



The Legal 500 Country Comparative Guides

United States - Environment

This country-specific Q&A provides an overview of laws and regulations applicable in United States - Environment.

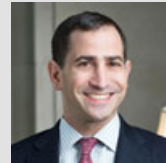
For a full list of jurisdictional Q&As visit [here](#)

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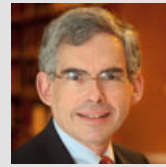
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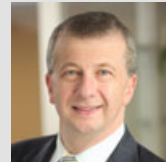
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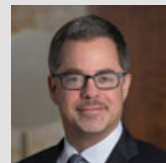
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1. What is the environmental framework and the key pieces of environmental legislation in your jurisdiction?

Congress has enacted statutes that apply nationwide. The most important of these laws are the National Environmental Policy Act; the Clean Air Act; the Clean Water Act; the Resource Conservation and Recovery Act; the Comprehensive Environmental Response, Compensation and Liability Act. Each of the fifty states also has its own environmental laws, and some cities do as well. There is limited pre-emption of state and municipal law by federal law, but generally the states are able to adopt more stringent environmental laws than the federal government.

2. Who are the primary environmental regulatory authorities in your jurisdiction? To what extent do they enforce environmental requirements?

The Environmental Protection Agency (EPA) is the primary environmental regulatory authority. The Department of Justice represents EPA in most court proceedings, including in enforcement actions. The Army Corps of Engineers is the regulatory authority for discharges of certain material into waters of the United States. Every state has at least one environmental regulatory authority; these also enforce environmental laws, typically with the assistance of the state's attorney general.

3. What is the framework for the environmental permitting regime in your jurisdiction?

Permits are required for many kinds of air and water discharges, for the construction of facilities that emit pollution into the air or water or that handle or dispose of wastes. EPA issues many of these permits, but has delegated to some states the permitting authority under certain statutes. The states issue their own permits under their own laws in addition to the federal laws.

4. Can environmental permits be transferred between entities in your jurisdiction? If so, what is the process for transferring?

Yes, environmental permits can be transferred between entities. Depending on the statute involved, this may be accomplished simply by providing notice of the transfer to the relevant agencies, or it may require the approval of those agencies.

5. What rights of appeal are there against regulators with regards to decisions to grant environmental permits?

Most final decisions by agencies may be challenged in court. Decisions by EPA and other federal agencies are challenged in federal court. Most decisions by state agencies are challenged in state courts. EPA and many states have administrative tribunals that hear challenges to certain regulatory decisions.

6. Are environmental impact assessments (EIAs) for certain projects required in your jurisdiction? If so, what are the main elements of EIAs and to what extent can EIAs be challenged?

The National Environmental Policy Act requires environmental impact statements (EISs) for major federal actions that could significantly affect the environment. For actions whose significance is uncertain, shorter documents called environmental assessments are prepared to aid in the decision as to whether a full EIS is needed. EISs include a description of the action under consideration; a description of the current state of the environment that could be affected by the action; analysis of how the action could affect the environment; analysis of alternatives to the action; and description of methods to mitigate any adverse impacts. Many states have their own environmental impact assessment laws. Final agency decisions after environmental impact assessment, whether federal or state, can typically be challenged in court.

7. What is the framework for determining and allocating liability for contamination of soil and groundwater in your jurisdiction, and what are the applicable regulatory regimes?

The principal law is the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), also known as the Superfund law. It imposes a very broad liability regime in which current and past owners and operators of contaminated land may be liable for its cleanup, as well as parties that generated waste that was disposed at what became listed as a contaminated site. Few statutory defences are available. CERCLA also provides for the cleanup of contaminated sites, and has detailed procedures for studies about the nature and extent of contamination, cleanup methods, and decisions by EPA.

8. Under what circumstances is there a positive obligation to investigate land for potential soil and groundwater contamination? Is there a positive obligation to provide any investigative reports to regulatory authorities?

Some states, most prominently New Jersey, require site investigations before certain transactions involving land or its ownership can be consummated. The release of certain quantities of certain hazardous substances must be promptly reported to the authorities under CERCLA and under the Emergency Planning and Community Right to Know Act. If those conditions are not met, the study results ordinarily do not have to be reported to the authorities, but there are certain exceptions, such as during certain enforcement actions.

9. If land is found to be contaminated, or pollutants are discovered to be migrating to neighbouring land, is there a duty to report this contamination to relevant authorities?

See the prior answer.

10. Does the owner of land that is affected by historical contamination have a private right of action against a previous owner of the land when that previous owner caused the contamination?

It might under certain circumstances.

11. What are the key laws and controls governing the regulatory regime for waste in your jurisdiction?

The principal federal law governing solid and hazardous waste is the Resource Conservation and Recovery Act. Most states have their own laws on these subjects.

12. Do producers of waste retain any liabilities in respect of the waste after having transferred it to another person for treatment or disposal off-site (e.g. if the other person goes bankrupt or does not properly handle or dispose of the waste)?

Yes. Under CERCLA, the producers of waste may be liable for their improper handling or disposal, or their disposal at a contaminated site.

13. To what extent do producers of certain products (e.g. packaging/electronic devices) have obligations regarding the take-back of waste?

Some states and cities have laws requiring the take-back of electronic waste and, in a few places, tires and other designated materials.

14. What are the duties of owners/occupiers of premises in relation to asbestos, or other deleterious materials, found on their land and in their buildings?

Some cities require the inspection of properties for asbestos and/or lead, and their remediation before they may be renovated or demolished. Some cities require the remediation of asbestos in residential dwellings. A federal law requires special attention to asbestos in schools.

15. To what extent are product regulations (e.g. REACH, CLP, TSCA and equivalent regimes) applicable in your jurisdiction? Provide a short, high-level summary of the relevant provisions.

The Toxic Substances Control Act requires extensive disclosures to EPA before chemicals can first be manufactured in the United States or imported. Under certain circumstances, EPA may require testing of new and existing chemicals.

16. What provisions are there in your jurisdiction concerning energy efficiency (e.g. energy efficiency auditing requirements) in your jurisdiction?

Energy efficiency audits are generally not required, except that a few cities and states require disclosure of energy efficiency in large buildings.

17. What are the key policies, principles, targets, and laws relating to the reduction of greenhouse gas emissions (e.g. emissions trading schemes) and the increase of the use of renewable energy (such as wind power) in your jurisdiction?

There are no such laws at the federal level. Most states have renewable portfolio standards, which require electric utilities to procure certain percentages of their electricity from renewable sources. Nine states in the northeastern and mid-Atlantic states belong to the Regional Greenhouse Gas Initiative, a trading scheme for carbon dioxide emitted from power plants. California has extensive requirements for reductions of greenhouse gas emissions. Several other states are now developing such requirements.

18. To what extent are environmental, social, and governance (ESG) issues a material consideration in your jurisdiction? Is ESG due diligence for transactions and/or ESG public reporting becoming more common?

Yes, many large companies and financial institutions have ESG policies, engage in ESG due diligence for transactions, and issue public reports about their ESG practices. Such reporting is becoming more common.

19. To what extent can the following persons be held liable for breaches of environmental law and/or pollution caused by a company: (a) the company itself; (b) the shareholders of the company; (c) the directors of the company; (d) a parent company; (e) entities (e.g. banks) that have lent money to the company; and (f) any other entities?

Companies are liable for breaches of environmental law and for their pollution, especially their contributions to land contamination. Shareholders and directors are not liable unless they had a personal role in the operations or decisions that caused the contamination. The corporate veil is rarely pierced to hold parent companies liable, but they may be liable if the corporate formalities were not observed or if the parent company is itself involved in the polluting activities. Banks that have loaned money to polluting companies tend to be liable only if they have foreclosed on the property or have taken some active role in its environmental management. There was one important court decision that suggested that banks could be liable if they merely had the capacity to control a borrower's environmental activities, but that was overturned by Congress.

20. To what extent can: (a) a buyer assume any pre-acquisition environmental liabilities in an asset sale/share sale; and (b) a seller retain any environmental liabilities after an asset sale/share sale in your jurisdiction?

Under CERCLA, the statute with the broadest liability scheme, buyers do assume pre-

acquisition liabilities for contaminated property, though in an asset sale (as opposed to a share sale) they might not be liable for prior violations not involving contaminated property, though there are exceptions to this lack of liability. The sellers tend to retain environmental liabilities after sales. Sellers and buyers often allocate liability between themselves in transactions, but this allocation is not binding on third parties if the party that assumed the liability in the transaction cannot pay.

21. What duties to disclose environmental information does a seller have in a transaction? Is environmental due diligence commonplace in your jurisdiction?

Environmental due diligence is quite common in substantial corporate transactions, and transactions (of whatever size) that involve property with a prior history of industrial or transportation uses, or other uses that create a real risk of contamination. In transactions it is standard for sellers to be required to disclose environmental information. A seller that does not disclose material environmental information to the buyer could be sued for fraud.

22. What environmental risks can be covered by insurance in your jurisdiction, and what types of environmental insurance policy are commonly available? Is environmental insurance regularly obtained in practice?


Environmental insurance is currently widely available. The insurance companies typically perform extensive due diligence before issuing policies. Purchasers with low risk tolerance often purchase environmental insurance. Insurance is not available to cover criminal penalties.

23. To what extent are there public registers of environmental information kept by public authorities in your jurisdiction? If so, what is the process by which parties can access this information?

Companies emitting certain designated chemicals, or storing large quantities of these chemicals, must report their activities to EPA under the Emergency Planning and Community Right to Know Act. These reports are publicly available on EPA's web site. Several commercial services obtain extensive information on permits, reported spills, listed contaminated sites, violations, and other data about sites, and make that information available for a fee. Much of this information is freely available on-line, but typically not as easily searchable as the products of the commercial companies.

24. To what extent is there a requirement on public bodies in your jurisdiction to disclose environmental information to parties that request it?

The federal Freedom of Information Act, and equivalent public records laws in every state, require government entities to disclose environmental information. There are limited



exceptions for certain confidential business information and other categories.

25. Have there been any significant updates in environmental law in your jurisdiction in the past three years? Are there any material proposals for significant updates or reforms in the near future?

After the inauguration of Donald Trump as President of the United States in January 2017, EPA and other federal agencies have been attempting to weaken or soften many environmental regulations, and have reduced environmental enforcement. Most of these deregulatory actions have been challenged in court, and quite a few of them have been struck down, mostly for procedural violations. If a Democrat is elected President in November 2020, he or she would be expected to reverse many of the deregulatory actions of the Trump administration, and to resume issuing new regulations.