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Global Legal Group

The International Comparative Legal Guide to:

Environment Law 2007

A practical insight to cross-border Environment Law

Published by Global Legal Group, in association with Freshfields Bruckhaus Deringer, with contributions from:

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www.ICLG.co.uk

Chapter 53

USA

Linda E. Benfield

Richard G. Stoll

Foley & Lardner LLP

1 Environmental Policy and its Enforcement

1.1 What is the basis of environmental policy in the USA and which agencies/bodies administer and enforce environmental law?

The National Environmental Policy Act (NEPA) of 1969 requires federal agencies to evaluate environmental impacts in their significant actions. Agencies are generally encouraged to assure their actions enhance environmental quality and minimise adverse environmental impacts. NEPA sets no specific rules or regulatory requirements, but parties have often forced significant changes to federal agencies' projects (in fact, even stopped them) through NEPA challenges in federal courts.

Environmental policy with specific mandates is embodied in a series of statutes enacted in the decade following NEPA. The most pervasive pollution control laws are the Clean Air Act (CAA) 42 U.S.C. §§7401 et seq.; the Clean Water Act (CWA) 33 U.S.C. §§1251 et seq.; and the Resource Conservation & Recovery Act (RCRA) 42 U.S.C. §§6901 et seq. The "Superfund" law provides the authority for contaminated site clean-ups. 42 U.S.C. §§9601 et seq.

Most significant environmental statutes are administered by the Environmental Protection Agency (EPA). Many other federal statutes aimed wholly or partially at protecting the environment are administered by EPA or other federal agencies.

Each of the 50 states (as well as the District of Columbia and territories such as Puerto Rico and Guam) administers its own environmental laws. Often, state laws are patterned after federal laws but in many cases state (and municipal) laws impose additional and more stringent requirements.

1.2 What approach do such agencies/bodies take to the enforcement of environmental law?

Environmental regulations impose extensive recordkeeping, monitoring, and reporting obligations on affected facilities. The results of monitoring (showing whether standards are being met or exceeded) must be reported to government agencies. Moreover, agencies regularly conduct on-site inspections.

Agencies thus have a wealth of information on which to base allegations of non-compliance. Evidence of violations is often so transparent that companies often voluntarily disclose violations to the government under the assumption the government will treat voluntary disclosures more leniently.

Most companies take environmental protection obligations seriously and seek to avoid adverse publicity portraying the company as a "polluter." Quite often, the government and the facility resolve alleged violations through an informal administrative settlement process.

Sometimes, however, the company and the government cannot agree. There are procedures for both administrative and judicial enforcement in which significant fines and penalties may be imposed and specific remedial actions and/or prohibitions may be ordered.

1.3 To what extent are public authorities required to provide environment-related information to interested persons (including members of the public)?

Generally any type of company information related to emissions, effluent, waste generation, etc., must be made available to the government. The government must make any such information available to the public, unless a company can demonstrate that some portion reveals trade secrets.

Under the U.S. Freedom of Information Act (FOIA), the public may obtain upon request virtually any information EPA possesses concerning environmental protection. To the extent environmental-related facts, records, and data are the subject of the request (as contrasted to opinions, legal memoranda, deliberative memoranda), there is a strong presumption that information requested must be disclosed. Many states have FOIA analogs.

2 Environmental Permits

2.1 When is an environmental permit required, and may environmental permits be transferred from one person to another?

There are two basic types of permits: "pre-construction;" and "operating." A pre-construction permit is more burdensome. If a company desires to engage in an activity that triggers the need for a pre-construction permit, the company is prohibited from moving forward with that activity unless and until a final permit is secured - which can take years. An operating permit, on the other hand, may be processed while the company is already engaging in the activity to be regulated by the permit.

A CAA "new source review" (NSR) permit is the most prominent type of preconstruction permit. If a company desires to construct a new facility with potential to emit at certain levels, or if a company desires to modify an existing facility with potential to increase emissions to certain levels, the company may not commence any

activity regarding such projects unless and until it obtains a final NSR permit. Similar preconstruction permits are required under the CWA and RCRA for "new" and "modified" facilities that would discharge effluents to rivers, lakes, etc. or would treat, store, or dispose of hazardous waste.

Operating permits are required for existing as well as new facilities under several statutes. Most prominently, almost all types of air pollution sources must obtain a CAA "Title V" permit. Any existing or new facility that discharges effluent to rivers, lakes, etc. must obtain a "National Pollutant Discharge Elimination System" (NPDES) permit under the CWA.

Permits can generally be transferred, but depending upon the statutory programme involved, prior notice to government agencies and/or government approval might be necessary.

2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

Extensive procedural rights are provided for permit applications and for appealing the denial or issuance of a permit (and/or particular conditions contained in a permit). The appeal is handled at the "administrative" (within EPA) level first. After administrative appeal, a dissatisfied party may seek judicial review.

Opponents of a facility (a competitor, neighbours, public interest groups) often challenge permits at the issuance, administrative, and judicial review stages. Particularly when a preconstruction permit is at issue, project opponents can tie up a company's plans for years.

2.3 Is it necessary to conduct environmental audits or environmental impact assessments for particularly polluting industries or other installations/projects?

"Due diligence" in mergers and acquisitions often includes a review of the environmental condition of the property and an audit of the compliance status of the facility. These investigations are not required as a matter of federal law, however. Some states require an assessment of the environmental conditions of the property prior to a sale or other transfer of rights to the property, and require that one of the parties agree to be the responsible party for handling any required clean-up.

For major *federal* projects (dams, highways, etc.), NEPA requires environmental impact assessments (see question 1.1 above). Many states have similar requirements for state-funded projects.

For non-governmental projects, the pre-construction permitting process will include an impact analysis of at least the media at issue (i.e., air quality impacts will be fully assessed in a CAA permit), but there is no overall, multimedia impact analysis required at the federal level for non-governmental projects. Some states may require multi-media environmental impact analyses for particular types of private projects.

2.4 What enforcement powers do environmental regulators have in connection with the violation of permits?

Agencies have extensive enforcement authority including the ability to seek substantial monetary penalties, injunctive relief, and incarceration in cases of "knowing" violations. At the federal level, a violation of a single CAA permit term can give rise to penalties of $32,500 per day. Generally, EPA can seek penalties and injunctive relief through its own administrative processes, or it can seek relief directly in court. If a company is dissatisfied with the results of an administrative process, it has judicial appeal rights.

3 Waste

3.1 How is waste defined and do certain categories of waste involve additional duties or controls?

Under RCRA, "discarded" material is deemed waste. EPA has been attempting for two decades to regulate some "recycled" materials as waste. EPA's regulations for "recycling" are supremely confusing, and federal courts have frequently vacated portions of these regulations.

All solid waste ("solid" includes liquid and gaseous) is regulated. "Hazardous" waste is regulated much more comprehensively than non-hazardous waste. EPA's regulations contain tests for determining hazardousness and lists of specific hazardous wastes. All parties handling hazardous waste are subject to comprehensive "cradle to grave" regulations, including a "manifest" paper trail requirement. Almost all hazardous wastes are subject to stringent treatment requirements (incineration, fixation, stabilisation). Non-hazardous waste is subject to less stringent state requirements.

3.2 To what extent is a producer of waste allowed to store and/or dispose of it on the site where it was produced?

RCRA permit requirements do not apply to generators (producers) or transporters of hazardous waste; only facilities at which hazardous waste is treated, stored, or disposed (TSD facilities) are required to obtain RCRA permits. A generating facility is allowed to treat, store, and/or dispose of waste at the site where the waste was generated *but only* if the facility obtains a RCRA permit for that activity. RCRA regulations do allow, however, a brief period (generally 90 days) of waste "accumulation" at the generating site without triggering the need for a RCRA permit. Most "generating" facilities are reluctant to seek a RCRA permit for TSD status, as the process is arduous and many burdensome conditions are imposed.

3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (e.g. if the transferee/ultimate disposer goes bankrupt/disappears)?

Absolutely. Superfund makes parties liable, with almost no meaningful exceptions or defences, for any clean-up liabilities and damages associated with hazardous substances they generate, no matter where deposited. The fact that materials are sent to a fully-permitted site does not shield generators from this liability. Generators may enter into contracts (indemnification, insurance, etc.) through which other parties may agree to assume the generator's liabilities, but such a contract would not impact the government's right to recover against the generator.

3.4 To what extent do waste producers have obligations regarding the take-back and recovery of their waste?

EPA encourages voluntary electronic waste "take-back" programmes, but there are no federal requirements at this time. EPA maintains a website with a comprehensive collection of information and recommendations for "take-backs." (www.epa.gov/epaoswer/hazwaste/recycle/ecycling/index.htm)

Some states (such as Maine, Maryland, Washington, and California) are adopting programmes. The requirements vary - either the

producer or the consumer generally must pay to fund a recycling programme. The following website summarises the status of state laws on the subject: www.e-takeback.org/docs%20open/Toolkit_Legislators/

4 Liabilities

4.1 What types of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are typically available?

There are virtually no meaningful defences (other than statute of limitations) where a facility is found in actual violation. Often, however, the terms of a regulatory or permit requirement specify that an exceedance of a limitation in certain circumstances will not be considered a violation. (Allowances for exceedances during "startup/shutdown/malfunction" phases are common.) If a violation is shown, most statutes authorise high daily penalties ($32,500 per day is common), as well as injunctive relief. Moreover, if a "knowing" violation is proved, criminal sanctions can be imposed (including imprisonment for responsible individuals).

The fact that an agency *alleges* a violation, however, does not mean there *is* a violation. If a facility desires to contest such an allegation, factual issues may come into play and the government has the burden of proof. Moreover, bona fide legal issues may arise about the meaning of a regulatory or permit condition, and a court might reject a governmental interpretation necessary to establish a violation.

Even where a violation is clear, agencies have great leeway to impose penalties that may fit the equities of the situation. For example, unusual weather or a strike may not be a valid defence to liability, but EPA often recognises such extenuating circumstances in negotiating a penalty. And even though a statute may authorise penalties up to $32,500 per day per violation, penalties actually imposed are rarely that high.

4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?

Generally, a facility complying with a governmentally-issued permit is immune from liability to the government for the type of pollution (air, water, waste, etc.) addressed by that permit. Full compliance with environmental laws, however, does not necessarily insulate a facility from tort liability. Individuals may pursue claims for personal injury and/or property damages alleged to have been caused by the facility's releases.

4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?

The government usually will pursue only a corporation as an alleged liable party. The government may, however, pursue individual officers, directors, or other corporate employees when an individual acted in bad faith or was reckless, and his/her bad conduct was a prime factor behind the violation.

Director and officer liability insurance may be obtained respecting environmental liabilities of a corporation. Such a policy will probably have exclusions, however, for the type of bad faith or reckless acts that would provoke the government into pursuing an individual in the first place. The same would generally be true of corporate indemnifications to directors and officers. Moreover, an individual usually cannot rely upon insurance or indemnification to cover criminal acts.

4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?

Because of retroactive liabilities for past hazardous substance disposal, parties must recognise that a target facility may have soil and/or groundwater problems that could range in the millions of dollars. Even more vexatious, anything a facility ever sent *off-site* can trigger major liabilities. When acquiring shares, the purchaser is acquiring the company, and the company will continue to be liable for all of its on-site and off-site liabilities of the past. This can be extremely problematical when acquiring a company with multiple facilities.

Asset purchasers usually will only be liable, on the other hand, for contamination existing on the purchased property. Courts have held asset purchasers liable for the historic environmental liabilities of the prior company in several instances, however. These include situations where there is a "mere continuation" of the prior company, where there is "substantial continuity" between the companies, and where the transaction was entered into fraudulently to avoid liabilities.

4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?

Under Superfund, a site "owner" and a site "operator" may be held liable for remediation costs. Until the law was amended in 1996, there had been significant problems for lenders holding a security interest in the site. A lender involved in influencing business decisions of the borrower could be viewed as an "operator" of the borrower's property. If a lender foreclosed, the lender would become the "owner" of the property and therefore instantly liable for all remediation costs. With the 1996 amendments, however, a lender will generally not be an "operator" unless the lender is shown to have exercised control or influence over environmental compliance or hazardous substance handling. And now a lender may foreclose on property without becoming an "owner" so long as the lender seeks to divest itself of the property at the earliest reasonable time.

As for "environmental wrongdoing," a lender would almost never be deemed liable for environmental regulatory or permit violations at a facility. If, however, the lender took some active part in management and influenced decisions relating to an environmental violation, a lender could be deemed liable either as an "operator" of the facility or under a conspiracy theory.

5 Contaminated Land

5.1 What is the approach to liability for contamination (including historic contamination) of soil or groundwater?

Superfund is the primary authority for addressing contaminated soil and groundwater, and most states have similar laws. Companies that arranged for substances to be disposed (either on their own property or off-site), transporters of these materials, and current and former owners and operators of the site may all be retroactively liable. Liability can be triggered by any level of contamination. The levels to which cleanups will be required are determined on a case-by-case basis.

5.2 How is liability allocated where more than one person is responsible for the contamination?

Under Superfund, all parties described in question 5.1 above are "strictly" liable - the degree of care exercised is irrelevant. And they have "joint and several" liability - which means (at least theoretically) that the government could sue just one of dozens of responsible parties and secure 100% recovery. As a practical matter, the government rarely sues only one out of dozens, but the government will often sue just a few out of many under the assumption that the few can then seek "contribution" from other responsible parties.

There is no formula in the law for allocating costs among multiple responsible parties. When courts have addressed the issue, and when parties allocate among themselves, the most common factors are: volume and toxicity of materials a party contributed; degree of control over the disposal activities presenting the problem; degree of care exercised by a party; and degree of cooperation with the government.

5.3 If a programme of environmental remediation is 'agreed' with an environmental regulator can the regulator come back and require additional works or can a third party challenge the agreement?

In almost all Superfund consent agreements, the government preserves limited rights to require additional work. Discovered conditions that were unknown or undisclosed at the time of the agreement, and/or subsequent findings that a remedy is not protective of health, are the types of conditions that may trigger additional work. The government has rarely sought additional work under such a provision.

As for third party challenges, when a consent decree is being considered by a federal judge, parties may intervene in the proceedings and object to the terms on grounds of fairness. There is a heavy presumption, however, that a settlement with the government has been negotiated in good faith and only rarely will a court reject a settlement. Moreover, Superfund prohibits courts from considering the adequacy of a remedy selected by the government unless and until the remedy is completed.

5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination; and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?

A prior owner that caused contamination is a liable party under Superfund, as is the current owner (even if the current owner did not cause the contamination). Assuming the government chooses to seek recovery from the current owner, the current owner would have certain causes of action against the prior owner unless under the terms of the sales agreement, the buyer and seller expressly recognised the contamination at issue, and expressly agreed that the buyer would be responsible for the contamination.

The degree to which one party has contribution rights against another directly under Superfund is uncertain, pending resolution of certain issues by the U.S. Supreme Court (probably in 2007). If the party seeking recovery has been sued by EPA or entered into a binding settlement with EPA under Superfund, the party will presumably have Superfund contribution rights. But if a party undertakes a voluntary clean-up or performs a clean-up in an agreement with a state, such contribution rights might not exist. There are often other state law causes of action, however.

5.5 Does the government have authority to obtain from a polluter monetary damages for aesthetic harms to public assets, e.g., rivers?

Superfund authorises the government to seek "natural resource damages" (NRD) from the same parties liable for a site clean-up. NRD include damages to fish and wildlife as well as soil and groundwater. Damages must be measured against the situation that will prevail after a site condition is remedied. Thus, if soil contamination is remediated through a Superfund cleanup, there would be no remaining NRD for that soil contamination. The NRD for which the government can seek recovery under Superfund is for publicly-held resources - privately owned soil, groundwater, etc. is not covered. (Private owners might seek the same type of recovery in the tort system.)

6 Powers of Regulators

6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc.?

These powers are virtually limitless, so long as an inquiry is reasonably related to a regulated activity (air emissions, water effluent, etc.). Generally any information in a company's possession relating to the nature, quantity, and type of releases must be made available to the government upon request, and this information must also be available to the public unless the company can demonstrate that it comprises "trade secrets." Even if information qualifies as such, however, it must still be produced to the government upon request. If a company believes a government demand is excessive or unduly burdensome, it may seek protection from a federal court, but such requests are rarely successful.

7 Reporting / Disclosure Obligations

7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?

Superfund establishes a one-time inventory reporting requirement under which any known contamination as of June, 1981, was required to be reported. If contaminated soil or groundwater is discovered after that date, however, Superfund does not require that it be reported. Some state laws require reporting of new or newly discovered contamination.

7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?

There is no general requirement to investigate land for contamination. If EPA suspects that certain land is contaminated, under Superfund EPA may either undertake its own investigation or order the owner to do so. Also, if a facility happens to be a RCRA TSD facility for hazardous waste (see question 3.2 above), there are comprehensive requirements for investigation and remediation of the entire property.

The sale or other transfer of interests in land often triggers an investigation because a company performing due diligence may want to assess the nature and extent of potentially costly liabilities hidden under the property. Some states require an investigation before certain types of property transfers may take place. State laws

may also require an investigation following a spill or incident on the property.

7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?

Parties to mergers and acquisitions have become acutely sensitive to the potential contamination liabilities. Sometimes, parties may decide it is preferable not to conduct any site investigation, under the theory that currently unknown contamination may never be discovered by the government, whereas discovery might require reporting. In such "don't ask don't tell" situations, the contract should clearly specify which party is assuming the risk of liabilities for any such pre-existing contamination.

More typically, in a contract a seller will list all environmental conditions known to the seller, and represent and warrant that these are the only adverse conditions known to seller. If there are conditions known to the seller that are not listed, the purchaser may then have a cause of action for breach of warranty. In addition, a seller that fails to disclose materially adverse conditions to a buyer (unless a buyer has expressly agreed to assume the risk of any contamination), may be sued for fraud.

Under federal law, however, there is no generally applicable requirement for a seller to disclose environmental problems to buyers. For most facilities subject to environmental regulations, however, many sources of publicly available information and data bases allow a buyer to search for reported problems associated with a particular facility. Such a search may not, of course, discover significant buried contamination problems.

8 General

8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier's potential liability for that matter?

An indemnification will not discharge a party's underlying liability for environment-related liabilities, but an indemnification is enforceable between the parties to it. If the indemnifying party meets its obligations under the agreement, an indemnification can limit the exposure of the indemnified party for environment-related liabilities. Once the indemnifying party has met its indemnification obligations, it would have no further contractual liability.

8.2 Is it possible to shelter environmental liabilities off balance sheet, and can a company be dissolved in order to escape environmental liabilities?

Accounting for environmental liabilities for public companies is regulated under the Securities and Exchange Act. Both current environmental liabilities and future environmental liabilities that will be incurred when assets are retired may have to be disclosed. A company's lawyers, accountants and remediation consultants work in close collaboration to advise a company on its disclosure obligations. Corporate dissolution is a matter of state law, which will govern the process of winding up a company's affairs. Corporate dissolution processes require the dissolving company to address its known obligations, and a dissolution can be challenged as fraudulent under certain circumstances.

8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?

Individual shareholders are not liable for environmental liabilities of the corporation merely by virtue of holding shares. However, individual shareholders have been held liable for environmental liabilities for their own actions relating to the polluting activity. The liability of parent corporations was addressed by the U.S. Supreme Court in *U.S. v. Bestfoods*, 524 U.S. 51 (1998) and several subsequent federal court cases, holding that traditional corporate law principles apply. As a result, parent corporations can be liable for the environmental obligations of a subsidiary where it is appropriate to "pierce the corporate veil." Generally, there is a presumption against the extraterritorial application of U.S. laws, and U.S. environmental laws have not been applied to the foreign operations of U.S. companies and their affiliates.

8.4 Are there any laws to protect "whistle-blowers" who report environmental violations/matters?

Several federal, and some state laws protect "whistle-blowers" who report environmental violations and matters. Under these statutes, employees are protected from retaliation or discrimination relating to their employment.

8.5 Are group or "class" actions available for pursuing environmental claims, and are penal or exemplary damages available?

The federal and state governments may bring enforcement actions against parties who are in violation of environmental laws, and some federal statutes also allow citizen groups to bring an action for specific violations, where the government is not diligently prosecuting the violation. An allegedly injured party may also bring an action for a specific injury (such as a neighbouring landowner or a downstream property owner). Under general tort principles, parties who meet the requirements for a class action law suit may sue for damages, and some of the major toxic tort suits in the U.S. have involved class actions for environmental exposure. Some statutes provide for enhanced penalties for recidivist violators.

9 Emissions Trading and Climate Change

9.1 What emissions trading schemes are in operation in the USA and how is the emissions trading market developing there?

There are several air emissions trading schemes, including federal trading schemes for certain emissions (including sulphur dioxide and mercury) from power plants, and for emissions of volatile organic compounds. Several states also have trading programmes for specific pollutants. The regulations governing these trades are detailed. There is also a voluntary trading programme initiated by the Chicago Climate Exchange for greenhouse gas air emissions from sources in North America. The federal and some state governments continue to evaluate whether trading programmes in other media (such as water) should also be implemented.

10 Asbestos

10.1 Is the USA likely to follow the experience of the US in terms of asbestos litigation?

Asbestos litigation continues.

10.2 What are the duties of owners/occupiers of premises in relation to asbestos on site?

The U.S. EPA and the U.S. Occupational Health and Safety Administration have adopted regulations that govern the identification, maintenance, removal, handling and disposal of asbestos, as well as training requirements for employees, notification, and permissible exposure limits. Employee claims against employers are usually limited under worker compensation laws, but owners and occupiers of buildings may have exposure to claims by non-employees under a theory of "premises liability."

Richard G. Stoll

Foley & Lardner, LLP
Washington Harbour
3000 K Street, NW, Suite 500
Washington, DC 20007-5109
USA

Tel: +1 202 295 4021
Fax: +1 202 672 5399
Email: rstoll@foley.com
URL: www.foley.com

Richard G. Stoll practices environmental and administrative law with Foley & Lardner LLP in Washington, D.C. Since 1989, he has been listed in each edition of Woodward-White's "*Best Lawyers in America*," and is currently listed in Marquis's "*Who's Who in the World*," Chambers USA's "*America's Leading Business Lawyers*," and "*The International Who's Who of Business Lawyers*." He serves on the Council of the American Bar Association's Administrative Law Section and previously served as Chair of the ABA's Section of Environment, Energy and Resources. He graduated from Georgetown University Law School, where he served as an editor of the *Georgetown Law Journal*. He recently completed a term as Elder in the Georgetown Presbyterian Church. He is a member of the Cosmos Club in Washington, D.C., and is President of the Georgetown Ministry Center - a non-profit organisation serving the homeless in Washington, D.C.

11 Environmental Insurance Liabilities

11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in the USA?

Environmental insurance is available for several kinds of exposure, including unknown historic contamination, excess cleanup costs, and cleanup for future spills or releases. Environmental insurance is relatively expensive, and therefore is currently primarily used to insure the excess costs for a cleanup obligation, or in transactions to protect purchasers from unknown historic contamination.

11.2 What is the environmental insurance claims experience in the USA?

Until the early 1980's, "Comprehensive General Liability" and umbrella insurance policies included provisions that could be interpreted to apply to environmental claims. Beginning in the early 1980's, insurance companies included "absolute pollution exclusion" clauses that precluded coverage for environmental conditions. Whether the pre-1980's policies apply to historic contamination has been the subject of significant litigation and as a result of case law, varies significantly state by state. Insurance policies specifically intended to cover environmental contamination are fairly recent and therefore there is neither significant claims experience nor interpretive case law with respect to those policies.

Linda E. Benfield

Foley & Lardner, LLP
777 East Wisconsin Avenue
Milwaukee
Wisconsin 53202
USA

Tel: +1 414 297 5825
Fax: +1 414 297 4900
Email: lbenfield@foley.com
URL: www.foley.com

Linda E. Benfield is the chair of the firm's Environmental Regulation Practice. She represents clients in environmental enforcement, permitting, compliance and litigation matters, and also advises clients on environmental risks in transactions. She has extensive experience on the cutting edge of Clean Air Act, Clean Water Act, Superfund and RCRA enforcement, as well as citizen suit litigation, settlement strategies, and related cost recovery, insurance coverage and indemnity disputes. Ms. Benfield graduated from Colorado College (1981 B.A., *summa cum laude*) and earned her J.D. from the University of Chicago (1985). She is listed in *The Best Lawyers in America*®, 1995-2007. She was also named to the 2005 and 2006 lists of Wisconsin Super Lawyers by *Law & Politics Media, Inc.*