

GETTING THE DEAL THROUGH

# Environment

in 26 jurisdictions worldwide

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# United States

Richard G Stoll, Lawrence G McBride and Julie Solmer Stine

Foley & Lardner LLP

## Legislation

### 1 What are the main statutes and regulations relating to the environment?

Several fundamental pollution control statutes are administered in partnership between the US Environmental Protection Agency (EPA) and the 50 states. The EPA issues regulations under these statutes, but sometimes states enact laws that may be more stringent or comprehensive. The most pervasive federal laws are the Clean Air Act (CAA); Clean Water Act (CWA); Resource Conservation and Recovery Act (RCRA, dealing with management of waste); the Comprehensive Environmental Response, Compensation, and Liability Act (also known as 'Superfund', dealing largely with the clean-up of old hazardous disposal sites); the Toxic Substances Control Act (TSCA, dealing with controls on products containing chemical substances); and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA, dealing with registration and controls over pesticides).

### 2 Is there a system of integrated control of pollution?

The EPA, as a single agency, administers the pollution control laws mentioned in question 1, so there is some integration in policy and priorities. But Congress enacted the major laws at different times and in separate, distinct formats. Each law has independent substantive and procedural requirements that can rarely be waived or balanced against other laws' requirements, so there is no true system of integrated control.

### 3 What are the main contents of the rules applicable to soil pollution?

The Superfund law is the primary authority 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 property in need of cleaning up may all be retroactively liable. This liability can be triggered by any level of contamination. The level of the clean-up is determined case by case.

### 4 How is waste defined?

Under RCRA's hazardous waste regime, material discarded by its initial user is deemed regulated waste. EPA has been attempting for two decades to regulate some recycled materials as waste. EPA's regulations for recycling are supremely confusing, and their status is usually in question as federal courts have frequently struck down portions of these regulations.

### 5 What types of waste are regulated and how?

All 'solid' waste (including liquid and gaseous) is regulated. Hazardous waste is regulated more comprehensively than non-hazardous waste. EPA's regulations contain tests for determining whether waste is hazardous and contain lists of specific types of waste deemed to be so. Generators, transporters and owners or operators of treatment, storage or disposal facilities of 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) before they may go into a landfill. Non-hazardous waste is subject to less stringent state requirements.

### 6 Which are the main features of the rules governing air emissions?

Any facility that produces air emissions is likely to be regulated by one or more CAA programmes. Existing sources of air pollution will be subject to State Implementation Plan (SIP) requirements to achieve ambient air standards. Most new sources, and modifications to existing sources, will trigger a new source review process requiring both a pre-construction permit and installation of expensive controls. The CAA established an emissions trading programme limited to acid rain pollution from electric power plants, but the Bush administration is making (often controversial) attempts to extend trading into other CAA regulatory programmes.

### 7 Are there any specific provisions made for climate change?

The US has not ratified the Kyoto Protocol. It has, however, undertaken research on climate change through the Global Climate Change Research programme, and has encouraged reductions in greenhouse gas emissions through several voluntary programmes and partnerships. Many state and local governments have established programmes and policies to reduce emissions.

### 8 How are fresh water and seawater, and their associated land, protected?

The CWA's goal is high water quality in all waters of the US, whether fresh or seawater. Industrial and municipal 'dischargers' into these waters through 'point sources' such as pipes, channels, ditches, etc, are subject to national technology requirements to limit effluents, and each must also obtain a permit for such discharges. Discharges from stormwater are also subject to these permit requirements. Similarly, discharges from dredging and filling of soils into waters (including wetlands) must also be permitted.

**9** What are the main features of the rules protecting natural spaces?

National parks are closely managed by the US Interior Department to balance public enjoyment with land and resource protection. The national park system includes 390 separate areas. The national forest and grassland system under US Agriculture Department control consists of 175 areas for the beneficial use and conservation of timber, water supply, livestock forage and mineral resources. Most restrictively, the Wilderness Act sets a framework for the designation of federal lands to provide areas where evidence of human activity and its effects would remain substantially unnoticeable.

States have their own systems of land ownership and management. Typically lands are set aside or managed for fish and game, flood control, public water supply and its quality, and recreational use.

**10** What are the main features of the rules protecting flora and fauna species?

The federal Endangered Species Act (ESA) protects a list of threatened and endangered flora and fauna species, and the US is party to the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The ESA prohibits federal agencies from jeopardising the existence of a listed animal or plant and, except under closely limited permits, prohibits anyone from engaging in commerce in listed animals or plants or parts thereof, and taking listed species. 'Taking' means destroying habitat as well as killing or capturing. Hunting and fishing are generally controlled by each state (or, within its reservation land, Native American tribe).

**11** What are the main features of the rules governing noises, odours and vibrations?

Noise, odours and vibrations are primarily regulated, if at all, on the state and local level, and these standards vary widely. On a federal level, noise is regulated by EPA under the Noise Control Act with respect to a few specific sources such as air traffic and vehicle mufflers. In addition, the US Occupational Safety and Health Administration (OSHA) regulates exposure to noise in the workplace. Under general tort law principles, private parties may bring nuisance actions for excessive noise, odours and vibrations.

**12** Is there a general regime on liability for environmental damage?

As explained in question 29, a private party claiming injury to property from a defendant's pollution or other hazardous activities may seek damages or injunctive relief in a tort action. Environmental damages are the types of damages for which a private party may seek recovery, to the extent the party owns or has some special relationship to (such as enjoyment of a view, a clean stream nearby, etc) the portion of the environment alleged to have been damaged. For damages to the environment in general for which no private party is directly harmed or affected, there is a 'natural resource damage' liability scheme under the federal Superfund law. The same types of parties who can be held liable under Superfund for site clean-ups can also be held liable for the assessed value of such natural resource damages (to flora, fauna, etc).

**Hazardous activities and substances****13** Are there specific rules governing hazardous activities?

The Department of Transportation regulates transport and handling of hazardous materials. People transporting or offering to transport hazardous materials must file a registration statement. OSHA regulates hazards in the workplace, including standards for machine guarding, electrical safety, blood-borne pathogens, and process safety management of highly hazardous chemicals. Several OSHA programmes include licensing requirements. Asbestos contractors must be certified through training programmes, and employees performing 'hot work' and work in confined spaces must obtain permits.

**14** What are the main features of the rules governing hazardous products and substances?

The EPA regulates products containing chemical substances under the TSCA. Thousands of existing substances are listed on TSCA's inventory, and the EPA issues regulations for labelling, use, transportation, etc, of some existing substances. Manufacturing a new chemical substance (one not on the inventory) is prohibited unless and until the EPA approves a pre-manufacture notification application for the substance. The EPA may deny an application or, more commonly, impose restrictions on the new chemical's marketing, uses, labelling, etc. The Consumer Product Safety Commission and the Federal Trade Commission also have labelling requirements and may prohibit or regulate certain hazardous products used in consumer products.

**Industrial accidents****15** What are the measures to prevent industrial accidents?

The OSHA's process safety management standard regulates hazards from using highly hazardous chemicals. The OSHA's hazardous waste operations and emergency response standard requires training and control measures at certain sites where clean-up activities are being conducted. Other OSHA standards apply to many types of industrial processes to reduce injuries.

The EPA's CAA Risk Management Programme requires companies using flammable and toxic substances to assess hazards and develop safety programmes. EPA's CWA Spill Prevention, Control and Countermeasure Programme requires companies storing oil to prepare plans detailing spill prevention and control measures. The Emergency Planning and Community Right-to-Know Act requires state and local governments to conduct emergency planning activities, and requires facilities to submit chemical storage and release reports.

**Environmental aspects in transactions****16** What are the main environmental aspects to consider in M&A transactions?

Because of retroactive liabilities for past hazardous substance disposal, a buyer must be aware that a target facility could have soil or groundwater problems that could cost millions of dollars. Even more vexatious: anything a facility sent off-site can trigger major liabilities. When acquiring shares, the purchaser acquires all of the on-site and off-site liabilities of the past. When acquiring assets, the buyer can often avoid past off-site liabilities, although some court decisions have held asset purchasers liable for environmental liabilities of the prior corporation.

**17** What are the main environmental aspects to consider in other transactions?

The lender or purchaser should analyse all existing, as well as retroactive, clean-up and regulatory liabilities. A new owner unaware of pre-existing liabilities might become criminally liable if he, she or it continues the past practices (even inadvertently). Site locations should be reviewed for any special liabilities that might be triggered – for instance, people living near a factory may sue the company for alleged health or property damages. Federal and state lender liability protection laws can protect lenders from environmental liabilities if specific procedures are followed.

**Environmental impact assessment****18** Which types of activities are subject to environmental assessment?

Federal agencies must evaluate the environmental impact of their programmes, permits and projects. Impacts include socio-economic, water and air quality, wildlife, views and recreation, and consistency with local land use and resource plans. Regulations and permits issued by the EPA are generally exempt from these requirements. A number of states (less than half) have comparable laws for environmental impact assessments. These vary significantly.

**19** Do environmental assessments act as a licence? Do they only cover industrial projects, or programmes and plans as well?

The federal law (as do most of the parallel state laws) treats environmental impact analyses as disclosure statements; they do not function as licences. An impact analysis may become the source of mitigation conditions in permits, or of changes in the federal project design to reduce or eliminate certain impacts. The decision criteria for a federal action, however, are independently based on the procedures and substantive standards in the federal statute covering the licence or project.

Environmental impact analysis obligations apply to agency programmes and plans if the programme has identifiable environmental impacts. There may also be a site- or project-specific analysis of actions later implementing the programme. As an example, for the federal offshore oil and gas leasing programme, separate impact statements are required for a general five-year leasing programme; each periodic regional auction of leases; and specific development plans for the issued leases.

**20** What are the main steps of the environmental assessment process?

Proposed major federal actions with a ‘significant impact on the quality of the human environment’ require a formal environmental impact statement before the action can be initiated. An impact statement must identify alternatives and mitigation measures, and identify resources or values that would be adversely affected. A statement begins with a general notice of intent, soliciting comment on the issues to be addressed. Then notice of a detailed draft impact analysis for public comment is given. A final environmental impact statement is prepared later, responding to the public comments and refining the proposed action. Those who participated in the process may challenge the statement’s adequacy in court. Such judicial challenges have often delayed actions for years; many have effectively killed off the proposed project. Minor federal actions require preparation of an informal (and much simpler) environmental assessment, which will involve public comment in various degrees depending on the agency’s own standards and practice.

**Regulatory authorities****21** Which authorities are responsible for the environment and what is the scope of each regulator’s authority?

The federal EPA administers each major statute (CAA, CWA, etc) and each state has an agency that administers environmental laws. Administration and enforcement is usually shared between the federal and state agencies and jurisdiction overlaps. An alleged violation will usually trigger a response from either the federal or state agency but not both, as one commonly (but not always) defers to the other to conserve resources. As for permitting, on a statute-by-statute basis (CAA, CWA, etc) in each state there will usually be an agreement in which a regulated party applies either to the state or federal agency. There is also usually an agreement through which one but not both agencies will make routine periodic inspections at particular facilities.

**22** What are the typical steps in an investigation?

A true investigation is not usually undertaken when federal or state agencies address compliance issues, as the majority of issues are handled informally. Based on site inspections or reviews of records required to be kept on-site or submitted to agencies, agency personnel will discuss alleged violations with facility personnel and informally agree steps securing compliance. Penalties are often agreed through this informal process. If a true investigation is initiated, typically the agency will make a site inspection, conduct testing and sampling as well as interviews, and prepare a detailed report documenting any alleged violations. Facilities are entitled to be represented by counsel at all stages, and are entitled to ‘splits’ of any sampling and the sharing of relevant data. Representation by counsel is advisable because of the potential for criminal penalties or burdensome civil penalties.

**23** What powers of investigation do the regulatory authorities have?

Federal and state environmental agencies have extensive authority (enforceable in court) to obtain records, emission and effluent, and to require testing and sampling, so long as what they seek is relevant to environmental compliance. They also have broad authority to physically inspect facilities subject to environmental regulations. If facility personnel resist government requests, agencies have broad powers of subpoena and judicial sanctions to force facilities to provide access or turn over information. Agency access requests and demands for information may be challenged in court on the basis that a request is overly broad or burdensome or not relevant to the agency’s statutory authority.

**24** What is the procedure for making administrative decisions?

Procedures vary at the federal level depending upon the statute (CAA, CWA, etc) and the type of process (permit, enforcement, variance, etc). They vary more markedly among the states. Some processes are quite informal with a notice, written comments and a final decision in writing, whereas others are more formal with administrative law judges presiding over a hearing with witnesses and cross-examination. In virtually all situations, however, both the facility and the interested public have a right to be heard and have their comments and concerns responded to for the record.

**25** What are the sanctions and remedies that may be imposed by the regulator for violations?

Subject to court control, federal agencies may impose penalties in the range of thousands of dollars a day per violation. They may also impose requirements for a facility to stop or start performing certain acts (including the installation of control equipment). If a facility cannot comply with steps necessary to secure compliance, the agency can force the facility to cease the polluting activity (sometimes having the practical effect of closing the facility).

**26** To what extent may decisions of the regulator be appealed, and to whom? What are the grounds and procedures for appeals?

Within the federal EPA and state agencies, administrative appeal mechanisms are almost always provided. Procedures vary at the federal level depending upon the statute (CAA, CWA, etc) and the type of process (permit, enforcement, variance, etc). Procedures vary even more markedly among the states. Appeals can relate both to factual findings and legal conclusions, as well as the extent of a remedy or sanction imposed (fine, closure, etc). When appeal rights within an agency are exhausted, a party may seek review of the final agency decision in the courts. Again, factual findings and legal conclusions may be challenged, although courts generally review agency decisions with deference, giving the agency the benefit of the doubt (especially on factual findings).

### Judicial proceedings

**27** Are environmental law proceedings in court civil, criminal or both?

For almost all environmental statutes at the state or federal level, a violation will give rise to civil enforcement proceedings in the courts. Also, under the same statutes, a party may be prosecuted in a criminal case if that party has knowingly violated the law.

**28** What are the powers of courts in relation to infringements and breaches of environmental law?

When a party is found to have violated an environmental law, a court may levy penalties against the violator, and also issue an injunctive order applicable to the violator requiring the violator to take or refrain from specific acts (such as installing control equipment). When a party is found guilty in a criminal case the court may levy penalties and sentence the party to prison.

**29** Are civil (contractual and non-contractual) claims allowed regarding breaches and infringements of environmental law?

A private party claiming injury (personal or property) from exposure to a defendant's pollution or other hazardous activities may seek damages or injunctive relief in a tort action. No contractual relationship is necessary. The party asserting such a claim has the burden of proving that the defendant's acts or omissions caused the alleged injury. In many jurisdictions, that the defendant's acts or omissions were in full compliance with environmental laws may be relevant in assessing the extent of damages, but will generally not insulate the defendant from tort liability.

**30** What defences or indemnities are available?

Generally defences to violations under such laws as the CAA, CWA, etc are extremely limited. At least under most federal statutes and state laws, there is a statute of limitations (five years is common). Sometimes issues of statutory and regulatory interpre-

tation may be used by defendants to defeat the government's case, but otherwise, if the government proves the violation, the defendant will be liable. Degree of care would be irrelevant to liability, although it may become relevant in assessing penalties. A party found liable could have indemnities or contractual provisions with other parties in which the violator in turn may seek recovery, but the violator may not use such indemnities as a shield from liability towards the government. In Superfund clean-up litigation in which multiple parties can be liable, courts have generally held that liability is joint, several and strict.

**31** Are there specific defences in the case of directors' or officers' liability?

Officer and director liability issues do not usually arise in cases where an agency pursues regulatory violations. In Superfund clean-up cases, the government has been successful in holding a director or officer personally liable where the director or officer was personally involved in or personally directed the corporate acts or omissions causing the problem. Moreover, EPA commonly requires a high-level corporate officer to certify the accuracy of information submitted to EPA in many contexts (permit applications, periodic reports, etc). Corporate officers may be held directly liable if submitted information is proven to be incorrect.

**32** What is the appeal process from trials?

At both federal and state levels, a party found liable in a trial may appeal the judgment to one or more levels of appellate courts. At the federal level a judgment from the federal district court is directly appealable to one of the 12 federal circuit courts of appeals. From the court of appeals one may petition the US Supreme Court to hear an appeal, but the US Supreme Court's jurisdiction in such matters is discretionary. Each of the 50 states has its own system and there are great variations, but generally, there would be a direct right of review to at least one level of an appellate court, followed by subsequent review in the state's highest court, often (but not always) referred to as the state supreme court. In many states, the highest court's jurisdiction is discretionary, like the US Supreme Court's.

### International treaties and institutions

**33** Is your country a contracting state to any environmental international treaties etc?

The United States is a party to many environmental treaties as well as many international environmental agreements. Among the most significant are the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (the London Convention), which limits dumping at sea of waste generated on land; the 1973 CITES Treaty, which restricts international trade in endangered species; the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, which provides for the phase-out of ozone-depleting substances; and the 1993 North American Agreement on Environmental Cooperation (NAAEC) between Canada, Mexico, and the US to address regional environmental concerns. The State Department maintains a complete list of treaties and other international agreements to which the US is a party (at [www.state.gov/s/l/treaty/treaties/2007](http://www.state.gov/s/l/treaty/treaties/2007)).

If a treaty is signed, but not ratified and approved by two-thirds of the Senate, it is not considered in full force with respect to the US. These unperfected treaties are still significant because a signatory state must refrain from defeating the object of the treaty until that state expresses its intent not to ratify the treaty. Treaties

## Update and trends

Perhaps following the lead of the EU, there has been a much greater emphasis on 'product return' issues, particularly waste electronics. There is no legislation at the federal level that hits the issue head on, but the EPA has many voluntary programmes in place and several states now have laws with product return requirements. The EPA has also been placing much greater emphasis on enforcing stormwater discharge

requirements under the CWA. Construction and agricultural activities are particularly affected by these requirements. Also, as a result of a recent US Supreme Court opinion, there is growing debate and agitation relating to EPA's ability to issue requirements relating to climate change under the Clean Air Act. Disputes over the EPA's authority (and willingness) to act are raging, and are certain to continue for the next few years.

in this category for the US are the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; and the 2001 Stockholm Convention on Persistent Organic Pollutants.

**34** To what extent is regulatory policy affected by these treaties?

Generally, the United States has implemented obligations imposed by environmental international agreements by enacting legislation and adopting regulations pursuant to the legislation. For example, Congress enacted the Marine Protection, Research and Sanctuaries Act to implement the London Convention; certain provisions of the Endangered Species Act to implement the CITES Treaty; and the Stratospheric Ozone Protection provisions of the CAA to implement the Montreal Protocol. The EPA and other agencies have issued regulations to implement such legislation.

## Foley & Lardner LLP

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Contact: Richard G Stoll

e-mail: [rstoll@foley.com](mailto:rstoll@foley.com)

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[www.foley.com](http://www.foley.com)