ENVIRONMENT

USA

LEXOLOGY
Getting The Deal Through

Consulting editor
Beveridge & Diamond PC

Environment

Consulting editors

James M Auslander, Brook J Detterman

Beveridge & Diamond PC

Quick reference guide enabling side-by-side comparison of local insights, including legislation and main environmental regulations; regulation of hazardous activities and substances; environmental aspects in M&A, public procurement and other transactions; environmental impact assessment; regulatory authorities; judicial proceedings; applicable international treaties and institutions; and recent trends.

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Contributors

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James M Auslander
jauslander@bdlaw.com
Beveridge & Diamond PC

Andrew C. Silton
asilton@bdlaw.com
Beveridge & Diamond PC

Ryan J. Carra
rcarra@bdlaw.com
Beveridge & Diamond PC

Nicole B. Weinstein
nweinstein@bdlaw.com
Beveridge & Diamond PC

Abby E Barnicle
Beveridge & Diamond PC

LEGISLATION

Main environmental regulations

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

The National Environmental Policy Act (NEPA) is the umbrella procedural statute that requires federal agencies to consider the environmental impacts of their actions.

Several substantive statutes are media-specific:

- the Clean Air Act (CAA) regulates air quality and emissions;
- the Clean Water Act (CWA) regulates water quality and discharges;
- the Safe Drinking Water Act establishes drinking water standards for tap water and underground injection rules;
- the Resource Conservation and Recovery Act (RCRA) regulates hazardous and solid waste management;
- the Comprehensive Environmental Response, Compensation and Liability Act (also known as Superfund) addresses remediation of legacy disposal sites and release reporting; and
- the Oil Pollution Act provides for oil spill prevention and response.

Other statutes are resource-specific. The Endangered Species Act (ESA) protects listed endangered and threatened species and critical habitat. Other statutes protect certain species, including the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act and the Marine Mammal Protection Act.

Other statutes govern natural resource planning and development on federal lands onshore and on the Outer Continental Shelf, including:

- the Mineral Leasing Act;
- the Outer Continental Shelf Lands Act;
- the Federal Land Policy and Management Act;
- the Mining Law of 1872;
- the National Forest Management Act;
- the National Park Service Organic Act;
- the Wild and Scenic Rivers Act;
- the National Wildlife Refuge System Administration Act;
- the Rivers and Harbors Act;
- the Marine Protection, Research, and Sanctuaries Act (ie, Ocean Dumping Act); and
- the Coastal Zone Management Act.

Additional statutes cover certain products or wastes:

- the Toxic Substances Control Act (TSCA) regulates new and existing chemicals and products that contain these chemicals;
- the Pollution Prevention Act creates a national policy to reduce pollution at the source by changing production, operation, and raw materials;
- the Federal Insecticide, Fungicide and Rodenticide Act regulates pesticides; and
- the Federal Food, Drug and Cosmetic Act regulates food, drugs and cosmetics.

Still more statutes focus on human health and safety:

- the Hazardous Materials Transportation Act (HMTA) regulates transportation of hazardous materials;
- the Occupational Safety and Health Act regulates hazards in the workplace; and
- the Emergency Planning and Community Right-to-Know Act provides emergency planning and notification for hazardous and toxic chemicals.

The US Environmental Protection Agency (EPA) offers high-level summaries and citations for key US environmental laws.

Nearly all of these statutes have implementing regulations issued and administered by federal agencies vested with jurisdiction. The federal and state governments share authority to administer some federal environmental programmes (eg, the CAA and the CWA). States also have their own, sometimes more stringent, environmental laws, such as groundwater protection schemes, additional recycling and extended producer responsibility requirements, and state equivalents of NEPA. Counties, cities and other local government entities may have their own requirements as well.

Law stated - 28 August 2023

Integrated pollution prevention and control

Is there a system of integrated control of pollution?

There is no general system providing integrated pollution prevention and control. The EPA administers most of the national environmental statutes and regulations, but other federal agencies also have jurisdiction over federal lands, wildlife, or specific activity types. State and local authorities generally may impose additional requirements where not pre-empted by federal law. In some cases, the federal system is a delegated programme where states implement minimum federal standards, but can impose more stringent requirements.

Law stated - 28 August 2023

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. EPA lists sites on the National Priority List based on a hazard ranking system. Liability under the act and state laws is typically strict, joint and several, and retroactive, even to legacy contamination sites. 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. States also implement voluntary clean-up and brownfields programmes aimed at remediating and reusing legacy contaminated soil sites. While Superfund covers soil pollution after the release of hazardous substances, RCRA aims to prevent soil pollution in the first place by implementing a cradle-to-grave approach to hazardous waste management and monitoring, and also provides redress for releases that create an 'imminent and substantial endangerment' to the environment.

Law stated - 28 August 2023

Regulation of waste

What types of waste are regulated and how?

RCRA defines 'solid waste' as 'any garbage, refuse, sludge... and other discarded material'. Under that law, 'solid' wastes include solid, liquid, semisolid or contained gaseous material. Solid wastes classified as 'hazardous wastes' under Subtitle C of RCRA 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 and 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.

RCRA creates 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. RCRA requires that certain hazardous wastes meet treatment standards (incineration, stabilisation) before landfill disposal. Certain treatment standards are numerical and others require the use of certain treatment technologies. 'Universal' wastes, including batteries, certain suspended or cancelled pesticides, aerosol cans, 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. The Act also imposes record-keeping requirements on disposers of hazardous waste. For hazardous waste storage, depending on the size and type of facility, RCRA regulations may impose accumulation time limits and technical standards (eg, for containers, tanks, drip pads or containment buildings), as well as training requirements, air emission limitations and the development of contingency plans and emergency procedures.

Under the HMTA, transporters of hazardous waste must obtain an EPA identification number and comply with EPA's hazardous waste manifest system. Exemptions exist for transporters of certain recycled or reclaimed hazardous wastes generated by small-quantity generators. Transporters must take certain actions in response to discharges or spills of hazardous waste. Transporters must also comply with applicable Department of Transportation regulations that apply to the transport of hazardous materials by rail, aircraft, water vessel or truck. These include record-keeping, training, manifest, labelling and packaging requirements. RCRA also restricts the export and import of hazardous waste.

RCRA and implementing EPA regulations and guidance exempt certain recyclable materials (including some by-products) and recycling activities from its hazardous waste regulations, generally if specified conditions are met. Recycling standards under RCRA range from full regulation to full exemption from regulation. Federal law does not mandate a circular economy or waste recycling in lieu of disposal. Under a growing number of state laws, extended producer responsibility requirements (including recycling targets) may apply for certain categories of products.

Law stated - 28 August 2023

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). To date, EPA has established NAAQS for six pollutants: particulate matter (coarse and fine), ozone, sulphur dioxide, nitrogen dioxide, carbon monoxide and lead. States must adopt state implementation plans (SIPs) to achieve the NAAQS and to control emissions of criteria and hazardous pollutants within their boundaries. The CAA also requires EPA to regulate emissions of listed hazardous air pollutants (HAPs) and to address ozone-depleting substances, acid rain and regional haze.

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 act requires new or modified sources of air pollutants to obtain pre-construction approval. The pre-construction permit programme requires project proponents to demonstrate that emissions from the new or modified sources will not cause or contribute to an increase in air pollutants that would degrade air quality, and requires installation of certain levels of pollution control equipment depending on the area's air quality. Following construction, new or modified sources must obtain operating permits, which require compliance with equipment standards (eg, best available pollution control equipment) and emissions limits. These standards and limits vary based on facility type and the nature of emissions. Permitting thresholds, emissions limits and equipment standards are generally more stringent for sources emitting HAPs or located in NAAQS non-attainment areas. For certain actions, federal agencies must also demonstrate general conformity or transportation conformity to approved SIPs, thereby ensuring that those actions will not create or worsen air quality violations under the NAAQS.

Although EPA issues permits in some circumstances, most permits are issued by state or local air pollution control agencies under their SIP authority (with EPA oversight). Operating permits are generally required for larger sources and sources that are subject to new source performance standards, HAP standards and acid rain control requirements. Operating permits typically last for five years and include enforceable emissions standards and limitations (which vary by industry or source category), compliance schedules, and monitoring and reporting requirements.

In August 2015, EPA introduced the Clean Power Plan (CPP) to set national standards to reduce carbon dioxide pollution from stationary power plants. In June 2019, EPA formally withdrew the CPP, and replaced it with the Affordable Clean Energy (ACE) rule. In June 2022, the Supreme Court reviewed the DC Circuit's decision to vacate the ACE rule, which would have opened the door for further regulatory action by the Biden administration on power plant GHG emissions. In West Virginia v EPA , the Supreme Court, relying on the 'major questions doctrine,' concluded that Congress did not grant EPA the authority to devise emission caps based on a goal to shift power generation from coal to renewable energy and natural gas. The EPA thus exceeded its power by enacting the CPP. Congress must now provide clear direction to the EPA in its delegation of authority before the agency can regulate greenhouse gas emissions as attempted in the CPP. In May 2023, EPA issued a proposed rule under the CAA to revise new source performance standards, to establish emission guidelines for existing fossil fuel-fired electric generating units and combustion turbines, and to repeal the ACE rule.

Beyond stationary sources, EPA has broad authority over mobile sources including aircraft, on-road vehicles and non-road engines and equipment. It sets emission standards for vehicles, imposes testing and certification for engines and controls fuel formulations and additives. Passenger cars and light-duty trucks must meet tailpipe emission standards for various air pollutants and greenhouse gases (GHGs). In September 2019, EPA formally revoked California's unique ability to set stricter vehicle emissions standards, followed by about a dozen other states, but then reinstated California's authority in March 2022. In December 2021, following a re-evaluation of standards previously set, EPA issued new stricter standards for tailpipe carbon dioxide emissions for passenger cars and light-duty trucks for model years 2023 to 2026. The Department of Transportation followed by strengthening corporate average fuel economy standards in April 2022 for model year 2026. In April 2023, EPA issued a proposed 'phase 3' rule to create stricter greenhouse gas emission standards for heavy-duty vocational vehicles that would begin to apply in model year 2027.

In addition, for aircraft, in August 2016, EPA finalised a finding that GHG emissions from certain classes of aircraft endanger human health and welfare. On 11 January 2021, EPA issued the first-ever Clean Air Act GHG emission standards for aircraft. Those standards apply to manufacturers of new aircraft and new aircraft engines, with compliance determined as part of the Federal Aviation Administration's airworthiness certification process. In November 2021, the Federal Aviation Administration published the US Aviation Climate Action Plan, which outlines the government's approach to achieving net-zero emissions by 2050. The plan relies on more efficient aircraft and engine technologies, production and use of sustainable aviation fuels, advancements in airport operations, international cooperation, and support for climate science research.

The US currently has no federal law setting energy efficiency standards or requiring energy audits for buildings. The US Department of Energy (DOE) establishes and implements minimum energy conservation standards for residential, commercial and industrial equipment and appliances used in buildings under the Energy Policy and Conservation Act of 1975, as amended by the National Appliance Energy Conservation Act, the Energy Policy Acts of 1992 and 2005, and the Energy Independence and Security Act of 2007. As part of the Inflation Reduction Act of 2022, the government offers incentives for energy efficiency such as 179D Commercial Building Energy-Efficiency Tax Deduction. States and localities have promulgated green building standards, which, generally, are voluntary, and are exploring other means to make buildings more energy efficient.

Law stated - 28 August 2023

Protection of fresh water and seawater

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

The CWA requires a permit for any person or entity to discharge either pollutants or dredged or fill material to waters of the United States. EPA oversees the former; the US Army Corps of Engineers oversees the latter (subject to EPA veto). In June 2023 , in Sackett v EPA , the Supreme Court substantially narrowed the definition of 'waters of the United States', a decades-long debate and the subject of numerous agency rulemakings and court decisions. In particular, the Supreme Court held that waters of the United States include jurisdictional wetlands with a continuous surface connection to relatively permanent bodies of water. The Corps and EPA are in the process of implementing Sackett .

Individual states also maintain their own programmes regulating these discharges to surface waters, and may be delegated authority to implement the act within their borders. 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. States also issue water quality certifications under Section 401 of the Clean Water Act, which remains the subject of ongoing regulatory changes and litigation aimed to balance state interests and expeditious permitting.

The EPA also sets standards for different contaminants in drinking water through the Safe Drinking Water Act and monitors states, local authorities and water suppliers who enforce those standards. State law governs the extraction of water for consumptive use. In addition, EPA regulates the transportation and deposit of waste by a vessel within coastal waters through the Shore Protection Act and Marine Protection, Research and Sanctuaries Act (also known as the Ocean Dumping Act).

Law stated - 28 August 2023

Protection of natural spaces and landscapes

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

Several categories of federally owned and managed lands are set aside for conservation and recreational purposes and under various agencies' jurisdiction. Such designations are usually made by Congress pursuant to an organic statute and a site-specific statute, with the exception of the presidential designations of national monuments under the Antiquities Act. Other categories of protected areas include national parks, national wildlife refuges, national forests, wild and scenic rivers and wilderness areas. Each type of designation entails balancing predominant or multiple uses. For example, the ESA requires protection for designated critical habitat areas, while the Land and Water Conservation Fund (LWCF) invests earnings from offshore oil and gas leasing to conserve parks, wildlife refuges, forests, open spaces, trails and wildlife habitat. Under section 6(f) of the LWCF Act, projects that convert to non-recreational uses property that has been supported by LWCF funds generally must receive approval from the US National Park Service and provide replacement lands or other mitigation.

The Department of the Interior manages most public lands, including both onshore and the 1.7 billion acres of the Outer Continental Shelf. The Department of Agriculture manages national forests. Designated wilderness areas receive the most protection. Individual states and localities also have systems of protected areas.

Transportation (road, transit, or rail) projects additionally must comply with section 4(f) of the US Department of Transportation Act of 1966, which precludes a transportation project's uses of parks, recreation lands, wildlife refuges, or historic sites unless there is no feasible and prudent avoidance alternative and the project includes all possible planning to minimise harm to section 4(f) properties, or that the project only has a minimis impact on section 4(f) properties.

Law stated - 28 August 2023

Protection of flora and fauna species

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

The ESA provides for the protection and recovery of listed endangered and threatened plants and animals and the habitats upon which they depend. Absent a 'no effect' determination, each federal agency must engage in consultation to ensure that its actions are not likely to jeopardise the continued existence of the species, or result in destruction or adverse modification of the species' designated critical habitat. 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. The Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act, and their respective regulations, also protect against certain actions, including 'taking' migratory birds and eagles.

The services remain engaged in review and potential further revision of regulations implementing the ESA, which in recent years have vacillated between fewer and greater protections. In August 2019, the US Fish and Wildlife Service and National Marine Fisheries Service sought to reform the ESA implementation, including the rules for listing species, designating critical habitat, conducting interagency consultation and removing the automatic extension of take prohibitions to listed threatened species under the jurisdiction of the US Fish and Wildlife Service. However, in July 2022, a federal court rejected those regulatory changes, effectively reinstating regulations adopted in 2016, which had been challenged in litigation before being superseded by the 2019 rules. Separately, the services in June 2022 reversed a December 2020 rule narrowing the definition of 'habitat' for purposes of designating critical habitat. In June 2023, the US Fish and Wildlife Service and National Marine Fisheries Service (Services) issued three proposed rules that aim to overturn regulatory amendments during the Trump administration. If finalised, these rules may engender litigation as well. On 4 October 2021, the US Fish and Wildlife Service reversed a January 2021 rule that had excluded incidental take from prohibition under the Migratory Bird Treaty Act, thereby again subjecting incidental take of migratory birds to prosecutorial discretion for enforcement. The agency continues to consider creation of an incidental take permitting program for migratory birds.

Law stated - 28 August 2023

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 local or state level. Many states have noise pollution programmes, which vary widely. Local zoning laws and allowed activities also vary widely. Under the Clean Air Act, Noise Control Act of 1972 and Quiet Communities Act of 1978, EPA retains authority to investigate, study and respond to questions about noise pollution and adverse health impacts. 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 or state and local agencies. Workplace exposure to noise, odours and vibrations is regulated by the US Occupational Safety and Health Administration. Under common law tort principles, private parties may bring nuisance actions for excessive noise, odours and vibrations. Federal and state agencies also are dedicating increasing attention to these issues via environmental justice initiatives.

Law stated - 28 August 2023

Liability for damage to the environment

Is there a general regime on liability for environmental damage?

There is no US generalised regime for environmental damages. Statutes, regulations and common law can impose various types of liability, including administrative, civil and criminal. Courts in turn establish precedent for liability in cases arising under various environmental laws. Alleged violators may face government administrative actions, civil suits or citizen suits. Only the government can prosecute criminal liability in court.

The government generally follows proportional enforcement. Minor offences may trigger administrative or civil sanctions; more serious and intentional violations trigger more severe sanctions or even criminal charges. The government's burden of proof is highest in criminal cases. Some programmes, like Superfund, impose strict liability based on party status. RCRA authorises the government or private parties to seek relief for 'imminent and substantial endangerment' to the environment.

Law stated - 28 August 2023

Environmental taxes

Is there any type of environmental tax?

Most US environmental programmes are regulation based, not tax based. Some environmental tax programmes do exist. For example, the Oil Pollution Act established a federal trust fund to clean up oil spills, financed by a per-barrel tax collected from the oil industry. An underground storage tank trust fund is funded by taxes on certain motor fuels. A federal tax also applies to use or import ozone-depleting chemicals. The Surface Mine Control and Reclamation Act authorises a reclamation programme for abandoned mine land, which is funded by a coal tax. Environmental taxes are more prevalent on the state and local levels, including taxes relating to waste and battery disposal, chemicals, petroleum, tires, air emissions, oil spill response, litter control and water quality.

Law stated - 28 August 2023

Environmental reporting

Are there any notable environmental reporting requirements (eg, regarding emissions, energy consumption or related environmental, social and governance (ESG) reporting obligations)?

Since approximately 2010, EPA has required certain large emitters (eg, fuel and industrial gas suppliers, CO 2 injection sites) to annually report their GHG emissions data using specified methodologies and EPA's electronic reporting tool (see EPA's Greenhouse Gas Reporting Program, codified at 40 CFR Part 98). Following EPA's multi-step verification process, the annual data is then made available to the public.

There is currently no general system for comprehensive ESG reporting in the United States, although more targeted reporting requirements have been established within the social dimension of ESG, such as the Securities and Exchange Commission's (SEC) conflict minerals rule, the SEC's rule on disclosures relating to human capital management and the State of California's Transparency in Supply Chains Act. To date, most companies voluntarily reporting ESG information have been driven by customer, investor, NGO and other stakeholder expectations. The US will likely transition to mandatory ESG reporting obligations, beginning with climate-related disclosures. In April 2022, the SEC proposed new disclosure and reporting requirements for investors concerning registered funds' and advisers' incorporation of ESG factors. The proposal , if finalised, would amend the rule under the Securities Act of 1933 and Securities Exchange Act of 1934.

Meanwhile, Congress remains divided on ESG issues and legislation has remained elusive. For example, in 2021, Congress considered legislation that would require disclosures relating to climate, ESG, political spending, tax havens and offshoring. For example, the Corporate Governance Improvement and Investor Protection Act (HR 1187) , if enacted, would require publicly traded companies to periodically disclose ESG factors, including ESG performing metrics, climate change-related risks and workforce management policies. The bill would also establish the Sustainable Finance Advisory Committee, which must recommend policies to direct assets towards environmentally sustainable investments. The bill was received by the Senate and referred to committee in June 2021, but no further action has been taken as of July 2023. By contrast, in March 2023, Congress voted to overturn the US Department of Labor's ESG rule that enabled fiduciaries to consider ESG factors when selecting investments for retirement plans. President Biden vetoed the resolution. Certain states have pursued similar actions to limit ESG considerations in investing.

Law stated - 28 August 2023

Government policy

How would you describe the general government policy for environmental issues? How are environmental policy objectives influencing the legislative agenda?

Environmental policy is often a function of the presidential administration in power, which changes every four to eight years. Current environmental policy under the Biden administration is largely focused on reducing and adapting to climate change and improving environmental justice. There also are concerted efforts to undo the overall deregulatory environmental policy of the prior Trump administration, including on air emissions, species, wetlands and environmental reviews. These environmental policy objectives have manifested earliest in new guidance documents, newly proposed regulations by various federal agencies, and litigation positions. On the legislative front, these environmental policy objectives are informing discussions on bills involving infrastructure (surface transportation, water resources and energy), sustainability, corporate reporting and agency budgets. For example, after the Trump administration in September 2020 updated regulations for NEPA environmental reviews of proposed federal agency actions, the Biden administration reversed some of them in April 2022, and in July 2023 proposed a broader reversal through a 'Phase 2' rulemaking. Certain environmental objectives that cannot be achieved via bipartisan legislation may be pursued via the budget reconciliation process, which is exempt from the 60-vote supermajority requirement in the Senate to overcome a filibuster. For example, the Infrastructure Investment and Jobs Act of 2021 (Bipartisan Infrastructure Law) provided substantial funding to improve the resiliency of the nation's infrastructure and advance environmental justice, including investments in grid modernisation, clean energy, environmental remediation, and safe drinking water systems. In addition, the Inflation Reduction Act of 2022 represents another major expansion of US environmental and climate policy. Most recently, the Fiscal Responsibility Act of 2023 (FRA) was signed into law to raise the national debt ceiling and prevent a government default. The FRA, in relevant part, modified NEPA to expedite permitting processes and codified certain of CEQ's 2020 amendments to its federal government-wide NEPA regulations.

Law stated - 28 August 2023

HAZARDOUS ACTIVITIES AND SUBSTANCES

Regulation of hazardous activities

Are there specific rules governing hazardous activities?

See the Resource Conservation and Recovery Act regarding the generation, treatment, storage, disposal and management of hazardous wastes; the Hazardous Materials Transportation Act for transport and handling of hazardous materials; the Comprehensive Environmental Response, Compensation and Liability Act for release of hazardous substances; the Toxic Substances Control Act (TSCA) for production, importation, use, and disposal of specific chemicals; and the Occupational Safety and Health Act of 1970 (OSHA 1970) for worker safety at facilities. OSHA 1970 also establishes 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 from exposure to various air contaminants, asbestos and other substances.

Law stated - 28 August 2023

Regulation of hazardous products and substances

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

Under TSCA, reporting, record-keeping and other requirements may apply to manufacturers (including importers), processors, distributors and users of chemical substances. Manufacturing a non-exempt new chemical substance (not on the inventory under the Act) is prohibited unless and until the US Environmental Protection Agency (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. Designated 'significant new uses' of approximately 2,800 chemicals are subject to similar notification and review requirements.

Following amendments to the act passed in 2016, EPA also has authority to:

- prioritise chemicals for in-depth review;
- conduct risk evaluations of high-priority chemicals; and
- regulate those chemicals found to present an unreasonable risk under the conditions of use.

EPA further may issue either orders or rules requiring testing by manufacturers and processors. For new chemicals (ie, not on the inventory), EPA must now make affirmative findings (eg, whether a chemical is likely to present an unreasonable risk under the conditions of use) with an order to follow if the 'likely to present' finding is made. EPA actions may pre-empt certain state restrictions on chemicals. Based on chemical manufacturer, importer, and processor submissions, EPA updates its inventory which identifies those chemical substances that are considered to be active. EPA is also prioritising chemicals for possible regulation pursuant to the 2016 statutory amendments to the act, and proposing changes to the existing regulations governing testing, risk evaluation, reporting, and significant new uses of chemical substances under TSCA to align these regulations with revisions to OSHA's Hazard Communications Standard (HCS).

The Consumer Product Safety Improvement Act 2008, implemented by the Consumer Product Safety Commission (CPSC), limits the levels of lead, phthalates and certain chemicals allowed in children's products. The CPSC also administers the Federal Hazardous Substances Act, which requires precautionary labelling to alert consumers to certain products' potential hazards. Moreover, the Federal Trade Commission has established 'green guides' for environmental marketing claims. States additionally have imposed requirements to regulate and restrict the sale of certain products containing specified hazardous substances.

Law stated - 28 August 2023

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 US 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 Emergency Planning and Community Right-to-Know Act requires facilities to report chemical storage and release information, and also requires state and local governments to undertake emergency planning activities. In addition, under the Clean Air Act, facilities that produce, handle, process, distribute or store certain chemicals must prepare and submit a risk management plan to EPA. Certain facilities are also required to prepare, develop and implement oil spill prevention, control and countermeasure plans.

Law stated - 28 August 2023

ENVIRONMENTAL ASPECTS IN TRANSACTIONS AND PUBLIC PROCUREMENT

Environmental aspects in M&A transactions

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

Purchasers should:

- check the target facilities' regulatory compliance;
- conduct 'all appropriate inquiries' including evaluating the facilities' environmental conditions and potential liability and costs for onsite remediation; and
- evaluate potential liabilities associated with the current and historic generation and offsite disposal of wastes from the target's operations.

A share purchaser generally acquires all the corporate target's assets and liabilities, including the predecessor's environmental liabilities. An asset purchaser 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.

Law stated - 28 August 2023

Environmental aspects in other transactions

What are the main environmental aspects to consider 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, often are not discharged in the bankruptcy.

Law stated - 28 August 2023

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 environmental violations may result in a company being suspended or debarred from doing business with the US, state, or local government.

Law stated - 28 August 2023

ENVIRONMENTAL ASSESSMENT

Activities subject to environmental assessment

Which types of activities are subject to environmental assessment?

The National Environmental Policy Act (NEPA) requires environmental review of most discretionary federal agency actions, including approving, financing, assisting or conducting plans, projects or programmes, whether regional or site-specific. No industrial activity restriction exists; in fact, many major NEPA documents address the federal government's natural resource management decisions. Certain actions are exempt from NEPA, such as ministerial agency actions or where potentially duplicative environmental reviews are required. In some 'small handles' situations where only a small component or minor approval involves a federal nexus, NEPA might not apply to the larger project. Certain states have laws analogous to NEPA, which vary significantly.

In July 2020, the Council on Environmental Quality (CEQ) within the White House amended the nearly 40-year-old NEPA implementing regulations applicable across the federal government, including a renewed focus on which federal agency actions may be exempt from NEPA. Litigation challenges to those regulations were dismissed by the Fourth Circuit Court of Appeals for lack of ripeness. In 2021, the Biden administration began to reconsider the 2020 regulatory amendments in a two-step process, delaying individual federal agencies' corresponding amendments of their own NEPA implementing regulations that correspond with the specific types of activities that those agencies commonly undertake. In April 2022, CEQ restored some of the provisions modified in 2020, including changes to streamline the NEPA review process. In June 2023, Congress enacted the Fiscal Responsibility Act, which aims to expedite the NEPA process by clearly allowing applicants to prepare draft NEPA documents, imposing hard time and page limits on studies, requiring the designation of a lead agency, and limiting analysis to those environmental impacts that are reasonably foreseeable. In July 2023, CEQ proposed 'broader changes' to NEPA in Phase 2, including to codify environmental justice considerations, add new steps for public participation, expressly consider climate change impacts, and refocus on environmental outcomes.

Law stated - 28 August 2023

Environmental assessment process

What are the main steps of the environmental assessment process?

NEPA requires an environmental impact statement (EIS) for 'proposals for... major federal actions significantly affecting the quality of the human environment.' A less detailed environmental assessment (EA) may suffice for a federal agency action with insignificant or unclear impacts. Finally, categorical exclusions (CEs) apply to categories of agency actions that do not significantly affect the environment individually or cumulatively. An agency can perform a more detailed review under NEPA than legally required, and is guided by agency-specific regulations implementing NEPA.

The lead federal agency is responsible for the NEPA review, and may invite assistance by cooperating or participating federal, state, tribal and local agencies with jurisdiction or special expertise. The lead agency may also hire and supervise third-party consultants, typically funded by the project proponent, to prepare the NEPA analysis. For an EIS, and often an EA, the lead agency will publish a notice of intent for the proposed action, conduct scoping of affected resources or values, prepare a draft analysis, and then finalise its analysis and decision. The project proponent and public may submit information and comments during this process, including typically a minimum 45-day comment period on the draft analysis. The adequacy of the final impact statement may be challenged in court. There is increasing legislative and regulatory focus, to facilitate and expedite NEPA reviews, on integration of NEPA with early planning efforts and with other environmental requirements for a given project. As described above, however, those rules remain somewhat in flux as of this writing.

Law stated - 28 August 2023

REGULATORY AUTHORITIES

Regulatory authorities

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

The US Environmental Protection Agency (EPA) implements most national environmental statutes. The Department of the Interior and the US Forest Service implement a variety of laws addressing environmental review, wildlife and cultural and historic resources. The US Clean Water Act (CWA) wetlands fill permits are issued by the US Army Corps of Engineers with EPA oversight. The US Department of Justice litigates cases arising under federal environmental and natural resources laws. State agencies issue most operations permits pursuant to authority delegated by EPA, and also share enforcement authority. States generally take the lead under the Clean Air Act (CAA), CWA, and the Resource

Conservation and Recovery Act 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, the Toxic Substances Control Act; the Federal Insecticide, Fungicide, and Rodenticide Act; and the Emergency Planning and Community Right-to-Know Act), EPA generally takes the lead on enforcement.

Law stated - 28 August 2023

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) 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.

EPA investigations were in decline for a decade, but that is expected to change. The Biden administration proposed a US$12.083 billion EPA budget for FY 2024, which among other things proposes increased civil enforcement, environmental compliance monitoring and criminal enforcement.

Law stated - 28 August 2023

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 resemble a formal trial. More informal proceedings are decided on written submissions. Although procedures vary, the parties typically may use any type of evidence they deem relevant in administrative proceedings. There also are means to seal confidential information if applicable. Any subsequent court challenge to a final agency action is typically based on and limited to the same administrative record as before the agency. Presently federal agencies are focused on improving public outreach particularly to environmental justice and tribal communities.

Law stated - 28 August 2023

Sanctions and remedies

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

Federal and state agencies may pursue injunctive relief and require the abatement or cessation of permit violations or environmental harm. Remedial steps may include installing equipment to control emissions, ceasing certain activities or revoking a permit or shutting down a facility. Many environmental statutes also authorise civil and criminal penalties, often calculated on a per-day, per-violation basis. Agencies may – and sometimes must – issue warnings or notices of violations before taking more severe enforcement actions. An agency typically may pursue an administrative enforcement action or sue the violator in federal court.

Law stated - 28 August 2023

Appeal of regulators' decisions

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

Nearly all formal administrative decisions from environmental agencies can be appealed by the recipient. Appeals can be based on factual findings and legal conclusions and can also challenge the extent of the remedy imposed by the decision-maker. Administrative appeal procedures differ among agencies, including potential proceedings before an Administrative Law Judge or an agency appeals board. After exhaustion of administrative remedies, a final agency action may be appealed to a federal district court, or in some instances directly to a US court of appeals. Judicial review follows the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and individual courts' local rules, and is deferential to agencies.

Law stated - 28 August 2023

JUDICIAL PROCEEDINGS

Judicial proceedings

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

Most violations trigger administrative or civil enforcement. In addition, 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, but typically seek remedies commensurate with the underlying offence. 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'). A party challenging a federal agency action on environmental grounds may bring a civil case in a proper federal district court or a specific (eg, appellate) court if the relevant statute so directs.

Law stated - 28 August 2023

Powers of courts

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

In civil cases brought by governmental entities or citizen plaintiffs 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 higher fine and serve time in prison. 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.

Under Federal Rule of Civil Procedure 65 and similar court rules and case law, courts may also grant a preliminary injunction or other interim relief to, for example, stay a challenged agency action or prevent a project from going forward during the litigation.

Law stated - 28 August 2023

Civil claims

Are civil claims allowed regarding infringements of environmental law?

Certain environmental statutes (eg, the US Clean Air Act (CAA), Clean Water Act (CWA) and the Resource Conservation and Recovery Act (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. The Administrative Procedure Act also generally enables citizen plaintiffs to file civil lawsuits challenging final agency actions, or omissions in some circumstances, as arbitrary and capricious or otherwise for failure to comply with procedural or substantive requirements of other laws.

Law stated - 28 August 2023

Defences and indemnities

What defences or indemnities are available?

In civil cases, potential defences frequently include:

- statutes of limitations (up to five years is common);
- ambiguity of statutory or regulatory language;
- compliance with a valid permit;
- factual defences; and
- limited statutory defences.

In criminal cases, additional defences often may include:

- lack of knowledge;
- the government's failure to meet its heightened burden of proof; and
- other constitutional arguments unique to criminal cases (eg, lack of fair notice or void for vagueness).

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).

Law stated - 28 August 2023

Directors' or officers' defences

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

Routine environmental violations generally do not create officer and director liability. However, 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 the US Environmental Protection Agency and state agencies are required to include formal certifications (under oath) with regard to the accuracy of the information contained therein, which can provide the basis for claims against corporate officers.

More often, various theories under laws governing the internal governance of corporations and other business enterprises can support personal liability of corporate directors and officers under environmental and other public health laws – for example:

- the corporate veil is pierced;
- the director or officer personally participated in the improper activity; or
- the director or officer personally exercised substantial control and supervision over the activity in question.

US law generally does not permit liability based only on the corporate position or job title of director or officer. However, federal prosecutors can rely on a range of surrogates to prove the executive's knowledge. Therefore, criminal charges can be pursued when the directors or officers:

- are personally aware of, or involved in, the commission of a crime;
- aid and abet a crime;
- fail to prevent the commission of a crime by others within the corporation by either turning 'wilfully blind' or negligently supervising the conduct of those subject to their control; or
- fail to implement preventive measures to ensure that violations do not occur.

Directors' and officers' liability insurance and corporate indemnification can mitigate such liability.

Law stated - 28 August 2023

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 and rarely exercised.

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 courts (although the jurisdiction of some courts of appeal may be discretionary).

Law stated - 28 August 2023

INTERNATIONAL TREATIES AND INSTITUTIONS

International treaties

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

Yes. For example, regionally, the United States and Canada have a bilateral Air Quality Agreement. The United States is also party to the North American Agreement on Environmental Cooperation and the North American Free Trade Agreement and its side agreements, which have environmental aspects.

Multilaterally, the United States is party to, among other agreements: the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter; the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora; and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. The State Department maintains a complete list of international agreements to which the United States is party. The United States is not a party to a number of other multilateral environmental agreements, generally for lack of certain domestic authority for which new legislation would be required before the United States could join, including: 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.

Law stated - 28 August 2023

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 United States has generally implemented its treaty obligations under multinational environmental agreements through national statutes and regulations. In some cases, this domestic authority has pre-dated the US international obligations and US law and policy make no direct reference to treaties. In other cases, however, the United States 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 United States is not yet a party.

Law stated - 28 August 2023

UPDATE AND TRENDS

Key developments of the past year

Are there any emerging trends or hot topics in environment law in your jurisdiction?

The election of President Biden in November 2020 and unified Democratic control of the Executive and Congress signalled a sea change in environmental law in the United States, just as the Trump administration had signalled a different sea change four years earlier. President Biden's campaign articulated a particularly strong commitment to the issues of climate change and environmental justice. Considering the divided Congress as of 2023 due to Republicans narrowly controlling the House of Representatives, the Biden administration is likely to continue pursuing bipartisan solutions on infrastructure, energy and other areas while also prioritising job creation and new economic opportunities.

The divided Congress is likely to deter substantial changes in core environmental laws. However, Congress has recently passed significant legislation advancing infrastructure and associated environmental permitting and reviews. Enacted on 15 November 2021, the Bipartisan Infrastructure Law creates new programmes and funding addressing a range of topics related to environment, energy and climate policy, including codification of environmental streamlining initiatives. The Inflation Reduction Act, signed by President Biden in August 2022, charts a new course in US energy and climate policy. The Fiscal Responsibility Act, signed by President Biden in June 2023, is an example of legislation that required the Biden administration to compromise on a package of environmental reforms in order to raise the nation's debt ceiling and avoid a government default, and resulted in the first changes to the National Environmental Policy Act (NEPA) statute in 50 years.

On the regulatory side, the Biden administration has moved quickly to reverse the overall deregulatory agenda of the Trump administration. On 20 January 2021, President Biden issued the 'Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis' (EO 13990). In addition to setting out the Biden administration's policy priorities, EO 13990 targeted specific policies of the Trump administration. Furthermore, EO 13990 directs executive agencies to evaluate all regulations, orders and guidance documents issued under the Trump administration and consider suspending, revising or rescinding prior actions that are inconsistent with the Biden administration's agenda. As discussed above, the Biden administration acted to reinstate the pre-Trump-era Endangered Species Act (ESA), NEPA and other regulations to better align the regulations with Biden administration policies and priorities. In April 2023, the Fifth Circuit Court of Appeals dismissed multiple Republican-led states' challenge to EO 13990 and vacated a 2022 preliminary injunction against the Biden administration for using interim estimates of the social costs of greenhouse gas emissions because the states lacked standing.

Much of the Biden administration's early effort in the environmental sphere involves addressing climate change. President Biden clearly articulated his expectation that all agencies will contribute towards the administration's effort to address severe climate impacts affecting communities across the United States. On 27 January 2021, President Biden issued the 'Executive Order on Tackling the Climate Crisis at Home and Abroad' (EO 14008). Importantly, EO 14008 established a National Climate Task Force, which includes every cabinet agency and additional non-cabinet agencies with authority over environmental or scientific matters. The National Climate Task Force will greatly facilitate the deployment of a 'whole-of-government' approach to combating the climate crisis. On the international front, President Biden recommitted the United States to the Paris Climate Agreement, which aims to limit the global temperature increase to 2 °C above preindustrial levels.

To achieve its ambitious climate change goals, the Biden administration has emphasised renewable energy. In addition to establishing a National Climate Task Force, EO 14008 set forth several substantive energy goals, including achieving net greenhouse gas neutrality for the electricity sector by 2035, doubling offshore wind production by 2035, and replacing federal state, local and tribal vehicle fleets with non-emitting vehicles. In April 2021, President Biden announced a new target, which is for the United States to achieve a 50 per cent reduction from 2005 levels in economy-wide net greenhouse gas pollution by 2030. To attain the energy goals, EO 14008 instructs relevant agencies to identify changes in siting and permitting processes that will facilitate production of renewable energy on public lands and waters. The Biden administration also continues to foster accelerated development of renewable energy and other preferred projects, while at the same time rolling back Trump administration steps to more broadly reduce project environmental review and permitting time frames and paperwork. In August 2022, a federal district courtpermanently enjoined implementation of EO 14008's pause of federal oil and gas lease sales.

The Biden administration has also taken a series of actions to prioritise environmental justice issues. EO 14008 established the White House Environmental Justice Advisory Council and the White House Environmental Justice Interagency Council, which will work together to develop a strategy to address current and historic environmental injustice. For example, the White House Environmental Justice Advisory Council released a report outlining recommendations to centre environmental justice in national policies and advance President Biden's environmental justice commitment. In addition, there will be an increase in environmental justice monitoring and enforcement through new or strengthened offices at the Environmental Protection Agency, the Department of Justice and the Department of Health and Human Services. In April 2023, President Biden issued the 'Executive Order on Revitalizing Our Nation's Commitment to Environmental Justice for All' (EO 14096) to build upon previous executive orders advancing environmental justice. Specifically, EO 14096 focuses on implementing environmental justice across the entire federal government.

At the same time, the judicial branch of government continues to wield significant influence and power over environmental and climate policy. The many regulatory efforts and policy reversals have triggered significant amounts of litigation across the country, particularly under the Administrative Procedure Act. In several instances, ongoing chal lenges to Obama or Trump administration rules have been mooted or stayed to accommodate new litigation on superseding Trump or Biden administration regulatory actions. In some cases where new actions were struck down in court, the original challenges subsequently resumed. Other cases seek broad relief from industry for climate change impacts under common law theories. These cases will continue for the foreseeable future.

The Supreme Court and other federal courts have also increasingly scrutinised federal agency actions in the environmental arena. In particular, the Supreme Court's 30 June 2022 decision in West Virginia v EPA narrowed the Biden Administration's ability to meet its environmental and climate goals by prohibiting the Environmental Protection Agency (EPA) from mandating generation-shifting (from coal-fired power to renewable energy generation) measures under the existing CAA. In doing so, the Supreme Court relied upon a 'major questions' doctrine that could form the basis for further challenges to environment-related actions by agencies. In addition, the Supreme Court's 25 May 2023 decision in Sackett v EPA narrowed the scope of federal jurisdiction over wetlands under the CWA by requiring wetlands to have a 'continuous surface connection to bodies that are waters of the United States in their own right.' The Supreme Court is presently considering whether to amend the basic ' Chevron' standard of deference to federal agencies in reviewing challenges to their actions. The outcome of upcoming environmental and administrative law cases will further erode or enable the ability of federal agencies to pursue environmental and climate objectives.

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 continue to be filed.

Other hot topics in US environment law include but are not limited to regulation of plastics, PFAS and other chemicals, mobile source emissions, protected species, wetlands, natural gas pipelines and building hookups, and environmental reviews. For example, in early 2023, E PA took several steps toward regulating PFAS , such as issuing new guidance on effluent limitations, proposing levels for safe drinking water and giving notice of a proposed rulemaking that would PFAS to the list of hazardous substances covered by Superfund. Certain types of projects, including pipelines and other large-scale infrastructure, also are frequent targets for litigation.

Law stated - 28 August 2023

Jurisdictions

European Union	Allen & Overy LLP
France	Huglo Lepage Avocats
India	Shardul Amarchand Mangaldas & Co
Indonesia	SSEK Law Firm
Japan	Anderson Mōri & Tomotsune
Malta	Camilleri Preziosi
Taiwan	Lee and Li Attorneys at Law
USA	Beveridge & Diamond PC