



# ICLG

The International Comparative Legal Guide to:

## **Environment & Climate Change Law 2012**

A practical cross-border insight into environment and climate change law

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## General Chapters:

1	<b>Decarbonising Europe's Energy System Will Take Time</b> - Paul Bowden, Freshfields Bruckhaus Deringer LLP	1
2	<b>Environmental Sanctions under Scrutiny</b> - Richard Macrory, University College London	4

## Country Question and Answer Chapters:

3	<b>Albania</b>	Tonucci & Partners: Enkelejda Muçaj & Itena Ndroqi	9
4	<b>Argentina</b>	Rattagan Macchiavello Arocena & Peña Robirosa: Gabriel R. Macchiavello & Guillermo L. Piccione	17
5	<b>Australia</b>	Maddocks: Patrick Ibbotson & Nadia Price	27
6	<b>Austria</b>	Freshfields Bruckhaus Deringer LLP: Stephan Denk	35
7	<b>Bolivia</b>	Guevara & Gutiérrez S.C. Servicios Legales: Jaime Lora & Jorge Inchauste	44
8	<b>Brazil</b>	Juchem Advocacia: Alessandra Lehmen	50
9	<b>Bulgaria</b>	CMS Cameron McKenna: Kostadin Sirleshtov & Raya Maneva	57
10	<b>Canada</b>	Fillmore Riley LLP: Sven Thorsten Hombach	66
11	<b>Chile</b>	Urrutia & Cía. Abogados: José Antonio Urrutia Riesco & Valeria Ruz Hernández	73
12	<b>Costa Rica</b>	Quirós & Asociados, Central Law: Jose Pablo Sánchez	82
13	<b>Cyprus</b>	Harris Kyriakides LLC: Michalis Kyriakides & Penelope-Alexia Giosa	87
14	<b>Denmark</b>	Horten: Henriette Soja	94
15	<b>England</b>	Freshfields Bruckhaus Deringer LLP: Daniel Lawrence & Jonathan Isted	101
16	<b>Finland</b>	Hammarström Puhakka Partners, Attorneys Ltd: Kari Marttinen & Mikko Erkkilä	117
17	<b>France</b>	Freshfields Bruckhaus Deringer LLP: Pascal Cuhe & Juliette Deslandres	124
18	<b>Germany</b>	Freshfields Bruckhaus Deringer LLP: Wolf Friedrich Spieth & Michael Ramb	134
19	<b>India</b>	M.V. Kini & Co.: Els Reynaers Kini	146
20	<b>Ireland</b>	McCann FitzGerald: Elva Carbery & Stephen Proctor	157
21	<b>Israel</b>	Yigal Arnon & Co.: Doron Tamir & Oren Roth	164
22	<b>Italy</b>	Freshfields Bruckhaus Deringer LLP: Marcello Clarich & Giuseppe Urbano	174
23	<b>Luxembourg</b>	KLEYR GRASSO ASSOCIES: François Collot & Anne Mertens	183
24	<b>Macedonia</b>	Debarliev, Dameski & Kelesoska Attorneys at Law: Elena Miceva & Dragan Dameski	190
25	<b>Malta</b>	Ganado & Associates, Advocates: Jotham Scerri-Diacono & Annalise Caruana	195
26	<b>Mexico</b>	Barrera, Siqueiros y Torres Landa: Juan Francisco Torres Landa R. & Mario Jorge Yáñez V.	207
27	<b>Namibia</b>	Koep & Partners: Peter Frank Koep & Hugo Meyer van den Berg	214
28	<b>Netherlands</b>	DLA Piper: Bart Koolhaas & Petra de Rooy	219
29	<b>Nigeria</b>	Bloomfield: Mojisola Agunbiade	225
30	<b>Philippines</b>	Romulo Mabanta Buenaventura Sayoc & de los Angeles: Benjamin Z. Lerma & Timothy John R. Batan	232
31	<b>Portugal</b>	Uría Menéndez - Proença de Carvalho: João Louro e Costa & João Diogo Stoffel	239
32	<b>Romania</b>	CMS Cameron McKenna: Roxana Fratila & Adriana Akyol	246
33	<b>South Africa</b>	Bowman Gilfillan: Claire Tucker & Athi Jara	257
34	<b>Spain</b>	Freshfields Bruckhaus Deringer LLP: Vicente Sierra & Mónica Nieberding	264
35	<b>Switzerland</b>	Schellenberg Wittmer: Yves Jeanrenaud & Josef Caleff	274
36	<b>USA</b>	Arnold & Porter LLP: Michael B. Gerrard	281

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# USA

Arnold & Porter LLP

Michael B. Gerrard



## 1 Environmental Policy and its Enforcement

### 1.1 What is the basis of environmental policy in the USA and which agencies/bodies administer and enforce environmental law?

The U.S. Environmental Protection Agency (EPA) is the most important environmental regulatory agency. The U.S. 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 U.S. 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 also have their own environmental rules. Determining the laws applicable to a given facility therefore requires an investigation of federal, state and municipal laws.

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

### 1.2 What approach do such agencies/bodies take to the enforcement of environmental law?

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.

### 1.3 To what extent are public authorities required to provide environment-related information to interested persons (including members of the public)?

The EPA maintains the National Priorities List (NPL) pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, also known as the Superfund law). The NPL lists the most environmentally contaminated sites in the U.S. 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. Beginning in 2012, EPA began making publicly available the information first gathered in 2010 under the Greenhouse Gas Reporting Rule. 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 requested.

## 2 Environmental Permits

### 2.1 When is an environmental permit required, and may environmental permits be transferred from one person to another?

Permits are required for air emissions; water effluent; hazardous waste storage, transport, treatment and disposal; and many other activities. Many states and municipalities have their own separate permitting requirements, although some of them are integrated with the federal requirements. Usually permits can easily be transferred with the filing of a notice, but greater complications arise for those permits that involve financial assurances or (as is often the case with solid waste permits) a review of the permit holder's compliance record.

### 2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

Decisions by environmental regulators to reject or excessively condition an environmental permit can typically be appealed administratively within the agency or, in some instances, to a separate administrative tribunal. Upon the exhaustion of administrative remedies, judicial review is typically available.

### 2.3 Is it necessary to conduct environmental audits or environmental impact assessments for particularly polluting industries or other installations/projects?

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. Environmental audits are seldom required by statute or regulation.

The National Environmental Policy Act (NEPA) requires environmental impact assessments 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 requirements. Under the judge-made doctrine of “functional equivalence”, most decisions of the EPA are exempt from NEPA; thus, if the only federal approval needed by a project is an EPA permit, it may avoid NEPA review.

Minor projects may be classified as “categorically exempt”, meaning that they do not require processing under the 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 the process, such as highways, dams, government buildings, airports, and military installations, as well as private projects that require certain federal approvals or that are building 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 states have adopted “little NEPAs” - laws that are similar to NEPA and require environmental assessment of projects that require state or, in some states, 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 a little NEPA, it can be suspended by the courts until compliance is achieved. Otherwise, there are rarely penalties for non-compliance.

## 2.4 What enforcement powers do environmental regulators have in connection with the violation of permits?

Non-compliance with federal air and water permits can result in penalties up to U.S. \$27,500 per day of violation (though the full penalties are rarely imposed). For certain violations, criminal penalties can also be imposed. States have their own enforcement provisions. In general, federal and state environmental regulators have extensive powers to impose heavy penalties and to direct cessation of violations.

## 3 Waste

### 3.1 How is waste defined and do certain categories of waste involve additional duties or controls?

U.S. law contains numerous definitions of waste. The legal obligations vary considerably depending on the type of waste involved. The most important categories are solid waste and

hazardous waste; the latter is a subset of the former. Hazardous waste is much more heavily regulated than solid waste.

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.

Under RCRA, other federal laws (such as those governing the use of wetlands), state laws and 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.

### 3.2 To what extent is a producer of waste allowed to store and/or dispose of it on the site where it was produced?

Under RCRA, a producer of waste is allowed to store and/or dispose of waste at the site where it is generated, only if the producer first obtains a permit for these activities. RCRA does allow producers a short period of time (usually 90 days) to accumulate waste where it is generated without seeking such a permit.

### 3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (e.g. if the transferee/ultimate disposer goes bankrupt/disappears)?

Yes. CERCLA employs an extremely broad liability scheme. Producers of hazardous substances, along with other parties who may have transported or accepted them, retain liability with respect to it. Liability is retrospective, strict, and joint and several. Parties may be liable even if they played no direct 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 be left with their share of the liability.

### 3.4 To what extent do waste producers have obligations regarding the take-back and recovery of their waste?

There are no federal take-back requirements. However, EPA does encourage voluntary electronic waste recycling. In addition, several states and large cities have recently passed laws requiring that retail establishments that sell certain types of electronic equipment take them back for recycling.

## 4 Liabilities

### 4.1 What types of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are typically available?

Most environmental statutes have high daily penalties if a violation is proven and also allow for injunctive relief. Criminal penalties can also be imposed in certain instances for knowing violations. Non-compliance with permits can also result in high daily penalties, and criminal penalties can also be imposed for knowing permit violations.

If a facility is alleged to be in violation of a law or permit, the facility will often attempt to establish that no technical violation

occurred, or that the subject regulation is inapplicable or ambiguous. If these efforts fail, typically there are few legal defences available apart from the statute of limitations. However, agencies normally have a great deal of discretion with respect to penalties even in the face of a clear violation and typically will negotiate a penalty less than the maximum amount. The courts may also recognise extenuating circumstances when setting penalties or considering challenges to administratively-imposed penalties.

#### **4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?**

Typically, a facility that is operating a polluting activity within the limits set forth in an agency-issued permit is not liable to the government for any environmental damage resulting from that activity. Two important exceptions are that, under CERCLA and some of its state equivalents, an operator may be liable for contamination that was lawfully deposited at the site, and a party may be liable for natural resource damages that result from releases that have state but not federal permits. Moreover, the facility could still be subject to tort liability from individuals who pursue personal injury or property damage claims resulting from that activity.

#### **4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?**

In certain instances where a director or officer of a corporation personally directed activities involving environmental wrongdoing, they may be held personally liable. Directors' and officers' insurance can be obtained to protect such individuals, but these policies typically have exclusions for criminal, intentional or grossly dangerous behaviour.

#### **4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?**

In a share sale, a buyer is at full 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 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) for property buyers who have conducted environmental due diligence, acted to prevent human exposure to contamination and met several other requirements.

#### **4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?**

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.

## **5 Contaminated Land**

### **5.1 What is the approach to liability for contamination (including historic contamination) of soil or groundwater?**

CERCLA 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. 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.

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.

### **5.2 How is liability allocated where more than one person is responsible for the contamination?**

Liability is retrospective, strict, joint and several. Parties may be liable even if they played no direct 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. For multi-party sites, liability is typically apportioned based on each party's contribution of waste to the site as measured by weight or volume, but sometimes relative toxicity and other factors are also considered.

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 provide for damages for personal injury or property damage, but such damages may be recoverable at common law.

### **5.3 If a programme of environmental remediation is 'agreed' with an environmental regulator can the regulator come back and require additional works or can a third party challenge the agreement?**

Typically, CERCLA consent agreements allow for the government to require additional remediation work in the event of subsequently discovered conditions that were unknown at the time the agreement was entered into or subsequent findings that a remedy is not adequately protective of health or the environment.

Third parties can challenge most kinds of consent agreements, but there is a heavy presumption that the agreement is sound and courts will rarely reject them.

**5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination; and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?**

A previous owner or occupier of land who caused the contamination is considered a liable party under CERCLA (see question 5.1). As a result of a U.S. Supreme Court decision in 2007, a party who itself is liable for cleaning up the contaminated land can instigate a contribution action against a previous owner or occupier even if it itself has not been sued by the government. Previously, a contribution action was only available to a party after it had been sued by the government.

The principal way for a polluter to transfer this risk of liability to a purchaser would be to expressly state in the purchase and sale agreement that the purchaser understood that the land may be contaminated and was assuming all liabilities with respect to it. However, this would not necessarily insulate the polluter from CERCLA liability if the government commenced an action with respect to the land and sought recovery from the polluter. In general, these risk transfer arrangements are not binding on third parties, though under CERCLA “contribution protection” is available in some circumstances.

**5.5 Does the government have authority to obtain from a polluter, monetary damages for aesthetic harms to public assets, e.g., rivers?**

CERCLA allows for the recovery of “Natural Resource Damages” (NRD) from a polluter. These damages include harm to soil, groundwater, fish and wildlife. Damages are measured by assessing the site once it has been completely remediated. Purely aesthetic damage is typically not covered.

## 6 Powers of Regulators

**6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc.?**

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 usually obtain access, though it might need to obtain a warrant from a court to allow inspection of sites and documents.

## 7 Reporting / Disclosure Obligations

**7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?**

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 U.S. 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 only apply to new spills. The requirement to report the discovery of historic contamination is considerably less strict. The requirements typically require disclosure to regulators but not to potentially affected third parties, though failure to disclose to third parties may expose the entity to tort liability if injury occurs.

**7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?**

No general requirement exists to investigate land for contamination. In the context of buying and selling real estate, several states require site investigation and disclosure of the results to the government. In such transactions, it is common for the seller to provide this information to the buyer as part of the due diligence process, and if the seller fails to disclose known contamination to a purchaser, it may be liable for fraud.

**7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?**

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.

## 8 General

**8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier's potential liability for that matter?**

An indemnification will not extinguish a party's liability with respect to an environmental liability such as remediation, but it is enforceable against the party with whom it is entered into. Such an indemnification can limit a party's exposure assuming the indemnifying party fulfills its obligations under the agreement. Indemnities are typically not binding on third parties.

**8.2 Is it possible to shelter environmental liabilities off balance sheet, and can a company be dissolved in order to escape environmental liabilities?**

Some companies set up separate entities to hold contaminated properties. Under some circumstances this may keep the liabilities off the balance sheet. However, if the separate entity is dissolved, there are often mechanisms by which liability returns to the company that originally held it.



### 8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?

Typically, shareholders of a company are not held liable for breaches of environmental law or pollution caused by the company merely by their status as shareholders. However, shareholders maybe found liable with respect to their own actions relating to such a breach or pollution. Parent companies can be held liable for actions of their subsidiaries under traditional corporate law principles, which allow for the piercing of the corporate veil in certain instances.

### 8.4 Are there any laws to protect “whistle-blowers” who report environmental violations/matters?

There are federal and state “whistle-blower protection” laws that shield individuals who report environmental violations from discrimination and retaliation as a result of their actions.

### 8.5 Are group or “class” actions available for pursuing environmental claims, and are penal or exemplary damages available?

Some federal and state statutes allow for “citizen suits” if the government is not diligently prosecuting an environmental violation. Parties who meet certain requirements can bring class actions and seek damages. Some statutes allow for additional penalties under certain circumstances. The availability of punitive damages is currently the subject of considerable litigation.

## 9 Emissions Trading and Climate Change

### 9.1 What emissions trading schemes are in operation in the USA and how is the emissions trading market developing there?

Emissions trading is currently not a central feature of environmental regulation in the U.S. However, 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. Some states and regions have developed their own trading programmes.

In January 2009, a cap-and-trade system for carbon dioxide from power plants was instituted under the Regional Greenhouse Gas Initiative, which encompasses nine northeastern and mid-Atlantic states. The State of California has adopted a cap-and-trade programme for greenhouse gases to be effective in January 2012, and some other western states may adopt similar programmes and allow linkage to California’s programme. Federal legislation to establish a cap-and-trade programme for greenhouse gas emissions was considered by Congress, and a bill was passed by the House of Representatives in 2009, but it failed to advance in the Senate.

### 9.2 What is the overall policy approach to climate change regulation in the USA?

At the federal level, the EPA is exercising its authority under the Clean Air Act to regulate greenhouse gas emissions. Following a

2007 decision by the Supreme Court which determined that EPA could regulate greenhouse gases under this statute, the agency has begun regulating stationary and mobile sources. It has enacted regulations requiring certain stationary sources to report their emissions beginning in 2011, as well as to obtain certain permits. The agency has also regulated mobile sources through rules concerning fuel economy standards for new cars and trucks. All of these rules are being vigorously challenged in court by industry groups, and several bills are pending in Congress to strip the EPA of its authority to regulate greenhouse gas emissions or to defund its activities in this regard.

At the regional level, several groups of states have formed cap-and-trade systems, including the Regional Greenhouse Gas Initiative mentioned above, which was formed by nine northeastern and mid-Atlantic states and which regulates carbon dioxide emissions from power plants. Similar schemes in California and other western states are now under development.

## 10 Asbestos

### 10.1 Is the USA likely to follow the experience of the US in terms of asbestos litigation?

This is not applicable in the USA.

### 10.2 What are the duties of owners/occupiers of premises in relation to asbestos on site?

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 asbestos require 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.

## 11 Environmental Insurance Liabilities

### 11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in the USA?

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.

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 adverse buyers. It is still the exception rather than the rule in most transactions.

## 11.2 What is the environmental insurance claims experience in the USA?

Most insurance policies have “pollution exclusion” clauses, which preclude coverage for certain types of environmental contamination. There is a large volume of litigation in the U.S. concerning insurance coverage for environmental contamination.

## 12 Updates

### 12.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Environment Law in the USA.

The inauguration of Barack Obama as President of the United States in January 2009 led to a fundamental shift in the environmental policies of the federal government. President Obama is a much greater proponent of vigorous environmental regulation than his predecessor, George W. Bush. The EPA has been reversing many of the policy choices made by the agency under President Bush, including those relating to the regulation of greenhouse gas emissions. However, since taking office, and particularly after the 2010 elections which led to a Republican majority in the House of Representatives, President Obama has been unable to advance his environmental agenda through Congress. In 2009, the House of Representatives passed a bill that would establish a cap-and-trade system for greenhouse gas emissions, but this bill did not pass the Senate. Since the 2010 elections, Republican legislators have been seeking to roll back

many initiatives launched by the EPA following President Obama's election. Likewise, several new Republican governors are seeking to roll back their states' environmental regulations. The November 2012 election will determine who will occupy the House, the Senate and the White House for the following two years. Meanwhile, the United States continues to see a very large volume of environmental litigation, and many states and cities are adopting and implementing their own environmental policies.



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