Enf.	4, 16, 23	3	4	§402
<b>U.S. District Court Decisions</b>							
128.	2011	+	Cit. S.	23	1	4	§404
129.	2011	--	Jud. Rev.	7, 23	2	3	§404
130.	2011	+	Enf.	23	1	7	§404
131.	2011	+	Cit. S.	23	1	5	§402
132.	2011	--	Crim.	23	1	7	§404
134.	2011	+	Cit. S.	23, 24	2	3	§402
135.	2011	+	Crim.	4, 22, 23, 24	4	10	§402
137.	2011	+	Cit. S.	23	1	5	§404
139.	2010	+	Enf.	23	1	8	§404
141.	2010	+	Jud. Rev.	13, 23, 24	3	3	§404
142.	2009	+	Cit. S.	4, 23	2	7	§402
143.	2009	+	Cit. S.	4, 23	2	2	§402
144.	2009	+	Jud. Rev.	7, 23	2	7	§404
147.	2009	+	Cit. S.	4, 7, 16, 23	4	14	§402
153.	2008	--	Jud. Rev.	23	1	5	§404
154.	2007	+	Enf.	7, 23	2	9	§404
155.	2007	+	Crim.	23	1	6	§404
156.	2007	+	Enf.	7, 23	2	8	§404
158.	2007	+	Enf.	23	1	4	§404
159.	2007	--	Cit. S.	23	1	1	§404
160.	2007	--	Cit. S.	23	1	4	§402
162.	2007	+	Crim.	23	1	7	§404
164.	2006	+	Enf.	23	1	6	§404
165.	2006	--	Enf.	4, 5, 22, 23	4	8	§402
168.	2003	+	Enf.	7, 23	2	13	§404
169.	2003	+	Enf.	4, 23	2	6	§404

A	B	C	D	E	F	G	H
171.	2003	+	Cit. S.	23	1	10	§§402/404
173.	2003	--	Jud. Rev.	4, 7, 23	3	12	§404
175.	2002	--	Enf.	1, 5, 7, 16, 23	5	2	§404
177.	2002	+	Cit. S.	23	1	6	§402
179.	2002	--	Enf.	5, 7, 16, 22, 23	5	2	§404
181.	2002	+	Enf.	23, 25	2	3	§404
182.	2002	+	Cit. S.	23	1	3	§402
185.	2002	+	Enf.	23, 25	2	1	§402
186.	2001	+	Cit. S.	4, 16, 23	3	9	§404
187.	2001	+	Crim.	4, 16, 23	3	8	§404
188.	2001	+	Cit. S.	22, 23	2	6	§402
194.	1998	--	Enf.	23	1	2	§404
197.	1997	+	Enf.	4, 23	2	1	§402
198.	1997	+	Cit. S.	4, 23	2	4	§402
199.	1997	--	Cit. S.	2, 4, 7, 16, 22, 23, 24	7	11	§402
201.	1996	+	Cit. S.	4, 23	2	4	§402
206.	1995	+	Cit. S.	23	1	3	§402
207.	1995	+/--	Cit. S.	4, 22, 23	3	13	§402
209.	1995	+	Enf.	23	1	3	§404
210.	1984	+	Cit. S.	4, 7, 16, 23	4	7	§402
212.	1993	+	Cit. S.	4, 23	2	9	§402
214.	1992	+	Cit. S.	6, 23	2	1	§404
216.	1991	+	Enf.	23	1	3	§404
218.	1989	+	Cit. S.	4	1	--	§402
222.	1989	+	Jud. Rev.	7, 24	2	--	§404
223.	1989	+	Enf.	23	1	2	§404
224.	1989	+	Enf.	23	1	1	§404
225.	1988	+	Cit. S.	4, 7, 16, 22, 23, 24	6	7	§402
226.	1987	+	Enf.	7, 23	2	1	§404
229.	1985	--	Cit. S.	4, 7, 16, 23, 24	5	4	§402
230.	1985	+	Jud. Rev.	22, 23	2	2	§404
232.	1984	+	Enf.	4, 16, 23	3	7	§404
233.	1984	+	Enf.	7, 23	2	3	§404
234.	1984	+	Enf.	4, 16, 23	3	3	§404
235.	1983	+	Enf.	4, 23	2	3	§404
236.	1981	+	Enf.	23	1	1	§404
237.	1982	+	Jud. Rev.	7, 16, 21, 23	4	3	§404
239.	1981	+	Enf.	4, 23	2	2	§404
241.	1980	+	Enf.	4, 16, 23	3	5	§404
243.	1979	+	Jud. Rev.	23	1	10	§404
248.	1977	+	Jud. Rev.	4, 16, 21, 23	4	2	§404
249.	1976	+	Enf.	4, 16	2	--	§402
250.	1977	+	Jud. Rev.	4, 16, 23	3	8	§404
252.	1975	+	Cit. S.	7, 23	2	5	§404
253.	1975	+	Cit. S.	4, 23	2	2	§404



A	B	C	D	E	F	G	H
254.	1975	+	Jud. Rev.	16, 23	2	1	§404
255.	1975	+	Jud. Rev.	10	1	--	§§402/404
256.	1975	+	Crim.	4, 22, 23	3	1	§402
257.	1975	--	Enf.	4, 16, 22, 24	4	2	§402
258.	1974	+	Enf.	4, 16, 21, 23, 24	5	5	§404

**Table B: Point Source**

A	B	C	D	E	F	G	H
<b>U.S. Supreme Court Decisions</b>							
2.	2013	--	Cit. S.	3, 6, 22, 24	4	--	§402
6.	2004	+	Cit. S.	4, 8, 22	3	--	§402
<b>U.S. Circuit Court of Appeals Decisions</b>							
12.	2011	+	Cit. S.	22, 23, 24	3	4	§402
13.	2011	--	Cit. S.	16, 22, 23, 24	4	4	§402
14.	2011	--	Jud. Rev.	22, 23	2	4	§402
17.	2010	+	Cit. S.	22, 23	2	3	§402
19.	2010	+	Crim.	22	1	--	§402
20.	2010	+	Cit. S.	4, 22, 23	3	3	§402
22.	2009	--	Cit. S.	4, 7, 22, 23, 24	5	7	§402
27.	2009	+	Jud. Rev.	4, 22, 23, 24	4	4	§402
28.	2008	--	Cit. S.	23, 24	2	3	§402
29.	2008	+	Crim.	16, 22, 23	3	6	§402
35.	2005	+	Crim.	23	1	4	§404
41.	2005	+	Cit. S.	7, 22, 23, 24	4	5	§402
42.	2005	+	Enf.	23	1	4	§404
44.	2004	+	Cit. S.	4, 23	2	2	§402
55.	2002	--	Cit. S.	3, 7, 10, 22, 23	5	2	§402
57.	2002	+	Cit. S.	4, 23	2	2	§402
59.	2002	+	Cit. S.	22, 23	3	2	§402
60.	2002	--	Cit. S.	23	1	1	§402
63.	2001	+	Jud. Rev./Enf.	2, 23	2	1	§404
66.	2000	--	Cit. S.	22, 23	2	5	§§402/404
74.	1997	+	Crim.	4, 22, 23	3	5	§402
82.	1994	+	Cit. S.	4, 7, 22, 23	4	7	§402
84.	1993	+	Cit. S.	22, 23	2	2	§402
85.	1993	--	Crim.	1, 8, 10, 16, 17, 22, 23	7	7	§402
93.	1991	+	Cit. S.	4, 10, 23	3	3	§402
94.	1991	+	Cit. S.	22	1	--	§402
103.	1984	+	Jud. Rev.	16, 22, 23, 24	4	2	§402
108.	1983	+	Cit. S.	22, 23	2	2	§402
110.	1982	--	Cit. S.	2, 4, 7, 16, 22, 23, 24	7	1	§402
111.	1982	--	Cit. S.	22	1	--	§402
113.	1980	+	Cit. S.	22, 23	2	2	§402
116.	1979	+	Enf.	4, 11, 16, 22, 23, 24	6	2	§402
119.	1977	+	Jud. Rev.	6, 16, 18, 23, 24	5	1	§402

A	B	C	D	E	F	G	H
123.	1976	--	Jud. Rev.	22, 24	2	--	§402
<b>U.S. District Court Decisions</b>							
138.	2010	+	Cit. S.	22	1	--	§402
140.	2010	+	Jud. Rev.	1, 23, 24	3	8	§404
141.	2010	+	Enf.	22, 23	2	1	§404
148.	2009	--	Cit. S.	7, 23	2	1	§402
149.	2009	+	Cit. S.	22, 23	2	2	§404
150.	2009	+	Cit. S.	4, 7, 10, 21, 23	6	2	§402
151.	2009	+	Enf.	23	1	5	§404
152.	2008	--	Cit. S.	23	1	9	§402
160.	2007	+	Cit. S.	4, 22, 23	3	7	§402
171.	2003	+	Cit. S.	22, 23	2	5	§§402/404
172.	2003	+	Cit. S.	4, 7, 23	3	3	§402
176.	2002	+	Cit. S.	1, 2, 4, 5, 23	5	8	§402
182.	2002	+	Cit. S.	4, 7, 22, 23	4	3	§402
184.	2001	--	Cit. S.	8, 13, 21, 23	4	5	§402
192.	1999	+	Cit. S.	22, 23	2	1	§402
195.	1998	--	Cit. S.	23, 24	2	2	§§402/404
198.	1997	+	Cit. S.	1, 23	2	3	§402
202.	1996	+	Jud. Rev.	4, 23, 24	3	4	§402
203.	1996	+	Crim.	23	1	1	§404
204.	1996	--	Cit. S.	13, 23	2	2	§402
205.	1996	+	Cit. S.	4, 23	2	8	§402
206.	1995	+	Cit. S.	4, 7, 23	3	2	§402
208.	1995	+	Cit. S.	22, 23	2	1	§402
210.	1994	+	Cit. S.	4, 7, 23	3	8	§402
215.	1991	+	Crim.	1, 4, 7, 8, 13, 16, 22, 23, 24	9	5	§402
217.	1990	+	Enf.	23	1	3	§404
220.	1990	--	Cit. S.	1, 4, 7, 23	4	3	§402
227.	1987	+	Cit. S.	22, 23	2	2	§402
228.	1986	+	Cit. S.	4, 23	2	4	§402
240.	1981	+	Cit. S.	22, 23	2	3	§402
241.	1980	+	Enf.	22, 23	2	1	§404
242.	1980	+	Crim.	22, 23, 24	3	1	§402
244.	1979	+	Cit. S.	22, 23	1	2	§402
247.	1978	+	Cit. S.	22, 23	2	1	§402
251.	1976	+	Cit. S.	6, 24	2	--	NEPA
259.	1974	+	Enf.	22	1	--	§402