ICLG

The International Comparative Legal Guide to:

Environment & Climate Change Law 2017

14th Edition

A practical cross-border insight into environment and climate change law

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Chapter 26

USA

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1 Environmental Policy and its Enforcement

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

Environmental law and policy in the United States derives from traditional common law notions of trespass and nuisance. Modern U.S. environmental law, however, is primarily based on statutory and regulatory enactments.

In areas where the federal government has chosen to act, federal environmental law pre-empts similar state and local enactments. Thus, federal law serves as a national baseline for environmental requirements. Consequently, U.S. environmental law is driven by the major federal statutes, and their implementing regulations, including the Clean Air Act, the Clean Water Act, the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA). Additionally, most states, and some Tribes, have been delegated the authority to implement aspects of federal law, and their statutory and regulatory requirements may exceed the requirements of federal law.

The major federal statutes tend to be fairly general and limited. As such, the U.S. Congress has authorised the U.S. Environmental Protection Agency (the USEPA), the U.S. Army Corps of Engineers and the Department of the Interior, to develop implementing regulations that provide specific legal requirements.

These federal regulatory agencies are also tasked with enforcement of U.S. environmental laws. Because of state delegation, however, the bulk of environmental enforcement has also been delegated to the states.

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

Civil penalties and criminal fines are authorised by statute to enforce state and federal environmental laws and permits. Injunctive relief can also be sought in federal or state court. Administrative penalties are generally enforced by an agency following inspection, discovery of a violation and issuance of a notice of violation and/or a corrective action order. The alleged violator may contest the fact of violation or amount of the penalty before the administrative agency and appeal a final decision for judicial review. Larger civil penalties or criminal penalties may be prosecuted in court against an alleged violator. Willful and knowing violations may be prosecuted as a crime (generally a misdemeanor) resulting in fines and possibly imprisonment. Actions to recover natural resource damages can be brought in the appropriate state or federal court with jurisdiction over the alleged violation.

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

Most environmental data filed with state and federal government is publicly available. Information filed with federal agencies can be requested by the public pursuant to the Freedom of Information Act. State governments generally have similar laws allowing public access. Confidentiality is the exception, not the rule, but trade secrets and commercially sensitive information that is clearly marked confidential may be exempt from public disclosure.

2 Environmental Permits

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

Environmental permits are authorised under local, state and federal law to assure site-specific compliance with environmental performance standards. In some cases, the permits are standardised for an industry and can be issued as a general or nationwide permit. In most cases, environmental permits are transferrable upon notice to the issuing agency, subject to the transferee's assumption of responsibility. The transferee may need to demonstrate the financial and technical ability to meet permit conditions. A transferee's poor environmental compliance history may block the permit transfer.

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?

State and federal agencies generally have an administrative appeal process set by statute or rule. Permit denial or disputed permit conditions are initially considered by an administrative law judge or appeals board. After this administrative process is exhausted, the final agency decision can then be appealed for judicial review. The scope of review depends on the enabling statute and is either a review on the administrative record or a trial *de novo*. Under

the federal Administrative Procedure Act (APA), the court may set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

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

Environmental assessments have different meanings in different contexts. The term "environmental site assessment" arises in the context of CERCLA liability. Prospective purchasers of property may be protected from liability under CERCLA for certain environmental conditions by conducting "all appropriate inquiries" (AAI). To meet AAI, an environmental site assessment process must be followed which meets specified industry standards issued by the American Society for Testing and Materials (ASTM). As a separate matter, under the National Environmental Policy Act (NEPA), if the project involves major federal action or approvals, an environmental assessment or environmental impact statement must be prepared to inform the agency decision. Finally, there are benefits to environmental self-evaluation and audits which may allow the polluting industry to voluntarily identify and remediate compliance problems. Some states, including Utah, have enacted legislation and rules of evidence which protect environmental audit reports from disclosure in state administrative and judicial proceedings. If violations are properly reported and remediated as a result of self-audit, these statutes and rules may result in the waiver of civil penalties for noncompliance. Without these protections, voluntary self-audits may provide a basis for liability.

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

See question 1.2, above.

3 Waste

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

The duties and controls required for the disposal of waste in the United States depends on the waste's classification(s). Generally, waste is classified as either non-hazardous solid waste or hazardous waste. Waste can also be classified as radioactive waste, for which separate rules apply. Finally, certain wastes (for instance, certain recycling) are exempt from classification as either solid or hazardous waste. Unfortunately, there is often uncertainty, and disagreement with regulators, as to the appropriate waste classification. Because the duties and controls vary substantially, depending on the classification, this uncertainty is often hotly contested.

Hazardous wastes are tracked and regulated from their generation to their disposal, to ensure that they are handled safely. Under the USEPA's regulations implementing RCRA, hazardous wastes exhibit at least one of four characteristics – ignitability, corrosivity, reactivity and/or toxicity. The RCRA regulations contain extensive requirements for hazardous wastes. For instance, the regulations specify how hazardous wastes are identified, how they can be recycled and how they can be transported. The regulations governing the treatment, storage and disposal of hazardous wastes are particularly extensive. Both the federal regulatory agencies and the delegated states have substantial authority under RCRA to enforce compliance with the applicable regulations.

The RCRA regulations also govern non-hazardous solid waste. These rules primarily focus on the requirements for recycling and reusing, composting, incinerating, or landfilling wastes. These rules are primarily implemented and enforced by delegated states.

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?

Generally, a facility that treats, stores or disposes of solid wastes, including the waste generator, must obtain a permit. There are, however, exceptions. For instance, a large quantity generator can store waste on site for less than 90 days without a permit, and a small quantity generator can do so for less than 180 days without a permit. There are also exceptions that may apply for transporters, for farmers, and for parties remediating contaminated sites.

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)?

Yes. This is a substantial issue under U.S. environmental law. In particular, under CERCLA, a party that disposes or treats, or arranges for the disposal, treatment or transportation, of a hazardous substance is strictly liable, jointly and severally, without regard to fault, for releases to the environment of the hazardous substance. In 2009, however, the U.S. Supreme Court limited CERCLA "arranger" liability to those parties who intended for disposal of hazardous substances to occur. Considering that remediation of CERCLA sites can cost hundreds of millions of dollars, and that the responsible parties are strictly liable for those costs, the scope of this relatively new exception to arranger liability is now heavily litigated throughout the United States.

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

Generally, waste producers do not have any obligation regarding the take-back and recovery of their waste. Some states, however, require that certain electronic waste, pharmaceuticals, batteries and/or bottles and cans must be collected and recycled by their manufacturers and distributors. Additionally, many businesses and municipalities have voluntary programmes designed to take back and recycle these wastes.

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?

A breach of environmental laws can give rise to administrative, civil and/or criminal penalties, damages, injunctions and (rarely) incarceration. The extent of liability typically will depend on the amount of damage caused, the duration of the damage, the cooperation of the party causing damage, and their prior compliance history. Criminal liabilities generally are reserved for cases where the damage is particularly egregious and/or the conduct was intentional.

There are limited statutory defences for breaching environmental laws. Primarily, they relate to equipment malfunctions and emergency responses. In order to qualify for a defence, an operator usually must provide notice of the breach to the proper regulatory authority within a matter of days, and must correct the situation as quickly as possible. Violations may also be time barred by statutes of limitation.

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

Yes. Many environmental statutes provide that compliance does not pre-empt other local, state or federal requirements. However, operation within permit limits demonstrates compliance with the specific performance standards addressed by the permit.

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?

Yes, corporate officers and directors can be personally liable for wilful and knowing violations, intentional acts including failure to report or to disclose known violations, and for fraudulent, grossly negligent or illegal acts that result in contamination. Personal liability may be established where it is shown that the officer and director actively participated in or exercised control over the operations. Fraudulent, criminal or grossly negligent acts are generally excluded from indemnification clauses and insurance policies.

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?

In a share sale, the buyer "steps into the shoes" of the company purchased and assumes the environmental liability of the seller. By contrast, in an asset sale, environmental liability relates to the assets acquired. Through due diligence, the buyer may determine whether or not to acquire certain assets and associated liability. In addition, the asset purchase agreement may be structured to limit or cap liability.

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

Lender liability largely depends on the amount of control exercised by the lender over the contaminated property. Lenders who hold a mortgage primarily to protect their security interest in the property are provided a limited "safe harbour" from CERCLA liability, if they do not directly participate in management of the property. If the lender exercises decision–making authority as to the use, management or environmental compliance of the property, the lender may become liable for environmental remediation costs.

5 Contaminated Land

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

As discussed in question 3.3, CERCLA imposes strict liability on a range of parties for the disposal of hazardous substances. This strict liability also applies to the past and present owners and operators of facilities where hazardous substances are disposed. The clear public policy in the United States is to find a responsible party, or parties, to pay for remediation of contamination.

Also, some states have additional statutes affecting the transferability of potentially-contaminated land. For instance, New Jersey's Industrial Site Remediation Act permits the state to rescind any transfer of industrial property if the buyer and seller have not first investigated and remediated any site contamination to the extent required by the state.

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

There is no definitive CERCLA law on how allocation should be done. Consequently, allocation of responsibility between potentially responsible parties is always a substantial issue in CERCLA matters.

As a general matter, usually the parties or a neutral third-party will determine the allocation scheme for a given CERCLA site. Issues that are usually considered for each party include: volume of waste disposed; type of waste; toxicity or other hazardous nature of waste; culpability as to the transportation, treatment, storage and/or disposal of the waste; degree of cooperation with government authorities to remediate the waste; and degree of care taken to ensure proper disposal of the waste. As noted in section 3.3, whether a party intended to arrange for disposal of the waste has become a primary issue in recent years.

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?

Yes, both the government and third parties usually have opportunities to either reopen the required work (for instance, if additional unknown contamination is found), or to challenge the agreement (if, in the case of a third party, their own rights may be impacted by the agreement). These opportunities, however, are often time limited, particularly with regard to third-party challenges of the initial agreement.

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?

Yes, CERCLA, RCRA and state statutes all provide private rights of action against previous owners and operators of contaminated land.

Additionally, yes it is possible to transfer the risk to a purchaser. This is discussed below in question 8.1.

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

Yes, the federal government, the Tribes, and the states can, and frequently do, seek to recover natural resource damages.

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.?

Environmental regulators have inherent police power to enforce environmental statutes. This means that they may require the production of documents, take samples, conduct site inspections and interview employees. Moreover, they may, and sometimes do, arrest site personnel for impeding their investigations.

Nevertheless, their police powers are limited by the United States Constitution, and by federal and state statutes and regulations. Consequently, it is usually the case that environmental regulators will work with the targets of their investigations (particularly, if the targets are themselves cooperative) in order to obtain information. In this regard, it is prudent for regulated entities to maintain cooperative relationships with their regulators.

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?

On or off-site pollution may need to be disclosed to environmental regulators. The legal requirements vary tremendously, however, depending on the jurisdiction of the site, the environmental law(s) at issue, and the characteristics of the pollution. This issue is best resolved by a legal practitioner within the jurisdiction. Because, however, some jurisdictions have extremely short mandatory reporting timelines (for instance, as short as 15 minutes in New Jersey), it is prudent to know these requirements in advance for any potential releases at a site.

As a general matter, pollution does not legally need to be disclosed to third-parties; although, as a practical matter, failure to warn third-parties can expose the property owner to new or greater liabilities if the third-parties are harmed.

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

Obviously, a release of contaminants will often trigger an obligation to investigate and remediate that release. Otherwise, it is generally the case that there is no obligation to investigate land for contamination unless either: (i) the ownership or operation of the land is being transferred; or (ii) the financial strength of the owner has changed, thereby calling into question the financial ability of the owner to conduct any necessary, future remediation. Because CERCLA makes current owners and operators of contaminated land strictly liable for hazardous substances, prudent purchasers as a matter of course engage in "all appropriate inquiry" prior to purchase. Finally, property used as collateral must usually be investigated.

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?

The extent of mandatory disclosure is sometimes driven by state law, but it is usually a matter of the contractual terms between the buyer and seller.

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?

Parties frequently include contractual indemnities for environmental liabilities. The efficacy and enforceability of such provisions depends on the terms of the provisions, the extent of any relevant disclosures, representations and warranties, and the underlying environmental laws involved.

Payment under an indemnity does not alter claims that the government may have against the indemnitor. Moreover, even if responsible parties allocate responsibility among themselves, each responsible party remains strictly liable, without regard to fault, under CERCLA for the discharge of hazardous substances.

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

Yes, it is possible to "escape" environmental liabilities. This is an issue, however, that is impacted not only by environmental laws, but also by corporate, bankruptcy and securities law. Accordingly, any such endeavour should only be undertaken, if at all, after careful review by an appropriate team of legal counsel.

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?

Shareholders are usually protected from corporate environmental liabilities. Parent corporations also are usually protected from subsidiary environmental liabilities. There are, however, a variety of ways that these protections might be breached. For instance, courts may "pierce the corporate veil" of a parent corporation, if the corporate form is not maintained by a subsidiary, and courts may hold a shareholder liable if a company is merely an alter ego.

While the United States federal courts may entertain lawsuits involving foreign subsidiaries or foreign companies, a recent decision from the United States Supreme Court has limited the extent to which federal courts will exercise their general jurisdiction to hear such cases.

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

Yes. Federal environmental laws protect "whistle-blowers" who report environmental violations from retaliation. Special protection is provided under the federal CAA, CWA, RCRA and CERCLA. In addition, the federal False Claims Act offers environmental whistle-blowers a financial incentive to report environmental violations in connection with federal contracts.

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

The Federal Rules of Civil Procedure provide for class action suits for a variety of legal claims, including environmental claims. As a practical matter, however, courts have determined that class action lawsuits are not well-suited for the enforcement of environmental laws. Consequently, such actions are fairly rare.

Penal damages generally are not allowed. Punitive or exemplary damages are available, and regulators will pursue punitive damage when they believe a party's conduct warrants punishment.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

No. As a general rule, litigants must bear their own costs of litigation. There are, however, exceptions. First, many federal environmental statutes allow for citizens' suits, in which private individuals seek to enforce environmental laws. If citizens prevail in those suits, they are generally able to recover their costs of litigation. Second, there are countervailing provisions that seek to prevent the filing of frivolous litigation. Under those circumstances, individuals may be forced to bear the costs incurred by others to defend against their suits.

9 Emissions Trading and Climate Change

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

The United States has fragmented emissions trading schemes for greenhouse gases, primarily in the northeast and California. It remains an open question whether such markets will develop fully in the United States. Indeed, the new Administration seems openly hostile to any such trading, or to acknowledging that climate change is occurring.

The United States does have established trading of SO2, which has reduced nationwide SO2 emissions. Additionally, new source air permitting often requires credits of banked, traditional air pollutants, thereby reducing those emissions.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

Yes, the USEPA requires monitoring and reporting of greenhouse gas emissions. The USEPA enacted regulations that would have required such reporting from a wide variety of major sources of greenhouse gases, but the Supreme Court issued a decision limiting such reporting to sources that are already regulated under Title V of the Clean Air Act (so-called, "anyway sources").

It remains to be seen whether those USEPA regulations are enforced under the new Administration.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

There is no overall policy approach to climate change regulation in the United States. The Supreme Court has held that the USEPA has the authority and the obligation to regulate greenhouse gases pursuant to the Clean Air Act. However, the Supreme Court has mostly struck down the regulations that the USEPA has sought to implement. Meanwhile, there seems to be virtually universal agreement, including within the USEPA, that the Clean Air Act – last amended in 1990 – is not well suited for the regulation of greenhouse gases. Whether a future Congress would amend the Clean Air Act, or pass a climate change bill, remains doubtful.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

The United States continues to experience substantial asbestos litigation. The plaintiffs' bar has depleted, or bankrupted, many of the original asbestos manufacturer defendants. As a result, plaintiffs have sought an ever-wider array of corporate defendants who may have used asbestos in their goods or services, or who may have had asbestos installed in their premises.

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

The requirements related to on-site asbestos are determined based on a range of federal, state and local health and safety statutes and codes. Asbestos removal from school buildings is subject to the federal Asbestos Hazard Emergency Response requiring the certification of contractors and workers. Many states have established asbestos work practices and certification programmes for contractors and other persons engaging in the removal and disposal of friable asbestos-containing material.

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 your jurisdiction?

The environmental insurance market in the United States is currently fairly soft and growing. Until recently, however, environmental insurance was difficult to obtain. Many of the companies that offered such insurance in the 1990s experienced losses far in excess of their expectations. Currently, to obtain environmental insurance, a contaminated site must be well characterised.

11.2 What is the environmental insurance claims experience in your jurisdiction?

Comprehensive general liability insurance policies, particularly those issued prior to 1974, continue to provide extensive coverage for environmental liabilities. The extent of available coverage, however, varies dramatically from state to state, as the various states' courts have often rendered distinctly different interpretations of identical policy terms. Consequently, the state in which a claim is filed (or adjudicated) can determine whether environmental insurance coverage is available, and the amount of coverage available.

12 Updates

12.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Environment Law in your jurisdiction.

President Donald Trump took office on January 20, 2017 and has undertaken a comprehensive review of the environmental regulations and policies of the previous Administration. In a memorandum issued on that date, the White House implemented a regulatory freeze on all pending regulations. The following week, USEPA published a list of some 30 regulations delayed at least until March 21, 2017. The list includes both national programme rules and federal approval of certain state primacy programmes. The Congressional Review Act is being used to repeal rules finalised at the end of the previous Administration. Under the CRA, agencies must notify Congress when rules are issued. Congress then has 60 days from the date of notice or publication to issue a joint resolution of disapproval by a simple majority. The Bureau of Land Management's final rules regulating methane emissions and flaring on federal lands, BLM's new 2.0 landscape-scale planning rules and the federal Office of Surface Mining stream protection rules are among the regulations targeted for repeal under the CRA. The aggressive expansion of the USEPA authority in rulemakings under both the Clean Water Act and the Clean Air Act are also subject to judicial review. Challenges to the rulemakings have now proceeded to federal court. The Sixth Circuit Court of Appeals and federal district courts are considering challenges to rules, adopted in June, 2015, which broadly define the scope of jurisdiction of USEPA and the Corps of Engineers over waters of the United States (WOTUS). The rule is currently stayed nation-wide, pending judicial review. In January 2017, the U.S. Supreme Court granted a petition to review whether the 6th Circuit or district courts have jurisdiction over the WOTUS challenge. USEPA's Clean Power Plan finalised in August 2015 extends climate change mandates to existing coal-fired power plants. Carbon emissions from these sources must be reduced 32 per cent from 2005 levels by 2030. These climate change mandates expand USEPA's authority under the Clean Air Act. Challenges to the Clean Power Plan are now pending before the D.C. Circuit Court of Appeals. The U.S. Supreme Court granted an emergency stay of the rulemaking. The stay is in effect until the D.C. Circuit rules on the case and the U.S. Supreme Court accepts certiorari review. However, it is possible that legislation now pending in Congress may repeal the Clean Power Plan before the high court has an opportunity to review the controversial plan.

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Our environmental and natural resources attorneys advise clients on a wide variety of environmental permitting and compliance issues. We assist with negotiation of environmental liability and oversight of due diligence for commercial transactions. Our litigation team represents clients in federal, state and local environmental enforcement actions. Due to our location in the Southwestern United States, we frequently address public land issues and permits which involve the National Environmental Policy Act, the California Environmental Quality Act and associated environmental impact statements. Our team can also advise clients regarding contaminated property and brownfield development including drafting and negotiating prospective purchaser agreements, voluntary clean-up agreements, institutional controls, deed and land use restrictions.

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