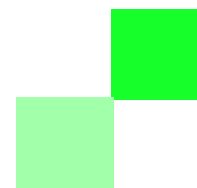


United States

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OVERVIEW

1. Please provide a brief overview of the system of environmental control?

The US Environmental Protection Agency (EPA) (*see box, The regulatory authority*) is the most important environmental regulatory agency. The US Department of the Interior is the agency with principal control over public lands and natural resources. Many other federal agencies have specialised functions.

Under the US system, the states have central roles. Most of the major federal statutes provide that the states can implement the regulations adopted by the EPA. Additionally, in most substantive areas, the states are free to adopt regulations that are stricter than those of the EPA. Some of the larger cities have also adopted their own environmental rules. Determining the laws applicable to a given facility therefore requires an investigation of federal, state and municipal laws.

The US Department of Justice represents the EPA and the other federal agencies in court, and is therefore a major player in environmental enforcement. Similarly, at the state level, the state attorneys general (many of whom are independent elected officials) have important roles.

2. To what extent are environmental requirements strictly enforced by regulators in your jurisdiction?

The federal government and almost all of the states take enforcement of their environmental requirements very seriously. Inadequate enforcement resources mean that not all violations are detected and penalised, but it is very risky to ignore regulations. Also, in many corporate and real estate transactions, the sellers are asked to make representations concerning compliance with environmental requirements.

3. To what extent are environmental non-governmental organisations (NGOs) and pressure groups active in your jurisdiction?

NGOs are extremely active. At national level, the leading NGOs active across a broad range of environmental regulation are the Natural Resources Defense Council, Environmental Defense, and

EarthJustice (formerly known as the Sierra Club Legal Defense Fund). Many other national organisations are active in more specialised areas. Most states and cities also have their own NGOs.

PERMITTING OF EMISSIONS

4. Is there an integrated permitting regime or are separate permits required for different types of emissions?

There is no integrated permitting regime. Separate permits are required for air emissions, water effluent and hazardous waste disposal. Many states and cities have their own separate permitting requirements, though some of them are integrated with the federal requirements.

5. If integrated, please provide a brief overview of the permitting regime.

Not applicable.

6. If there are separate permitting regimes (either instead of or in addition to an integrated regime), please provide a brief overview of regimes applicable to:

- Emissions to air.
- Emissions to water.
- Air. Permits are required for most significant stationary sources of air pollution, such as factories and power plants. Most air pollution requirements for a particular facility are consolidated in a single air pollution permit under Title V of the Clean Air Act. The EPA sets emissions and technological standards as required by the Clean Air Act. Application is made to the EPA or to the states, where implementation authority has been delegated (as it has been to most states).

Non-compliance can result in penalties of up to US\$25,000 (about EUR32,000) per day of violation (though the full penalties are rarely imposed). For certain violations, criminal penalties can also be imposed.

Permits last for several years. The terms vary, depending on the type of permit. Usually they can be renewed, but the permit holder may need to comply with new regulations that have been imposed in the interim. Usually permits can easily be transferred with the filing of a notice.

- **Water.** Under the National Pollutant Discharge Elimination System (NPDES), permits are required for most pollution discharges into rivers, lakes, oceans, and other bodies of water. The EPA sets effluent and technological standards as required by the Clean Water Act. Application is made to the EPA or to the states, where implementation authority has been delegated (as it has been to most states).

Holders of NPDES permits must submit periodic discharge monitoring reports to the government. Non-compliance with permit limits can result in penalties of up to US\$25,000 per day of violation (though the full penalties are rarely imposed). For certain violations, criminal penalties can also be imposed.

Permits last for several years. The terms vary, depending on the type of permit. Usually they can be renewed, but the permit holder may need to comply with new regulations that have been imposed in the interim. Usually permits can easily be transferred with the filing of a notice.

7. Please provide a brief overview of any emissions trading schemes in your jurisdiction.

Emissions trading is not a central feature of environmental regulation in the US. However, the EPA allows new sources of air pollution to be built in areas that are not within ambient air quality standards if they obtain "offsets" from existing facilities that reduce their emissions. A trading programme is also in place with respect to sulphur dioxide emissions, principally by electric power plants, and also for other specified types of emissions. The administration of President George W Bush favours, and has proposed increasing future reliance on, "cap and trade" programmes to meet air quality targets. Some states and regions have developed their own trading programmes.

WASTE

8. Please provide a brief overview of the regulatory regime applicable to the generation, transfer and disposal of waste.

For non-hazardous solid waste, regulation is primarily at the state level. Permits are generally not required to generate solid waste. State permits are required for solid waste transfer stations, and for disposal facilities such as landfills and incinerators. These permits are obtained from the state environmental agencies. Some but not all states require a demonstration of financial capacity for landfills. The EPA has set location standards for solid waste disposal facilities, as well as air pollution standards for incinerators and landfills.

The treatment, storage and disposal of hazardous waste is governed by the federal Resource Conservation and Recovery Act (RCRA). The EPA has promulgated an extremely complex set of regulations to implement RCRA. A central feature of these regulations is that a document (manifest) must accompany each shipment of hazardous waste from the point of generation to the place of ultimate disposal, so that all waste can be tracked. The regulations also contain very detailed waste management and treatment standards for particular kinds of waste.

Under RCRA, other federal laws (such as those governing the use of wetlands), and state laws, complex restrictions govern the location of hazardous waste disposal facilities. RCRA requires proof of financial capability for most hazardous waste treatment, storage and disposal facilities.

Most aspects of the implementation of RCRA have been delegated to most of the states, so applications for hazardous waste activities are typically made to the states.

Violations of RCRA tend to be the subject of serious enforcement actions and penalties, including criminal penalties.

A separate federal law, the Hazardous Materials Transportation Act, governs the transport of hazardous materials (including not only hazardous waste, but products and intermediate materials) by road, rail, air and water. This law is implemented by the US Department of Transportation.

CONTAMINATED LAND

9. Please provide a brief overview of any regulatory regime relating to contaminated land.

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, also known as the Superfund law) is often regarded as the most stringent contaminated land law in the world.

Under CERCLA, the EPA maintains a National Priorities List (NPL, also known as the Superfund list) of the most contaminated sites. The EPA has broad authority to investigate sites to determine if they should be placed on the NPL. When a site is placed on the NPL, it is subject to a set of procedures called the National Contingency Plan, which involves a lengthy and expensive programme of site investigation and clean-up.

Sites that have received permits for hazardous waste operations which become unduly contaminated may be subject to the corrective action programme of RCRA. This programme is similar to, but less procedurally complicated than, CERCLA.

Most states have their own lists of contaminated sites, and their own procedures for placing sites on those lists and for their remediation.

CERCLA sets out an exceptionally broad liability scheme. The liable parties include those who:

- Currently own the property.

- Owned the land when the contamination occurred.
- Were "operators" of the site (a term that the courts have defined broadly).
- Generated waste that ultimately went to the site.
- Arranged for the disposal of the waste.
- Transported the waste to the site, if they selected the disposal site.

Liability is retrospective, strict, and joint and several. It is not a defence that the defendant complied with all applicable laws, or that the disposal occurred before the enactment of CERCLA in 1980. Parties may be liable even if they played no role in contaminating the site. If some of the parties liable in relation to a site cannot be found or are unable to pay, the remaining parties may inherit their share of the liability.

Private parties who incurred "response costs", typically clean-up costs, can bring a legal action against liable parties. Frequently, the EPA or a state brings legal action against the largest potentially responsible parties, and those entities then bring third-party actions against smaller potentially responsible parties. CERCLA does not allow for damages for personal injury or property damage, but such damages may be recoverable at common law.

Many states have their own liability schemes similar to that of CERCLA.

Petroleum is not covered by CERCLA clean-up or liability schemes. Instead, petroleum contamination is covered by RCRA (see *Question 8*), whose liability scheme is not as broad as that of CERCLA. Many states have their own separate laws concerning petroleum clean-up and liability.

10. If there is no regulatory regime, is it usual for owners or occupiers of contaminated land to carry out voluntary clean-up?

When a site is not on the NPL or an equivalent state list, and there is otherwise no legal requirement that it be cleaned up, owners or occupiers often still clean it up. Most states have voluntary clean-up programmes that provide official approval of investigation and clean-up procedures, and governmental certification that clean-ups have been performed adequately. Some of the programmes are called "brownfield" programmes and are often accompanied by financial or other incentives.

ASBESTOS

11. Please provide a brief overview of the regulatory regime applicable to the presence, use and disposal of asbestos.

Most uses of asbestos have been prohibited. A federal statute, the Asbestos Hazard Emergency Act, requires the investigation

and clean-up of asbestos in school buildings. Additionally, the National Emission Standards for Hazardous Air Pollutants under the federal Clean Air Act require advance notice to (though not approval by) the EPA before the disturbance of more than a minimal amount of asbestos in buildings, and also requires that certain procedures be observed in carrying out this work. Some states and cities have more elaborate rules concerning the investigation and removal of asbestos. It is common practice for asbestos investigations to be conducted in connection with the sale of buildings and other structures that may contain asbestos.

The transportation and disposal of waste asbestos requires special state permits.

Heavy fines and criminal penalties have often been imposed on those who removed or disposed of asbestos from buildings without following the proper procedures.

ENVIRONMENTAL IMPACT ASSESSMENTS

12. Are there any requirements to carry out environmental impact assessments in respect of certain projects (for example, construction of an oil and gas facility)? If so, please provide a brief overview of the regulatory regime.

The National Environmental Policy Act (NEPA) requires environmental impact assessment for federal projects that may have a significant impact on the environment. NEPA applies to direct federal projects, and also to projects that may receive federal authorisation, such as permits, or financial assistance. Compliance with NEPA is the duty of the federal agency with principal responsibility for a given project. The Council on Environmental Quality, a unit of the Executive Office of the President, oversees the overall NEPA process and sets general NEPA regulations.

Minor projects may be classified as "categorically exempt", meaning that they do not require processing under NEPA. Otherwise, for federal actions that may have a significant environmental impact, an environmental assessment is prepared. Based on that assessment, the lead federal agency either issues a "finding of no significant impact", ending the NEPA process, or it prepares an environmental impact statement (EIS). A broad range of public projects is analysed under this process, such as highways, dams, government buildings, airports, and military installations, as well as private projects that require certain federal approvals or that are built on federally-owned land, such as mines, pipelines and ski areas. These studies examine impacts on species habitat, air and water quality, traffic, noise, population patterns, and many other aspects of the human and natural environment. The NEPA process must be completed before any federal agency can make a final decision on whether to proceed with a project.

About 20 of the states have adopted "little NEPAs" - laws that imitate NEPA and require environmental assessment of projects that require state or local approvals. These state laws vary widely. The states with the most comprehensive "little NEPA" laws are California, New York and Washington.

At both the federal and state levels, if a project is begun without compliance with NEPA or the little NEPA, it can be suspended by the courts until compliance is achieved. Otherwise, there are rarely penalties for non-compliance.

REPORTING AND AUDITING

13. Are regulators required to keep public registers of environmental information (for example, registers of environmental permits or contaminated properties)? If so, how easy or otherwise is it for a third party to search those registers?

The EPA maintains the NPL and several other lists of contaminated sites. The EPA also keeps lists of sites with various environmental permits. These lists are increasingly available online on the EPA's website and on various private websites.

Most state environmental agencies maintain their own lists of contaminated sites and environmental permits, and these are also generally available online.

Under the federal Emergency Planning and Community Right-to-Know Act, information is publicly available about releases of toxic substances from industrial facilities.

Information that is not online may be obtained by the public through the federal Freedom of Information Act, and its equivalent in every state. A broad range of government documents is available under these laws, though it often takes agencies weeks or months to produce the materials asked for.

14. Are companies required to report or provide information to the regulators and/or the public in relation to:

- **Environmental performance?**
 - **Incidents (such as water pollution and soil contamination)?**
- **Environmental performance.** Entities that have received air pollution or water permits must periodically report on compliance with the limitations contained in these permits. Many other permits have periodic reporting requirements. However, there are few general requirements for reporting environmental performance beyond permit compliance.
- **Incidents.** Many federal and state laws require spills and other unpermitted discharges into the environment to be promptly reported to the government. The principal recipient of these reports is the National Response Centre, which is operated by the US Coast Guard. The laws and regulations are quite specific in relation to the types and quantities of releases that require reporting. Most of the laws apply only to new spills. The requirement to report the discovery of historic contamination is considerably less strict.

15. Are companies required to carry out environmental auditing?

With rare exceptions, companies are not required to carry out environmental auditing. However, the EPA and many states provide incentives for companies to perform environmental audits, such as reducing penalties and/or mitigating criminal penalties for environmental violations that are discovered, disclosed and corrected as the result of an audit.

16. What powers do environmental regulators have to access a company's documents, inspect sites, interview employees and so on?

Most environmental permits require the permit holders to give access to the permitted facility for inspections and for review of documents, but they do not usually require employee interviews. If a government agency has cause to believe that a violation has occurred at a site that does not have a permit, it can obtain a warrant from a court to allow inspection of sites and documents. Disputes over responsibilities for environmental liabilities are a major subject of litigation in the US.

TRANSACTIONS

17. To what extent is a seller, of assets or shares, required to disclose environmental information to the buyer?

There is no general federal requirement for sellers of assets or shares to disclose environmental information to the buyer. A few states require site investigation, and disclosure of the results to the government, before properties may be sold. It is common in transactions for the seller to provide environmental information to the buyer, and companies providing financing or insurance often require such disclosure.

18. Is it common for environmental due diligence to be undertaken on the acquisition of assets or shares? If yes:

- **What areas are usually covered?**
 - **Are environmental consultants usually engaged? If so, what issues should a company cover in an engagement letter (for example, limit on consultant's liability)?**
- **Areas covered.** It is common for environmental due diligence to be undertaken on major transactions involving companies with industrial operations, and properties whose current or past uses may suggest contamination. The focus of such due diligence is usually whether soil or groundwater contamination may exist. A site assessment standard promulgated by the American Society for Testing and Materials has generally been used for these enquiries, but that is now being replaced by the EPA's new "all appropriate inquiry" standard. In transactions involving industrial properties, it is common to inquire whether the facility has

and is complying with all required environmental permits, but this kind of compliance assessment is less common than investigations focused on site contamination.

- **Environmental consultants.** Site and compliance assessments are typically performed by environmental consultants. The EPA's new "all appropriate inquiry" standard specifies the qualifications of professionals who may undertake site assessments that qualify for certain liability releases. Engagement letters with consultants should specify the scope of work required, and the protocols that must be followed. These letters often require the results to be kept confidential (unless the government requires their release) and for limitations on liability.

19. In what circumstances is a buyer at risk of inheriting pre-acquisition liabilities?

In a share sale, the buyer is fully at risk of inheriting pre-acquisition liabilities. In an asset sale, the buyer is generally liable for soil and groundwater contamination that is still present on the site (see *Question 9*) and, if the buyer is continuing the business of the seller, the buyer may also be liable for pre-acquisition liabilities such as toxic torts. CERCLA allows limited protection from CERCLA liability (but not from liability under RCRA or state laws) (see *Question 9*) for property buyers who have conducted environmental due diligence, acted to prevent human exposure to contamination and met several other requirements.

20. In what circumstances is a seller at risk of retaining liabilities post-acquisition in the context of:

- **An asset sale.**
- **A share sale.**
- **An asset sale.** The sale of contaminated property does not prevent liability for the contamination. The government or injured private parties may still take legal action against the seller (see *Question 9*).
- **A share sale.** Liabilities are usually held by the corporate entity being sold. However, if individual corporate officers or employees were personally involved in the operations that led to the contamination, they may retain personal liability after a share sale (see *Question 9*). The selling parent corporation may retain liability if, in particular, it exerted sufficient control over the entity's environmental operations.

21. In what circumstances could a lender be liable?

Before 1996, several court decisions suggested that a lender may be liable for the environmental contamination of its borrowers. However, Congress amended CERCLA in 1996 to protect lenders from such liability, unless the lenders themselves had some involvement in the contamination.

THE REGULATORY AUTHORITY

US Environmental Protection Agency (EPA)

Head. Stephen Johnson, Administrator

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W www.epa.gov

Main area of responsibility. Implementation of the federal environmental laws concerning air pollution, water pollution, hazardous waste, toxic substances, pesticides, contaminated properties and other areas.

22. What kind of environmental warranties and/or indemnities is a seller usually required to give a buyer in the context of:

- **An asset sale.**
- **A share sale.**
- **An asset sale.** The nature of environmental warranties and/or indemnities is entirely a matter of negotiation between the parties. In some transactions there are very broad and comprehensive warranties and indemnities, in others there are none. In sophisticated business transactions between large companies, the former is more common. Typical warranties are that:
 - the facility has obtained and substantially complies with all necessary environmental permits;
 - there are no pending lawsuits or administrative actions against it; and
 - there are no underground storage tanks.

Indemnities are often granted against penalties and tort liabilities for prior operations.
- **A share sale.** Similarly, there is no standard set of warranties or indemnities in share sales, such matters are negotiated between the parties (see *above*, *An asset sale*).

INSURANCE

23. What types of insurance coverage are available for environmental damage/liability?

An increasing variety of environmental insurance products are available. The most common types provide coverage if clean-up expenses exceed a specified level, and provide protection against tort liabilities.

24. How easy or otherwise is it to obtain environmental insurance and is this usually obtained in practice?

Several providers now offer environmental insurance, and they compete for this business. Most types of coverage are available only if extensive site investigations have been carried out. Environmental insurance is most often purchased by risk-averse buyers. It is still the exception rather than the rule in most transactions.

TAXES

25. Please provide a brief overview of any environmental taxes which apply in your jurisdiction (for example, tax on waste disposal, carbon tax and tax breaks for carrying out clean-up of contaminated land).

Some states impose taxes on the disposal of hazardous waste. Federal and state tax breaks may be available for the clean-up of

contaminated land. Certain specialised operations are the subject of taxes, and others receive financial incentives. For example, the "Superfund" which is used for the clean-up of hazardous waste sites when no responsible parties can be found, has been financed largely through taxes on petroleum and chemical feedstocks. Financial incentives are provided, for example, for certain renewable energy resources, such as ethanol, wind and solar.

REFORM

26. Are there any significant proposals for reform in your jurisdiction in the area of environmental law?

There is considerable debate in the US over whether controls should be imposed on the generation of greenhouse gases. The US has not ratified the Kyoto Protocol, but many officials are calling for US participation in the post-Kyoto regime.

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- Innovative strategies to reduce greenhouse gas emissions
- Contaminated site and brownfields redevelopment, remediation, permitting, and litigation
- Cross-border regulation of chemicals and wastes
- Permitting and regulatory compliance for major facilities

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