

Environment

In 20 jurisdictions worldwide

Contributing editor
Carlos de Miguel



2015

GETTING THE
DEAL THROUGH

GETTING THE
DEAL THROUGH 

Environment 2015

Contributing editor
Carlos de Miguel
Uría Menéndez

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
George Ingledeu
george.ingledew@lbresearch.com

Alan Lee
alan.lee@lbresearch.com

Dan White
dan.white@lbresearch.com



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Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

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Preface

Environment 2015

Ninth edition

Getting the Deal Through is delighted to publish the ninth edition of *Environment*, which is available in print, as an e-book, via the GTDT iPad app, and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the 20 jurisdictions featured. Our coverage this year includes the European Union, Korea, the Netherlands and Turkey.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Carlos de Miguel of Uría Menéndez, the contributing editor, for his continued assistance with this volume.

GETTING THE 
DEAL THROUGH 

London
November 2014

United States

Donald J Patterson Jr and Elizabeth M Richardson

Beveridge & Diamond, PC

Legislation

1 Main environmental regulations

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

The following statutes and their accompanying regulations constitute the principal set of national environmental legal requirements in the United States:

- Clean Air Act (CAA) – regulation of air emissions from stationary and mobile sources;
- Clean Water Act (CWA) – regulation of water discharges and quality standards for surface waters;
- Comprehensive Environmental Response, Compensation, and Liability Act (Superfund or CERCLA) – remediation of historic disposal sites;
- Emergency Planning and Community Right-to-Know Act (EPCRA) – emergency planning and notification for hazardous and toxic chemicals;
- Endangered Species Act (ESA) – protection of endangered and threatened species;
- Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) – registration of and controls over pesticides;
- National Environmental Policy Act (NEPA) – requires federal agencies to consider environmental impacts of projects that could significantly impact the environment;
- Oil Pollution Act – prevention of and responses to oil spills;
- Resource Conservation and Recovery Act (RCRA) – regulation of waste management;
- Safe Drinking Water Act – establishes drinking water standards for tap water and rules for underground injection;
- Toxic Substances Control Act (TSCA) – regulation of chemicals and products containing them;
- Hazardous Materials Transportation Act – regulation of hazardous materials in transportation; and
- Dodd-Frank Wall Street Reform and Consumer Protection Act – requires disclosures associated with conflict minerals.

Many states have enacted their own, sometimes more stringent and often overlapping, environmental regulatory programmes. Some states have also adopted groundwater protection schemes, additional recycling and extended producer responsibility requirements and state equivalents of NEPA.

2 Integrated pollution prevention and control

Is there a system of integrated control of pollution?

The US Environmental Protection Agency (EPA) administers most of the national environmental statutes and regulations, but there is no general system providing integrated pollution prevention and control. State and local authorities generally may impose additional requirements.

3 Soil pollution

What are the main characteristics of the rules applicable to soil pollution?

Superfund's remediation authorities extend to soil pollution. Most states have adopted similar laws, and have also adopted separate voluntary clean-up and brownfields redevelopment programmes that address soil and other media. See question 11 for more details.

4 Regulation of waste

What types of waste are regulated and how?

RCRA defines 'solid waste' as 'any garbage, refuse, sludge [...] and other discarded material [...]'. For RCRA purposes, 'solid' wastes include solid, liquid, semisolid or contained gaseous material. EPA regulations define 'by-product' as 'a material that is not one of the primary products of a production process and is not solely or separately produced by the production process.' Certain by-products may be considered wastes.

Wastes classified as 'hazardous wastes', including certain specifically listed wastes and wastes that fail generic characteristics of toxicity, reactivity, corrosivity or flammability, are subject to a cradle-to-grave regulatory scheme, including detailed design and operating standards for treatment, storage and disposal facilities, which generally require state or federal treatment, storage and disposal permits. Substantial litigation and associated regulatory action have occurred with regard to what types of reused, recycled and reclaimed materials are subject to RCRA hazardous waste regulation. Almost all hazardous wastes are subject to stringent treatment requirements (incineration, stabilisation) before they may go into a landfill. 'Universal' wastes, including batteries, certain suspended or cancelled pesticides, light bulbs and lamps and mercury-containing equipment (states can expand and have expanded this list) are subject to a set of streamlined hazardous waste storage, labelling and transportation requirements. Municipal solid wastes are generally subject to state transportation and disposal requirements. Imports and exports of hazardous wastes are controlled by RCRA.

5 Regulation of air emissions

What are the main features of the rules governing air emissions?

The CAA regulates air emissions from stationary and mobile sources. One of the main provisions of the CAA authorises the EPA to establish National Ambient Air Quality Standards and to regulate emissions of hazardous air pollutants. Most facilities that produce air emissions are likely to be regulated by the CAA and must comply with federal and state level requirements to meet or maintain the National Ambient Air Quality Standards; the latter are implemented through individual state implementation plans. Most new sources of air pollution must obtain pre-construction and operating permits and comply with equipment standards or emission limits that vary based on the type of facility and the type and amount of emissions. Thresholds for permitting and equipment standards are generally more stringent for facilities that emit hazardous air pollutants or that are located in areas with poor air quality. Many larger new sources and modifications to existing larger sources will trigger a New Source Review process that requires pre-construction permitting and best-available pollution control equipment, as well as emissions offsets in areas with poor air quality.

Larger sources also have to consider certain greenhouse gas emissions (GHGs) in the New Source Review process. Mobile sources such as vehicles, aircraft, and non-road vehicles and engines, and the formulation and use of fuels, are highly regulated under a variety of standards. Light duty vehicles (ie, passenger cars) and light duty trucks are subject to tailpipe emission standards that address various air pollutants and GHGs. In addition, the CAA authorises EPA to regulate fuels and fuel additives used in motor and non-road vehicles and engines if emissions from those products cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare.

There are no national rules on the energy efficiency of buildings or plants, but some states and local governments have enacted such rules. The EPA implements a voluntary programme known as Energy Star, which provides certifications to buildings and plants recognising improvements in energy efficiency.

6 Climate change

Are there any specific provisions relating to climate change?

The US has not ratified the Kyoto Protocol. Legislation that would implement a mandatory cap-and-trade (CAT) programme to reduce GHGs is unlikely to be enacted at the federal level in the near or medium term.

In the absence of specific legislation, EPA has taken several steps to impose GHG-related regulations under its existing CAA authority. Adopted in 2009, the GHG Mandatory Reporting Rule requires suppliers of fossil fuels or industrial GHGs, manufacturers of many vehicles and engines, certain industrial source categories and certain other facilities to submit reports of GHG emissions to EPA. A series of additional rules, adopted in early 2010, provides for the phased application of GHG-related requirements on stationary sources beginning in 2011. In relation to those rules, the United States Supreme Court held that a facility's GHG emissions alone cannot be the basis for imposing certain CAA requirements. Recently, EPA proposed a series of rules designed to reduce carbon dioxide emissions from existing and new power plants. There have been a number of efforts in Congress (so far unsuccessful) to eliminate EPA's authority to impose GHG-related rules.

In the meantime, many states and local governments have taken steps to establish GHG standards and emission reduction programmes, and several groups of states are developing regional CAT programmes. The Regional Greenhouse Gas Initiative, made up of most of the north-eastern US states, continues to apply to GHG emissions from fossil fuel burning power plants. The Western Climate Initiative, which includes most of the western states as well as many Canadian provinces and Mexican states, continues to develop an economy-wide CAT programme that is designed to be fully implemented in 2015. As part of the Western Climate Initiative, California is continuing to implement its ambitious AB 32 programme, and has adopted final CAT regulations. The regulations cover 85 per cent of GHG emissions in California and apply to large industrial sources, electricity generating facilities and electricity importers as of 2013. Starting in 2015, the programme will apply to fuel suppliers. California's CAT auction scheme is currently on appeal.

7 Protection of fresh water and seawater

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

The objective of the CWA is to ensure that 'Waters of the US' are of a quality to be fishable and swimmable. 'Waters of the US' is defined as surface waters, including fresh water and marine waters, as well as jurisdictional wetlands. Industrial and municipal 'discharges' of wastewater and designated discharges of storm water to these waters that pass through a 'point source' are subject to permitting. 'Discharges' of fill material are also subject to permitting. Permits must contain the more stringent of technology-based effluent limitations reflecting uniform national standards or effluent limitations designed to protect the water quality of the specific water body to which the discharge is made. Extraction of water for consumptive use is regulated under state law.

8 Protection of natural spaces and landscapes

What are the main features of the rules protecting natural spaces and landscapes?

There are several categories of federal lands in the US, established for distinct primary purposes and governed by different federal agencies, including national parks, monuments and similar sites, natural resource or rangelands, national forests, national wildlife refuges, wild and scenic rivers, wilderness areas, and military lands. The Department of the Interior manages most public lands, including 401 national parks, monuments, battlefields, military parks, historical parks, historic sites, lakeshores, seashores, recreation areas, scenic rivers and trails, and the White House, approximately 331 million acres of public rangelands and the 1.7 billion acres of the Outer Continental Shelf. National parks and monuments are managed in accordance with the goals and standards set forth in the legislation or regulation creating the specific site. Economic development of natural resources is prohibited in most national parks. Public rangelands are managed in accordance with land use plans reflecting principles of multiple use and sustained yield. Wilderness areas are roadless areas (within public lands) designated to be preserved in their natural condition, unaffected by human activities. The Department of Agriculture manages approximately 191 million acres of public land, including national forests. National forests must be administered for multiple uses, including timber production, outdoor recreation, grazing, watershed protection and wildlife and fish conservation.

Every state also has a system of protected areas within its boundaries that provide recreational opportunities and conservation benefits, and local jurisdictions often own and maintain parks and playgrounds that protect small natural areas and open spaces.

9 Protection of flora and fauna species

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

The ESA protects listed endangered and threatened plants and animals and the habitats upon which they depend. The ESA requires each federal agency to ensure that any action it authorises, funds or carries out does not 'adversely impact' any listed species, or 'destroy or adversely modify' any critical habitat for that species. The ESA further prohibits anyone from 'taking' a listed species and from engaging in commerce in listed animals or plants or parts thereof. 'Taking' is broadly defined to include killing, capturing or destroying habitat. Some states have enacted legislation to protect endangered and threatened plants and animals (in addition to the federal ESA list) within those states.

10 Noise, odours and vibrations

What are the main features of the rules governing noise, odours and vibrations?

Noise, odours and vibrations are primarily regulated, if at all, at the state level, local level or both. Many states have noise pollution programmes, although regulatory requirements in this area vary widely. Federal noise regulations cover standards for transportation equipment, air and motor carriers, low noise emission products and construction equipment, and are enforced by EPA or other designated federal agencies. Workplace exposure to noise, odours and vibrations is regulated by the US Occupational Safety and Health Administration (OSHA). Under general tort law principles, private parties may bring nuisance actions for excessive noise, odours and vibrations.

11 Liability for damage to the environment

Is there a general regime on liability for environmental damage?

US law does not establish a single, general regime for environmental damages, but many of the statutes discussed herein contain provisions establishing liability for various types of environmental damage. Superfund is the federal statute that provides for the remediation of hazardous substances released into the environment. Potentially responsible parties (PRPs) liable for remediation under Superfund include entities that arrange or arranged for the disposal of hazardous substances, transporters and current and former owners and operators of contaminated sites. These PRPs may be strictly and retroactively liable for investigation, evaluation

and remedial action, which is generally selected by EPA in compliance with the National Contingency Plan. Superfund also provides that federal and state 'trustees' can recover from PRPs the costs associated with the injury to, destruction of or loss of natural resources. In addition, RCRA allows governmental agencies and private parties to seek injunctive relief for imminent and substantial endangerment to the environment. Private parties claiming injury to property from a defendant's pollution or hazardous activities may seek damages or relief in a tort action.

12 Environmental taxes

Is there any type of environmental tax?

Most taxes in the US that apply to products and processes having environmental risks are levied at the state or local levels. Among the products and activities taxed by various states are waste disposal, chemicals, petroleum, tyres, air emissions, battery disposal, oil spill response, litter control and water quality.

There are few environmental taxes imposed at the federal level. Under the Oil Pollution Act of 1990, a trust fund established to clean up oil spills if the responsible party fails to do so is financed by a barrel tax collected from the oil industry on petroleum produced in or imported into the US. The Energy Policy Act of 2005 used several tax incentives to support policy goals, including support for alternative energy sources, and extended the tax on certain motor fuels to fund the Leaking Underground Storage Tank Trust Fund. There is a federal tax imposed on the use or importation of ozone-depleting chemicals. The abandoned mine land reclamation programme under the Surface Mine Control and Reclamation Act is funded by a tax on current production of coal.

Hazardous activities and substances

13 Regulation of hazardous activities

Are there specific rules governing hazardous activities?

Generation, treatment, storage, disposal and management of hazardous wastes are regulated under the cradle-to-grave permit and regulatory management programme under RCRA. Transport and handling of hazardous materials are regulated by the Department of Transportation under the Hazardous Materials Transportation Act. OSHA sets general industry standards that cover a wide range of activities, as well as specific standards for the construction, maritime and agriculture industries, designed to reduce on-the-job injuries and to limit workers' risks of developing occupational diseases. Workplace hazards are subject to extensive and specific regulations, including standards for process safety management of highly hazardous chemicals and employee exposure to various air contaminants, asbestos and other substances. There are licensing, training and certification requirements for certain OSHA-regulated activities. Also included among the OSHA standards are requirements that employers provide personal protective equipment and grant employees access to their medical records.

14 Regulation of hazardous products and substances

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

All manufacturers (including importers), processors, distributors and users of chemical substances may be subject to TSCA reporting, record-keeping and other regulatory requirements. Manufacturing a non-exempt new chemical substance (not on the TSCA inventory) is prohibited unless and until EPA approves a pre-manufacture notification application for the substance, with or without restrictions on the new chemical. Similar notification and review requirements apply to designated 'significant new uses' of hundreds of chemicals. TSCA also gives EPA extensive authority to impose testing requirements or other regulatory restrictions on chemicals, although some of those authorities have been little used. Legislation to overhaul TSCA is currently receiving substantial attention in Congress. Legislation under consideration would provide EPA with much more authority and flexibility to impose significant new requirements on manufacturers of chemicals and those who handle or use chemicals downstream. EPA also is making more aggressive use of its authority under existing TSCA provisions. The Consumer Product Safety Improvement Act of 2008, implemented by the Consumer Product Safety Commission, imposes limitations on the levels of lead and phthalates allowed in children's products. The Consumer Product Safety Commission also administers the Federal

Hazardous Substances Act, which requires precautionary labelling to alert consumers to the potential hazards that certain products present. The Federal Trade Commission has established 'Green Guides' for environmental marketing claims. There are a number of additional requirements imposed by states that regulate and restrict the sale of certain products that contain specified hazardous substances.

15 Industrial accidents

What are the regulatory requirements regarding the prevention of industrial accidents?

Under the 'general duty' clause of the Occupational Safety and Health Act of 1970, each employer is required to provide to employees a place of employment free from recognised hazards. OSHA has promulgated numerous specific standards for industrial processes, establishing specific workplace practices as well as imposing training requirements. For instance, OSHA's process safety management standard addresses hazards from the use of highly hazardous chemicals, and its hazardous waste operations and emergency response standard requires training and control measures for clean-up operations.

EPCRA imposes requirements on facilities to report chemical storage and release information, and also requires state and local governments to undertake emergency planning activities. In addition, under the CAA, facilities that produce, handle, process, distribute or store certain chemicals must prepare and submit to EPA a Risk Management Plan. Certain facilities are also required to prepare, develop and implement oil spill prevention, control and countermeasure plans.

Environmental aspects in transactions and public procurement

16 Environmental aspects in M&A transactions

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

The three main areas of environmental concern in M&A transactions are: regulatory compliance; potential costs associated with onsite remediation at the target's facilities; and potential liabilities associated with the current and historic generation and offsite disposal of wastes from the target's operations. The second and third categories are of particular concern because liability under Superfund and some state statutes for onsite remediation and for historic offsite disposal is strict (meaning regardless of fault) and retroactive. Additionally, continuation of regulatory non-compliance or a failure to address environmental conditions posing a danger to human health and welfare can result in criminal liability.

A purchaser of shares acquires the corporate target with all of its assets and liabilities, including the environmental liabilities identified above. A purchaser of assets may be able to acquire the assets free of environmental liabilities arising from pre-closing regulatory non-compliance by the target and from historic offsite disposal. However, asset purchasers have been held responsible by various courts for these types of environmental liabilities under several theories. Moreover, if the purchaser acquires contaminated real property as part of the assets, under Superfund and many analogous state statutes the purchaser becomes liable for such contamination simply by becoming the owner of the property.

17 Environmental aspects in other transactions

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

The three areas of environmental concern identified in question 16 are equally important in other transactions. The scope of many environmental laws has been interpreted quite broadly to impose liability on entities beyond the actual owner of a facility or business. For instance, lenders have been held liable in some circumstances for their borrower's environmental liabilities (although there are some defences and 'safe harbours' available for lenders). An entity acquiring contaminated real property (whether through a purchase, foreclosure or corporate restructuring) will be liable for the remediation of such contamination, even if the acquirer had nothing to do with the cause. The acquirer may have contractual indemnity or statutory rights of contribution from one or more prior owners, but government enforcement authorities can choose to seek recourse against only the current owner. Transactions involving entities in bankruptcy present unique environmental issues. Environmental claims that 'continue' after a transaction or even after an entity emerges from bankruptcy, such as

obligations to correct ongoing non-compliance and to remediate contaminated property, are not discharged as a result of the bankruptcy.

18 Environmental aspects in public procurement

Is environmental protection taken into consideration by public procurement regulations?

National regulations require the US government to take into account certain environmentally preferable products in the procurement process. Some state and local governments also have procurement policies that favour environmentally preferable products. Moreover, certain violations of environmental laws may result in a company being suspended or debarred from doing business with the US government. State and local governments have similar suspension or debarment authority.

Environmental assessment

19 Activities subject to environmental assessment

Which types of activities are subject to environmental assessment?

Under NEPA, federal agencies must evaluate the potential environmental and socio-economic impacts of all of their own actions and programmes. In addition, federal agencies must evaluate the potential impacts of private actions that require federal approval or permitting or that may be supported by federal funding. NEPA covers a broad spectrum of federal actions and is not restricted in any way to purely industrial activities. In fact, many major NEPA documents address the federal government's natural resource management decisions involving both conservation and resource development. A number of states have comparable laws for environmental impact assessments, although the requirements of these laws vary significantly.

20 Environmental assessment process

What are the main steps of the environmental assessment process?

NEPA requires a formal environmental impact statement before the initiation of a proposed major federal action 'significantly affecting the quality of the human environment'. The environmental impact statement includes a general notice of intent with regard to the proposed action, and identifies resources or values that would be adversely affected, alternatives and mitigation measures. Initially, a detailed draft impact analysis is prepared and public comments are solicited and considered. A final impact statement is then prepared, that responds to public comments and refines or modifies the proposed action, as appropriate. The adequacy of the final impact statement may be challenged; such judicial challenges can delay proposed projects for years and even effectively terminate them.

The preparation of a less formal environmental assessment is required for minor federal actions. This process involves public comments and participation in various degrees depending on the agency's standards and practices.

Regulatory authorities

21 Regulatory authorities

Which authorities are responsible for the environment and what is the scope of each regulator's authority?

EPA is the lead federal agency for implementing most of the national environmental statutes. Separate air emission, water discharge and, in some cases, hazardous waste treatment, storage and disposal permits are required for many industrial operations, with most permits issued by states pursuant to authority delegated by EPA. The Department of the Interior and the Forest Service implement a variety of laws addressing environmental review, wildlife and cultural and historic resources. The US Department of Justice is responsible for litigating cases arising under federal laws relating to the protection of the environment and natural resources. Each state has at least one agency with responsibility for administering environmental laws and enforcement. As a general rule, there is overlapping authority, and administration and enforcement of environmental laws are shared between federal and state agencies. States generally take the lead under the CAA, CWA, and RCRA on inspections and enforcement, with EPA retaining significant 'overfiling' enforcement authority with regard to

violations of these statutes at individual facilities. In other areas (eg, TSCA, FIFRA, EPCRA), EPA generally takes the lead on enforcement.

22 Investigation

What are the typical steps in an investigation?

Although state and federal environmental agencies routinely conduct inspections of regulated facilities, comprehensive governmental investigations are not usually initiated as a result of most regulatory compliance issues. Many compliance issues, whether self-disclosed or identified as a result of an agency inspection, are resolved informally. If agency inspectors identify non-compliance through review of a regulated facility's records or an onsite inspection, under most circumstances agency personnel initially will discuss the alleged violations with facility personnel. If a regulatory agency initiates a comprehensive or even a limited investigation, it will typically make a site inspection, undertake testing, sampling or similar activities, conduct interviews of facility personnel and prepare a written report and notice of violation identifying the practices or events constituting alleged non-compliance. The facility is entitled to obtain split samples of materials removed by the agency for testing, to retain copies of records requested by the agency and to be represented by counsel throughout the investigation. Environmental agencies also have the power to initiate criminal investigations.

23 Administrative decisions

What is the procedure for making administrative decisions?

Most administrative decision-making processes are open and allow for participation by interested parties and the general public. The procedural aspects of administrative decision-making vary based on a number of factors, including the agency involved (eg, federal or state), the type of decision (eg, individual permit or variance, enforcement) and the environmental statute under which the decision is made. Some administrative processes are quite formal, under which an administrative law judge makes a decision after a hearing with formal statements, witnesses testifying under oath and cross-examination. Others are more informal and include written submissions (after notice) and a final decision based solely on the written submissions. Although procedures vary, the parties typically may use any type of evidence they deem relevant in administrative proceedings. In many cases, the parties may submit confidential business information under seal to prevent its release to the public, although the submitting party may be required to substantiate the claim of confidentiality.

24 Sanctions and remedies

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

Federal and state environmental statutes authorise a range of civil and criminal penalties for violations, as well as injunctive relief. Penalties are often calculated on a per day, per violation basis (many federal environmental statutes authorise civil penalties of up to US\$37,500 per day per violation). Federal and state agencies also can pursue injunctive relief to require the abatement of the violation or environmental harm, such as by requiring the installation of pollution control equipment, the cessation of an activity alleged to be in violation of law and even the shutdown of a facility.

25 Appeal of regulators' decisions

To what extent may decisions of the regulators be appealed, and to whom?

There are appeal mechanisms for virtually all formal administrative decisions from environmental agencies at the federal and state level. The appeal procedures and the entity to which the appeal is made differ by agency, type of decision and the environmental statute under which the decision was made. Appeals can be based on factual findings and legal conclusions and can also challenge the extent of the remedy imposed by the decision-maker. In most cases, a party may appeal the final agency decision (meaning the decision made at the highest administrative level) to a court. As a general rule, courts will allow an agency deference in its decision-making, particularly with regard to factual findings.

Update and trends

On 18 June 2014, EPA issued the centrepiece of President Obama's Climate Action Plan, a proposed rule to regulate carbon dioxide (CO₂) emissions from existing power plants. The proposal would establish emissions targets on a state-by-state basis and would require states to develop plans sufficient to meet these targets. States would have the discretion to employ a variety of measures in doing so, such as relying on renewable energy, energy efficiency, increased use of natural gas-fired power plants, efficiency improvements at the power plant, energy efficiency measures for industrial consumers of energy, and emissions trading. By using 2005 as the baseline reference point, the proposal's emissions reduction targets are intended to reward previous investments in renewable energy and energy efficiency, such that states that have already made CO₂ reductions would need to make smaller new investments as compared to other, less advanced states. If a state is unable to come up with a plan that can achieve its federally mandated target, then it would fall to EPA to develop a federal implementation plan.

One of the most significant aspects of the proposal is that it would allow states to realise emissions reductions 'beyond the fence-line' of the power plants through, among other measures, reductions in energy demand. The premise is that lower power demand means less power production which means lower CO₂ emissions. The result, however, would be that the impact of the final rule could be felt well beyond the power plant sector, particularly in high energy-use industries. The Obama Administration has committed to issue the final rule by June 2015, with states to submit their plans for implementing the rule before the end of the Administration in early 2017.

In a key judicial GHG development on 23 June 2014, the United States Supreme Court decided *Utility Air Regulatory Group v EPA*, 134 S. Ct. 2521 (2014) (UARG), involving the scope of EPA's authority to require large industrial sources to control emissions of GHGs under specific CAA permitting provisions. The Court held that:

- a facility's GHG emissions alone cannot be the basis for subjecting it to CAA Prevention of Significant Deterioration (PSD) and Title V permitting requirements; but

- if the facility undertakes a project that would be subject to permitting under these provisions for more conventional pollutants (eg, particulate matter, nitrogen oxides, and sulfur dioxide), permitting authorities may impose Best Available Control Technology (BACT) requirements on GHG emissions associated with the project.

The Supreme Court's ruling has differing impacts across different industrial facilities. For those sources already subject to PSD on the basis of emissions of conventional pollutants, the Court determined that these sources could still be required to implement BACT for their GHG emissions if the GHG emissions exceeded a de minimis level, which must be justified by EPA and may or may not be the 75,000 tons per year previously established by EPA in the so-called Tailoring Rule. However, for sources that would not otherwise be subject to PSD and Title V requirements, the Court held that the EPA lacked the authority to impose PSD and Title V requirements.

In reacting to the UARG decision, EPA and environmental groups have focused on the Court's holding regarding GHG BACT for sources already subject to PSD, and cited the Court's reiteration of the EPA's contention that approximately 83 percent of stationary source GHG emissions are attributable to these sources compared with 3 per cent attributable to sources that would not otherwise be subject to the PSD and Title V requirements but for GHG emissions. On the other hand, UARG and their industrial allies highlight the Supreme Court's holding barring entry into the PSD system based on GHG emissions alone as a strong rebuke of EPA's overreach, citing specifically, the Supreme Court's statement – '[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.' UARG at 394.

Judicial proceedings

26 Judicial proceedings

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

Federal and state environmental statutes generally provide that violations will give rise to administrative or civil enforcement proceedings. In addition, these statutes often provide that a party may be prosecuted in a criminal case if that party has committed a knowing, or in some cases even a negligent, violation of the law.

27 Powers of courts

What are the powers of courts in relation to infringements of environmental law?

In civil cases brought by governmental entities, courts are generally authorised to require violators of environmental legal requirements to pay penalties and to undertake injunctive relief to abate the violation or address the environmental impacts of the violation. In a criminal case, defendants found guilty can be ordered to pay a fine and to serve time in prison.

28 Civil claims

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

Certain environmental statutes (eg, CAA, CWA, and RCRA) contain 'citizen suit' provisions authorising non-governmental entities to sue third parties for injunctive relief for violations. A private party claiming injury from hazardous activities also may seek damages or injunctive relief in a tort action. No contractual relationship among the private parties is necessary, but contracts can create obligations for compliance with environmental laws.

29 Defences and indemnities

What defences or indemnities are available?

Under most federal and state environmental statutes, statutes of limitations (five years is common) apply to limit the time period within which claims of violations of environmental law can be brought. Given the highly specific and complex nature of environmental statutes and regulations, most defences raised focus on issues of regulatory or statutory interpretation. Factual defences are available as well. A liable party could have indemnity rights against other parties or be a party to contracts with other parties under which the violator in turn may seek recovery, but the violator may not use such indemnities as shields from liability to the government. In Superfund litigation, in which multiple parties can be liable, courts have historically held that liability is strict and joint and several, although recent US Supreme Court case law may have modified those holdings regarding joint and several liability. Further, liability under Superfund in most instances is not based on a violation of law, and the statute is applied retroactively to impose liability for historic waste disposal that often occurred many years in the past.

30 Directors' or officers' defences

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

Routine environmental regulatory violations do not, as a general rule, give rise to claims of officer and director liability. However, there are various legal theories under which corporate officers and directors can be held personally liable under environmental and other public health laws. For instance, they can be pursued civilly if the corporate veil can be pierced or if they personally participated in the company's improper activity. Civil liability also may be imposed if a corporate officer exercised substantial control and supervision over a project that resulted in an environmental problem, even if there was no personal participation in the specific improper action. Corporate officers, directors and employees can be pursued criminally if they personally commit a crime, if they aid and abet a crime or if they fail to prevent the commission of a crime by others within

the corporation by neglecting to control or supervise the conduct of those subject to their control or fail to implement measures that will ensure violations do not occur. Some federal environmental statutes, including the CAA, specifically state that an 'operator' can include 'any person who is senior management personnel or a corporate officer'. In addition, a number of reports submitted to EPA and state agencies are required to include formal certifications (under oath) with regard to the accuracy of the information contained therein, and these certification requirements have provided the basis for claims against corporate officers.

31 Appeal process

What is the appeal process from trials?

In the federal courts, a judgment from a trial-level federal district court is directly appealable to one of 12 federal circuit courts of appeals. From a circuit court of appeals, a party may petition the US Supreme Court to hear an appeal, but the Supreme Court's jurisdiction is discretionary.

Each of the 50 states has its own court system, but generally there is a right of review from the trial level to an intermediate appellate court and then to the state's highest court. In many states, the highest court's jurisdiction is discretionary. State court systems vary as to the possible levels of appeal, but there are typically two or three levels of appellate courts (although the jurisdiction of some courts of appeal may be discretionary).

International treaties and institutions

32 International treaties

Is your country a contracting state to any international environmental treaties, or similar agreements?

The US is a party to many international environmental agreements, including various bilateral agreements (eg, the US-Canada Air Quality Agreement), regional agreements (eg, the North American Agreement on Environmental Cooperation between the United States, Canada and Mexico, the UNECE Convention on Long-Range Transboundary Air

Pollution and several of its protocols, including the 1998 Protocol on Heavy Metals) and global multilateral environmental agreements (eg, the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, the 1973 CITES Treaty, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, and the 1992 UN Framework Convention on Climate Change). The US State Department maintains a complete list of international agreements to which the US is a party (www.state.gov/s/l/treaty/tif/index.htm).

The US is not a party to several significant multilateral environmental agreements, generally for lack of certain domestic authority for which new legislation would be required before the US could join. Treaties in this category include 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.

33 International treaties and regulatory policy

To what extent is regulatory policy affected by these treaties?

With few exceptions, treaties are generally not given direct effect in US law. The US has generally implemented its treaty obligations under environmental agreements through national statutes and regulations. In many cases, this domestic authority has predated the US international obligations and US law and policy make no direct reference to treaties. In other cases, however, the US has enacted new legislation expressly to satisfy international obligations, and US policy under such laws is closely keyed to the developments under international agreements (eg, regulatory policy on ozone depleting substances and the Montreal Protocol). As a general matter, federal agencies that are responsible for developing, implementing and enforcing US environmental regulatory policy are conscious of US obligations under international agreements, as well as of developments under agreements to which the US is not yet a party.



Donald J Patterson Jr
Elizabeth M Richardson

dpatterson@bdlaw.com
erichardson@bdlaw.com

1350 I Street NW, Suite 700
Washington DC 20005-3311
United States

Tel: +1 202 789 6000
Fax: +1 202 789 6190
www.bdlaw.com

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