

Environment & Climate Regulation

Contributing editors

Carlos de Miguel Perales, Uría Menéndez

Per Hemmer, Bech-Bruun



2018

GETTING THE
DEAL THROUGH 

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Environment & Climate Regulation 2018

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CONTENTS

Environment

Austria 5

Thomas Starlinger and Anita Trenkwalder
Starlinger Mayer Attorneys at Law

Brazil 15

Simone Paschoal Nogueira, Iris Zimmer Manor and
Marina Vieira Freire
Siqueira Castro – Advogados

China 21

Jihong Wang, Jie Shi, Anjing Wu and Yibai Xu
Zhong Lun Law Firm

Colombia 28

José Vicente Zapata Lugo and Margarita Solorza Cortés
Holland & Knight

Denmark 33

Jacob Brandt and Håkun Djurhuus
Bech-Bruun

Dominican Republic 41

Giselle Pérez-Reyes and Fabio J Guzmán-Saladín
Guzmán Ariza

European Union 47

Adrien Fourmon
Huglo-Lepage & Associés

Germany 52

Jochen Terpitz
Jochen Terpitz – Rechtsanwalt

Japan 58

Kiyoshi Honda and Takumi Naito
Nagashima Ohno & Tsunematsu

Mexico 64

Jose Luis Rendon
RHT Legal Consulting

Portugal 72

João Louro e Costa and Gonçalo Andrade e Sousa
Uría Menéndez – Proença de Carvalho

Spain 80

Carlos de Miguel Perales and Jesús Andrés Sedano Lorenzo
Uría Menéndez

United Kingdom 86

Douglas Bryden and Megan Penny
Travers Smith LLP

United States 95

Donald J Patterson Jr and Elizabeth M Richardson
Beveridge & Diamond, PC

Climate

Introduction and overview 102

Per Hemmer, Johan Weihe and Rania Kassis
Bech-Bruun

EU legislation on climate change 110

Adrien Fourmon
Huglo Lepage & Associés

Austria 118

Thomas Starlinger and Eva Kubr
Starlinger Mayer Attorneys at Law

Brazil 125

Simone Paschoal Nogueira, Iris Zimmer Manor and
Marina Vieira Freire
Siqueira Castro – Advogados

Colombia 133

José Vicente Zapata Lugo and Luisa Toledo Plata
Holland & Knight Colombia SAS

Denmark 139

Per Hemmer, Johan Weihe and Rania Kassis
Bech-Bruun

Germany 148

Jochen Terpitz
Jochen Terpitz – Rechtsanwalt

Japan 154

Kiyoshi Honda and Takumi Naito
Nagashima Ohno & Tsunematsu

Mexico 158

Jose Luis Rendon
RHT Legal Consulting

Portugal 164

João Louro e Costa
Uría Menéndez – Proença de Carvalho

Spain 169

Carlos de Miguel Perales and Jesús Andrés Sedano Lorenzo
Uría Menéndez

Turkey 174

M Feridun İzgi
Firat İzgi Attorney Partnership

United Kingdom 179

Tom Bainbridge, Louisa Cilenti and Sandy Abrahams
Lux Nova Partners Ltd

United States 190

Brook Detterman, David Weber, Kristin Gladd, Michael F Vitris,
Jacob Duginski, Laura LaValle, and Leah A Dundon
Beveridge & Diamond, PC

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:

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

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. In some cases, the federal system is a delegated programme where states implement minimum federal standards, but can impose more stringent requirements.

3 Soil pollution

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

Superfund's remediation authorities extend to pollution of soil and other media. 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 10.

4 Regulation of waste

What types of waste are regulated and how?

The RCRA defines 'solid waste' as 'any garbage, refuse, sludge [. . .] and other discarded material [. . .]', and under the RCRA 'solid' wastes include solid, liquid, semisolid or contained gaseous material. Solid wastes classified as 'hazardous wastes' include certain specifically listed wastes, wastes that fail generic characteristics of toxicity, reactivity, corrosivity or flammability, certain mixtures of hazardous wastes and other solid wastes, and residues from treatment of hazardous waste, and media (eg, soil or debris that contain hazardous waste). Some states have adopted additional provisions that expand the generic characteristics of hazardous waste or the list of wastes identified as hazardous in that state. Hazardous wastes are subject to a cradle-to-grave regulatory scheme, including detailed requirements for generators and transporters of hazardous wastes, as well as detailed design and operating standards for treatment, storage and disposal facilities, which generally require state or federal permits.

Recyclable materials (including certain by-products) and recycling activities may be exempted from hazardous waste regulations, generally if specified conditions are met. 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 (some states have expanded this list) are subject to streamlined hazardous waste storage, labelling and transportation requirements. Municipal solid wastes and medical and infectious wastes are generally subject to state transportation and disposal requirements. Imports and exports of hazardous wastes are controlled by the RCRA.

There is no federal legislation mandating a circular economy. Some states have adopted extended producer responsibility requirements for certain categories of products.

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 and obliges the government to regulate air pollutants it determines may endanger public welfare. One of the main provisions of the CAA authorises EPA to establish National Ambient Air Quality Standards (NAAQS) 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 requirements to meet or maintain the NAAQS; 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. The most recent efforts to regulate hazardous air pollutants, the EPA Mercury and Air Toxics Standard (MATS) rule, is currently in abeyance before the DC Circuit pending EPA re-review of the rule. 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. New GHG standards for medium and heavy-duty vehicles will take effect beginning in 2021. Final fuel economy standards for model years 2022 to 2025 are currently under re-review by EPA. 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. In August 2016, EPA also finalised a finding that GHG emissions from certain classes of aircraft endanger human health and welfare, which is a precursor to adopting GHG standards for aircraft.

At the time of writing, the US is in the midst of litigating a national regulatory programme under the CAA to control greenhouse gases, specifically carbon emissions from new and existing power plants. In 2015, EPA issued the final Clean Power Plan (CPP), which imposes carbon dioxide (CO₂) emissions requirements on the electric generating industry's existing electric generating units. A similar rule, the New Source Rule, limited CO₂ emissions from new or modified power plants. The CPP is the most significant US attempt to act on climate change at the national level. The CPP establishes emissions performance rates for existing fossil fuel-fired power plants. The performance rates, calculated to reflect the Best System of Emission Reduction (BSER), are applied to each state's unique energy mix to calculate a state-specific goal. The performance rates were calculated using three 'building blocks': operational efficiency improvements; load-shifting to lower-emitting plants; and increased use of renewable power. Because each state has a different mix of power generation infrastructure and energy programmes, targets vary significantly. States are required to develop plans to achieve their goal at either the individual power plant level, or on a state-wide basis.

Under the CPP, states were to submit their plans by September 2016, and, following EPA approval, begin implementing their plans in 2022, meet interim targets from 2023 to 2029, and achieve their final targets by 2030. The CPP and the New Source Rule have been challenged in court in numerous lawsuits. In February 2016, the US Supreme Court stayed the implementation of the CPP pending judicial review before the DC Circuit. Briefing on the CPP merits before the DC Circuit concluded with oral argument in September 2016. In March 2017, the President ordered EPA to re-review, amongst other rules, the CPP and the New Source Rule. The DC Circuit granted the government's subsequent motions to hold both cases in abeyance pending internal review. Though states may proceed to work on their individual state plans if they so choose, EPA's administrator issued guidance to the States that they are under no obligation to expend resources to comply with a rule currently stayed by the Supreme Court. The DC Circuit's decision will undoubtedly be appealed to the US Supreme Court. In the face of significant litigation and reordering of administrative priorities, the fate of the CPP and climate change regulation in the US remains uncertain. For further discussion of the CPP and related climate change issues, see the United States Climate Regulation chapter.

6 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' and 'discharges' of fill material are 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.

7 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 resources 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 417 national parks, monuments, battlefields, military parks, historical parks, historic sites, lakeshores, seashores, recreation areas, scenic rivers and trails, and the White House, approximately 337 million acres of public rangelands and wildlife refuges 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 193 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.

8 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.

9 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 or 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 common law tort principles, private parties may bring nuisance actions for excessive noise, odours and vibrations.

10 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.

11 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

12 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 Subtitle C of the RCRA. Transport and handling of hazardous materials are regulated by the Department of Transportation under the HMTA. EPA requires facilities that produce, handle, process, distribute or store extremely hazardous substances to develop and implement a risk management plan. OSHA sets general industry standards to protect worker safety, as well as establishing 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.

13 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 makes an affirmative finding either that a chemical is not likely to present an unreasonable risk, or that manufacture may begin subject to a compliance order imposing restrictions on the new chemical. Similar notification and review requirements apply to designated 'significant new uses' of around 2,800 chemicals. The TSCA also gives EPA extensive authority to impose testing requirements through issuance of an order or through rule making. The TSCA was significantly amended in 2016 in the Frank R Lautenberg Chemical Safety for the 21st Century Act (LCSA), giving EPA new authority to prioritise chemicals for in-depth review; to conduct risk evaluations of high-priority chemicals; and to regulate those chemicals found to present an unreasonable risk under the conditions of use. The amendments also give EPA authority to require testing by manufacturers and processors by order rather than only through rulemaking. For new chemicals (those not on the TSCA inventory), EPA must now make affirmative findings such as that a chemical is or is not likely to present an unreasonable risk under the conditions of use, with an order to follow if the 'likely to present' finding is made. Limited pre-emption of state restrictions on chemicals may occur based on EPA actions.

EPA is revising the TSCA Inventory, and virtually all manufacturers and importers of chemicals must submit reports to EPA by 7 February 2018, notifying EPA regarding the manufacture or import of chemical substances for non-exempt commercial purposes occurring from 21 June 2006 to 21 June 2016 (Look-Back Period). Processors may also notify EPA regarding chemical substances they processed for non-exempt commercial purposes during the Look-Back Period until 5 October 2018. EPA will publish a new version of the TSCA Inventory that identifies those chemical substances on the inventory that are considered to be active chemical substances. This 'inventory reset' was a key feature of the LCSA. For chemical substances being reported that are on the confidential portion of the inventory, manufacturers or importers and processors must indicate whether they seek to maintain an existing claim to protect the chemical identity from disclosure as confidential business information (CBI). Certain chemical substances are exempt from the 'reset' rule, including substances that were reported in 2012 and 2014 under a recent EPA chemical data reporting rule, substances that were added to the inventory during the look-back period and substances that have been reported to EPA by another manufacturer. However, if CBI protection is sought, the manufacturer or importer or processor must re-submit a claim of confidentiality. Once EPA has completed its final active or inactive designations and the TSCA Inventory has been formally 'reset', no one will be permitted to manufacture, import, or process an inactive or new chemical substance without first submitting a notification to EPA within 90 days prior to the anticipated date of manufacture, import, or processing.

EPA is also moving forward with prioritising chemicals for possible regulation as required by the LCSA. A new EPA rule, effective from 18 September 2017, sets forth a risk-based screening process and criteria for identifying and designating high-priority substances, which must undergo risk evaluations, and low-priority substances, which do not meet the high-priority screening criteria and will not receive risk evaluations. EPA is expected to begin using this process to evaluate chemicals in the near future.

The Consumer Product Safety Improvement Act of 2008, implemented by the Consumer Product Safety Commission, imposes limitations on the levels of lead, phthalates and certain chemicals 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.

14 Industrial accidents**What are the regulatory requirements regarding the prevention of industrial accidents?**

Under the 'general duty' clause of OSHA 1970, each employer is required to provide to employees a place of employment free from recognised hazards. The OSHA has promulgated numerous specific standards for industrial processes, establishing specific workplace practices as well as imposing training requirements. For instance, the 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.

The 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**15 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.

16 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 15 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 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.

17 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**18 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.

19 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**20 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 'overfilling' 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.

21 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 will initially 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, which are generally brought when 'serious' environmental violations (which pose actual environmental harm or substantial risks of harm) and are committed 'knowingly' or 'intentionally'. These criminal charges can be brought against the company, culpable or responsible individuals, or both. If criminal charges are brought against individuals in the federal system, the risks of an active prison sentence are real. With regard to companies, apart from substantial fines, the biggest adverse impact can arise from suspension or debarment from public contracting, which can also spill over into contractual bars imposed by the compliance requirements of larger corporations, which prohibit them from using vendors with corporate criminal records.

22 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.

23 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. Penalties are often calculated on a per day, per violation basis. 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. As previously noted, the sanctions imposed upon criminal defendants can be severe, and depending upon the facts of each case, can involve active prison sentences (for

individuals) and substantial fines and collateral business consequences for companies.

Apart from the substantive violations of the various environmental laws and regulations, the government can also bring enforcement actions for 'process' violations or crimes, which involve efforts to lie or mislead regulators or obstruct government investigations.

24 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.

Judicial proceedings

25 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. In addition, these statutes often provide that a party may be prosecuted in a criminal case if that party has committed a knowing violation of the law or a permit (or in some cases, even a negligent violation). Civil regulators and criminal prosecutors have substantial discretion about whether and which charges to bring in response to environmental violations. In general, in the US, the government will follow a pattern of proportional enforcement, where minor offences are handled with administrative or civil fines, and criminal prosecution will be reserved for more serious and knowing violations. Since the consequences associated with criminal charges are more severe, US law imposes a higher burden of proof for crimes (eg, 'beyond a reasonable doubt') as opposed to civil violations (eg, 'preponderance of the evidence' or 'more probable than not').

26 Powers of courts

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

In civil cases brought by governmental entities to enforce environmental laws, 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, individual defendants who plead guilty or are convicted at trial can generally be ordered to pay a fine and to serve time in prison. Depending upon the facts of each case, the fine amount and prison sentence can be substantial. The primary factors that the US courts consider in imposing such a sentence include:

- the level of harm or danger imposed;
- the degree of the violations;
- the duration of the violations; and
- whether the violations required a substantial clean-up, etc.

27 Civil claims

Are civil 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.

Update and trends

The election of President Trump in November 2016 signalled a sea change in environmental law in the United States. Since his inauguration, the Trump administration, guided by a focus on states' rights and cooperative federalism, has moved to roll back the environmental policies of the Obama and earlier administrations, reduce funding for federal environmental agencies and programmes, and has begun the process of making fundamental substantive changes to the landscape of environmental law in the United States.

Much of the Trump administration's early effort in the environmental law sphere has involved climate change. On the international front, the US Department of State formally announced in August 2017 its intention to withdraw the United States from the Paris Agreement as soon as it is eligible to do so. The Trump administration has taken numerous steps aimed at revising or rescinding (or both) the Obama administration's Clean Power Plan's efforts to (among other things) curb emissions from power plants, adopt methane rules covering the oil and gas industry to limit greenhouse gas emissions and impose additional energy efficiency regulations.

Consistent with the Trump administration's objective of increased energy development, it has also taken a series of actions on public lands. The Department of the Interior repealed the Obama administration's moratorium on new coal leases on public lands. President Trump has asked that Interior Secretary Zinke review whether national monuments should be reduced in size. Secretary Zinke has recommended that Bear Ears National Monument in southern Utah be shrunk by President Trump; 26 other national monuments remain under review. The Interior Department has also recommended that the Obama administration's 2015 habitat conservation plan to protect the greater sage grouse, developed as an alternative to listing protection under the

Endangered Species Act, be modified to, among other things, reprioritise oil development.

The Trump administration has also targeted the Waters of the United States (WOTUS) rule. In July 2017, EPA and the Army Corps of Engineers published a proposed rule to rescind the 2015 WOTUS rule and restore the definition of 'waters of the US' that was in place before the 2015 WOTUS rule, and stated the intention that at some future date, the agencies will propose a new, narrower WOTUS definition. The proposed rule, if finalised, would provide some certainty, beyond simply restoring the prior version of the WOTUS definition, that the status quo will remain in place for the time being. Comments on the proposed rule are due in September 2017, and following promulgation of a final rule, lawsuits are likely to be filed to challenge the rescission of the WOTUS rule and any replacement issued by the agencies.

The Trump administration's 2018 budget proposal would also severely impact the major federal environmental agencies. The Trump administration's budget proposal called for:

- a 31 per cent reduction in EPA's budget;
- a 12 per cent reduction in the Interior Department's budget; and
- a 6 per cent reduction in the Energy Department's budget.

The United States Congress is currently considering the nation's 2018 budget. In reaction to the above federal environmental law developments, and those that can be expected in the future, additional environmental statutory and regulatory protection, as well as environmental enforcement, can be expected at the state and local levels, subject to their budgeting constraints. In addition, increased numbers of citizen suits by non-environmental and public health organisations will be filed.

28 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 for bringing claims of violations of environmental laws. Given the highly specific and complex nature of environmental statutes and regulations, most defences focus on issues of statutory or regulatory interpretation. Factual defences are also available. 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 such indemnities do not shield the violator from liability to the government. In Superfund litigation, in which multiple parties can be liable, courts have generally held that liability is strict and joint and several (subject to potential 'divisibility' defences). 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.

In criminal cases, there are also additional defences, including lack of knowledge; failure of the government to prove any of the elements of the crime 'beyond a reasonable doubt; and other constitutional arguments unique to the criminal arena (such as due to a 'lack of fair notice' or 'void for vagueness').

29 Directors' or officers' defences

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

Routine environmental 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. While US law does not permit convictions based merely upon an executive's corporate position or job title, federal prosecutors are permitted to rely upon a variety of surrogates for proof of actual knowledge. Accordingly, corporate officers, directors and employees can be pursued criminally:

- if they are personally aware of, or involved in, the commission of a crime;
- if they aid and abet a crime;
- if they are 'willfully blind' or 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' or 'responsible corporate officer' 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.

30 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

31 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, and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer). In September 2016, the US ratified the Paris Agreement on climate change as an executive agreement. However, on 4 August 2017, the US State Department submitted a communication to the United Nations, in its capacity as depositary of the Paris Agreement, regarding the US intent to withdraw from the Paris Agreement as soon as it is eligible to do so. The Paris Agreement's formal processes do not allow for a notice of withdrawal to be submitted until 4 November 2019, after which it would take one year for such notice to be effective. 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 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989;

- the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 1998; and
- the Stockholm Convention on Persistent Organic Pollutants 2001.

32 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 multinational environmental agreements through national statutes and regulations. In some 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.

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