

# Environment & Climate Regulation

*Contributing editors*

Carlos de Miguel Perales, Uría Menéndez

Per Hemmer, Bech-Bruun



2019

GETTING THE  
DEAL THROUGH 

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# Environment & Climate Regulation 2019

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# Preface

## Environment & Climate Regulation 2019

Fourth edition

**Getting the Deal Through** is delighted to publish the fourth edition of *Environment & Climate Regulation*, which is available in print, as an e-book, and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on China, Korea and a new Climate article from the Dominican Republic.

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Carlos de Miguel Perales of Uría Menéndez and Per Hemmer of Bech-Bruun, the contributing editors, for their continued assistance with this volume.

GETTING THE  
DEAL THROUGH 

London  
October 2018

# United States

Toby Chun, Ali Zaidi and Ty'Meka Reeves-Sobers

Kirkland & Ellis LLP

## Legislation

### 1 Main environmental regulations

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

In the United States, federal, state and local governments share responsibility for environmental regulation. Often, the federal government sets the baseline for what is permissible. Together, these governments implement a set of statutes and regulations that present both civil and criminal penalties for violations.

At a high level, several core federal statutes provide the Environmental Protection Agency (EPA) with the authority to regulate pollution of air and water, namely the Clean Air Act (CAA), the Clean Water Act (CWA) and the Safe Drinking Water Act. In addition, the EPA regulates chemicals, pesticides and wastes under the Toxic Substances Control Act (TSCA), the Federal Insecticide, Fungicide and Rodenticide Act and the Resource Conservation and Recovery Act (RCRA), respectively. As discussed below, the EPA's regulations and policies under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) are particularly salient for environmental transactions.

Several statutes and regulations also inform the way the federal government manages natural resources and protects wildlife. Leasing offshore is governed by the Outer Continental Shelf Lands Act (OCSLA) and onshore is governed, principally, by the Minerals Leasing Act and the Surface Mining Control and Reclamation Act. The National Forest Management Act, National Historic Preservation Act, the Antiquities Act and the Wilderness Act provide guidance on the federal regulation of environmentally sensitive places. Finally, animals and other wildlife are protected under the Endangered Species Act (ESA), the Marine Mammal Protection Act (MMPA) and the Magnuson-Stevens Fishery Conservation and Management Act (MSA).

Other statutes and regulations govern issues like disclosure, such as the Emergency Planning and Community Right-to-Know Act (EPCRA), or transport, such as the Hazardous Materials Transportation Act, of hazardous substances. There are also statutes governing worker safety, consumer product safety, and investor protection that include environmental implications. More broadly, all significant federal decisions are governed by the National Environmental Policy Act (NEPA), which prescribes a process by which federal agencies must consider the environmental impacts of their decisions. This process is discussed in greater detail in response to questions 18 and 19.

### 2 Integrated pollution prevention and control

#### Is there a system of integrated control of pollution?

No, there is no integrated pollution prevention and control system.

### 3 Soil pollution

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

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) imposes strict, joint and several liability on the current owners and operators of contaminated properties, as well as the former owners and operators of such properties when the

contamination occurred. Under CERCLA, the EPA has provided Soil Screening Guidance (SSG) to assist in the evaluation of soil pollution issues. In addition, the EPA provides a rigorous, multi-step site analysis process under its Superfund programme to ensure adequate remediation.

### 4 Regulation of waste

#### What types of waste are regulated and how?

The primary regulation of waste is undertaken by the EPA under the RCRA. The RCRA, and its implementing regulations, focus on cradle-to-grave management of both hazardous and non-hazardous solid waste. Under the statute, solid waste includes garbage, refuse, sludge and other discarded materials, including solid, semisolid, liquid or contained gaseous materials. Subtitle C outlines the requirements for hazardous waste across the supply chain from generation of the waste to handling and shipping, and, ultimately, for disposal. (Additional discussion on regulation of hazardous materials, including waste, under RCRA is provided in question 13.) Subtitle D outlines the requirements for non-hazardous waste, which are largely enforced by states with oversight from the EPA. These requirements include bans on open dumping and provide baseline standards for the operation of facilities such as landfills.

### 5 Regulation of air emissions

#### What are the main features of the rules governing air emissions?

The EPA is the primary federal regulator of air emissions, following its mandate from the Clean Air Act (CAA). CAA regulations cover both mobile and stationary sources. In addition, the EPA attempts to manage air quality more generally through national ambient air quality standards (NAAQS), which currently regulate sulphur dioxide, carbon monoxide, particles, nitrogen dioxide, ozone and lead. Working with states through state-specific implementation plans, the EPA sets regional requirements for areas that are either in attainment or non-attainment of NAAQS. Under its New Source Review (NSR) programmes, the EPA regulates specific stationary sources that emit any air pollutant with either Prevention of Significant Deterioration Permits, Nonattainment New Source Review Permits, or Minor NSR. The specific approach taken is fact-specific and depends on the type of source, associated emissions and location of the source.

Finally, the EPA sets standards for specific sources, such as its carbon emissions standards for power plants and vehicles. For power plants, an earlier direction was set by the EPA's Clean Power Plan, which required each state to achieve a certain level of greenhouse gas emissions reductions from its power sector. The Clean Power Plan was challenged in the courts and stayed; during this time, the new presidential Administration commenced a process aiming to repeal and replace the Clean Power Plan. In August 2018, the EPA issued its proposed replacement plan, titled the Affordable Clean Energy plan. Under this proposed rule, states must develop their own plans to reduce greenhouse gas emissions from the power sector. However, in developing these plans, states are to focus exclusively on the reductions possible through heat rate improvements to coal-fired power plants. The Affordable Clean Energy plan is currently a proposal; the EPA still has to finalise the plan before it may be implemented by the states.

For cars and trucks, a regulatory programme jointly administered by the EPA and the US Department of Transportation (DOT) governs greenhouse gas emissions, along with fuel economy. Together, the EPA and the DOT set standards for several model years at a time. The standards for model years 2022–2025 are currently under review.

## 6 Protection of fresh water and seawater

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

The CWA, which is administered by the EPA and the US Army Corps of Engineers, provides the primary framework for regulation of jurisdictional waters, which includes navigable waters and wetlands. The CWA imposes permitting requirements for various activities, including discharges and dredging. The CWA applies to both public and private entities and is, in part, enforced in collaboration with state environmental agencies.

## 7 Protection of natural spaces and landscapes

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

The National Forest Management Act, the National Historic Preservation Act, the Antiquities Act and the Wilderness Act provide the primary bases for protecting natural spaces and landscapes, which in the United States may be designated as national forests, parks, monuments and wilderness areas. Each designation is paired with different obligations for the government in managing those lands, and different limitations on private parties regarding appropriate uses. In addition to these protected spaces, federal lands managed by the Department of the Interior are also governed in a generally protective manner. Private parties must be aware of site-specific rules and relevant permitting requirements where parties undertake commercial operations at, crossing or near these lands.

## 8 Protection of flora and fauna species

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

The primary statutes protecting animals and other wildlife are the ESA, the MMPA and the MSA. The ESA is the broadest of these statutes and provides a robust mechanism for listing species as either threatened or endangered. Listing decisions are followed by specific precautions to ensure species recovery, including protection of critical habitat and permitting of operations that may 'take' species.

## 9 Noise, odours and vibrations

### What are the main features of the rules governing noise, odours and vibrations?

Along with the EPA, the FAA and the Occupational Safety and Health Administration (OSHA) provide certain noise-related regulations specific to sources. As a general matter, however, many of these issues are regulated under state and local laws.

## 10 Liability for damage to the environment

### Is there a general regime on liability for environmental damage?

No, the United States does not have a general regime on liability for environmental damage. Rather, liability is imposed, principally, through enforcement of media-specific environmental laws and regulations or through CERCLA, which is discussed in greater detail in response to questions 3 and 28.

## 11 Environmental taxes

### Is there any type of environmental tax?

The federal government imposes environmental taxes on petroleum (ie, the Oil Spill Liability Tax), ozone-depleting chemicals (ODCs) and other products or stocks associated with ODCs. In addition to these specifically environmental taxes, the federal government imposes taxes on various fuels, which share a nexus with the environment given

externalities. The federal government also provides a range of tax benefits for deploying a range of technologies with environmental benefits (eg, tax credits for renewable energy installations and electric vehicles).

## Hazardous activities and substances

### 12 Regulation of hazardous activities

#### Are there specific rules governing hazardous activities?

The RCRA governs the management of hazardous materials and waste. Pursuant to its authority under RCRA, the EPA established comprehensive regulatory programmes to ensure the proper management of hazardous materials and waste. These programmes include standards for hazardous waste management (under subtitle C) and underground storage tanks (USTs) that store petroleum and certain hazardous substances (under subtitle I). To determine whether waste is a regulated hazardous waste, the regulations rely on a hazardous waste identification process. The regulatory framework for hazardous waste management includes a permitting programme for hazardous waste generators, hazardous waste transporters and hazardous waste storage and treatment. Permits are issued by authorised states or the EPA regional offices. An RCRA permit establishes the waste management activities that a facility is permitted to conduct and the conditions under which such activities may be conducted. Permits typically require facilities to develop emergency plans and train employees to handle hazards. Some permits may also include groundwater monitoring requirements.

Hazardous waste generators regulated under RCRA must comply with recordkeeping, reporting, labelling, exporting and containing requirements. Generators are also responsible for tracking waste through a manifest system. Transporters of RCRA-regulated waste are subject to labelling requirements, container standards and recordkeeping requirements. They are also subject to DOT regulations. Owners and operators of treatment, storage and disposal facilities are subject to recordkeeping and reporting requirements, permitting and technical standards. To the extent that certain hazardous wastes are stored in USTs, owners of such tanks are also subject to technical and financial assurance requirements under subtitle I.

### 13 Regulation of hazardous products and substances

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

The Toxic Substances Control Act (TSCA) addresses the production, importation, use and disposal of specific chemicals. TSCA requires pre-manufacture notice for new chemical substances, the issuance of Significant New Use Rules by the EPA when the agency determines a use of a chemical substance is a 'significant new use' that could result in exposures to, or releases of, a substance of concern; the maintenance of an inventory of chemicals (currently, approximately 83,000 chemicals); importers and exporters of chemicals to comply with certain requirements, including certification requirements; recordkeeping and reporting by manufacturers, processors and distributors of chemical substances in commerce; and immediate notification to the EPA of information leading to a reasonable conclusion that a substance or mixture of substances presents a substantial risk of injury to health or the environment.

State-level laws are also significant in the governance of hazardous products and substances. The most notable among these is California's Safe Drinking Water and Toxic Enforcement Act of 1986, more commonly known as Proposition 65, which requires the State of California to maintain a list of chemicals known to cause cancer or birth defects and requires businesses to warn Californians about potential exposures to such chemicals (eg, in products) and often outpaces in the federal TSCA programme in regulating hazardous products and substances.

### 14 Industrial accidents

#### What are the regulatory requirements regarding the prevention of industrial accidents?

Under the OSHA and regulations implemented by the Occupational Safety and Health Administration, employers have a responsibility to provide a safe workplace. Specifically, employers must provide a workplace free from serious recognised hazards and comply with applicable OSHA regulations; ensure employees have and use safe tools and

equipment and that such equipment is properly maintained; establish operating procedures that set health and safety requirements and ensure that they are kept up to date and adequately communicated to employees; provide safety training; develop and implement written hazard communication programmes in the event hazardous chemicals are present in the workplace and train employees on proper precautions; report all work-related injuries and fatalities in a timely manner; and keep records of work-related injuries and illnesses. The purpose of these requirements is to prevent accidents and work-related injuries. Additionally, while not required, employers are encouraged to adopt an injury and prevention programme with the goal of substantially reducing the number and severity of workplace injuries and alleviating associated financial burdens. While not required by OSHA, some states have requirements to implement such prevention programmes.

The EPCRA was enacted to reduce the likelihood of disasters resulting from the storage and handling of toxic chemicals. EPCRA requires facilities to report the storage, use, and release of hazardous substances to federal, state and local governments. The goal of these Community Right-to-Know requirements is to increase the public's knowledge and access to information on chemicals at facilities, their uses and releases into the environment. EPCRA also requires state and local governments and native American tribes to use reported information for emergency planning to prepare communities from potential risks. This includes the preparation of chemical emergency response plans.

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### Environmental aspects in transactions and public procurement

#### 15 Environmental aspects in M&A transactions

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

When evaluating the environmental risk profile of the target company or business in M&A transactions, the main aspects to consider include contamination at current and former facilities (for which liability is strict, joint and several for current owners and operators regardless of when the contamination occurred, and for any former owner or operators at the time the contamination occurred), liabilities arising from releases at off-site waste disposal facilities, failures of the company's operation or products to comply with current or pending environmental laws or regulations (and the capital expenditures required to achieve compliance), toxic torts and other environmental, health and safety claims and complaints, and existing or potential solutions to mitigate environmental risk (eg, insurance, contractual indemnities, accounting reserves and financial assurance mechanisms).

It is also important to consider the nature of the parties to the transaction (eg, a strategic buyer may be more risk-averse, and more likely to request subsurface investigations, than a financial buyer), whether the target is a public company (in which case the reps in the purchase agreement are likely to be MAE-qualified with no survival, placing greater pressure on a buyer's environmental diligence), whether the buyer is acquiring shares or assets (eg, if title to real property is being transferred, certain federal and state environmental liability protections are available to bona fide purchasers who satisfy certain environmental diligence requirements – these protections are generally not available in stock deals), and what other parties are involved in the transaction (eg, lenders, insurance carriers) and what their environmental diligence requirements may be (which could affect the way a buyer scopes its environmental diligence).

If an environmental consultant is being retained to perform diligence, consideration should be given to the consultant's reputation (eg, are they nationally recognised, or at least known and trusted by the relevant parties?), as well as to the quality of its analysis and presentation of issues – consultants help facilitate transactions when they provide thorough analysis and present balanced findings that neither exaggerate nor undersell the risk.

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#### 16 Environmental aspects in other transactions

##### What are the main environmental aspects to consider in other transactions?

Generally, the environmental considerations that are important in M&A transactions are also important in other transactions. If a buyer has adequately diligenced and mitigated the environmental risks and

liabilities associated with a target, this typically will satisfy a lender (although lenders may have heightened requirements for mortgaged properties). Issuers of securities conservatively disclose these same environmental risks, and are required by securities laws to disclose material environmental liabilities, in public offering documents. Sale-leasebacks and other real estate transactions may have more stringent requirements for subsurface investigation or remediation or for insuring against environmental risks. While certain environmental liabilities and obligations may be discharged in bankruptcy, purchasers of assets out of bankruptcy will still be liable for contamination at any acquired real properties, and will still want to understand the environmental risk profile associated with the assets or business it is acquiring to gauge the risk of (and any protections against) future environmental claims.

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#### 17 Environmental aspects in public procurement

##### Is environmental protection taken into consideration by public procurement regulations?

The EPA's Environmentally Preferable Purchasing (EPP) Program helps develop standards for identifying environmentally preferable products and services (ie, products and services that have a lesser or reduced effect on human health or the environment). The Green Procurement Compilation then helps federal contractors identify products and services that meet federal green purchasing requirements. Certain state and local governments have EPP or similar programmes.

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### Environmental assessment

#### 18 Activities subject to environmental assessment

##### Which types of activities are subject to environmental assessment?

Under the NEPA, federal agencies must undertake an environmental review when they propose to take a major federal action (ie, an action that requires federal funding, permits, policy decisions, facilities, equipment or employees), including non-federal projects when the project cannot begin or continue without prior approval of a federal agency.

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#### 19 Environmental assessment process

##### What are the main steps of the environmental assessment process?

To comply with the NEPA, a federal agency must prepare a categorical exclusion determination or an environmental assessment (EA) and either a finding of no significant impact (FONSI) or an environmental impact statement (EIS).

Under NEPA, a federal action may be categorically excluded from a more detailed environmental analysis if the action does not individually or cumulatively have a significant effect on the human or natural environment. These exclusions are described in NEPA implementing procedures adopted by each federal agency.

If a categorical exclusion does not apply, the federal agency must prepare an EA to determine whether the federal action has the potential to cause significant environmental effects. Each federal agency has its own procedures for preparing EAs, but EAs generally discuss the need for the proposed action, any alternatives, the environmental impacts of the proposed action and the alternatives, and a list of the agencies and persons consulted. If the EA determines that the proposed action will have no significant environmental impacts, the agency issues a FONSI that lays out its reasoning; if the EA determines that the proposed action will have significant environmental impacts, an EIS must be prepared.

If an EIS is required, the agency publishes a Notice of Intent in the Federal Register to inform the public of the upcoming environmental analysis and how the public can get involved. A draft EIS is then published for public review and comment for a period of no less than 45 days, after which the agency considers all substantive comments conducts any necessary further analysis, and publishes a final EIS that responds to all substantive comments. The agency must then wait at least 30 days before issuing a Record of Decision explaining its decision, describing the alternatives considered, and discussing any plans for mitigation or monitoring.

## Regulatory authorities

### 20 Regulatory authorities

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

The EPA has jurisdiction over many of the national air, water, waste and hazardous substance programmes that have been established pursuant to federal laws such as the CWA, CAA, CERCLA and RCRA. The EPA has primary enforcement and permitting authority under such programmes, but some of this authority is delegated to (or shared with) state environmental agencies.

The Fish and Wildlife Service, along with the Department of Commerce, have primary authority to administer, implement and enforce the ESA.

The Department of Energy has primary responsibility for nuclear waste.

The US Army Corps of Engineers has authority under the CWA to issue permits in areas containing wetlands, even though applications for such permits are reviewed by the EPA.

The Forest Service manages and protects national forests and grasslands and shares authority with the Department of the Interior to implement laws addressing environmental review, wildlife and cultural and historic resources.

The Bureau of Land Management has primary responsibility for the management of Federal lands and resources, including many national conservation lands.

The Bureau of Safety and Environmental Enforcement is the lead federal agency charged with improving safety and ensuring environmental protection related to the offshore energy industry on the US outer continental shelf.

### 21 Investigation

#### What are the typical steps in an investigation?

Most environmental regulatory investigations begin with the discovery of a potential violation or non-compliance issue through a systematic investigation conducted by the regulated entity (followed by self-disclosure to the appropriate agency) or an inspection or inquiry from the agency. From there, the agency takes appropriate steps to remedy the issue. Depending on the significance of the violation or non-compliance, the agency may merely issue a notice of violation and require the regulated entity to remedy the issue and submit documentation confirming resolution of the issue within a reasonable amount of time. For more egregious violations, a civil or criminal enforcement action may be triggered.

### 22 Administrative decisions

#### What is the procedure for making administrative decisions?

Federal and most state laws establish open meeting requirements for administrative agencies, requiring public notice of, access to and participation in agency meeting, hearings and proceedings. Procedural aspects of administrative decision-making vary depending on whether the agency is a federal or state agency and the type of issue before the agency (eg, permitting or enforcement). Some administrative proceedings and hearings are formal and resemble courtroom practices and procedures, with administrative law judges presiding over the case and parties engaging in discovery, presenting evidence and arguing the facts and merit of the case. In other cases, parties may submit evidence and briefs summarising each party's case and advocating for a desired outcome, and the administrative law judge makes a decision on the case based solely on these written submissions without a formal hearing.

### 23 Sanctions and remedies

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

Most environmental statutes contain both civil and criminal provisions to address violations. Civil enforcement results include settlements, civil penalties, injunctive relief and supplemental environmental projects (SEPs). Settlements are agreed-upon resolutions to an enforcement case, often in the form of consent agreements or administrative orders on consent (for administrative actions) or consent decrees (for

## Update and trends

Pollution Legal Liability (PLL) insurance has traditionally been the primary insurance for environmental risks. Typically, PLL insurance will cover cleanup costs, third-party bodily injury, property damage, natural resource damages and business interruption. PLL insurance covers unknown conditions and typically will exclude known pollution conditions (which the policyholder will want to define as precisely and narrowly as possible). Sometimes, limited coverage can be obtained for known conditions, such as for third-party bodily injury or property damage relating to known contamination. However, Representation and Warranty (R&W) insurance has become more prevalent as a risk management tool in transactions, and has increasingly provided environmental coverage where it once was generally excluded. R&W insurance protects against breaches of contractual representations and warranties in the purchase agreement. It typically has a policy period of three to six years. Known issues (eg, issues discovered during due diligence or described in the disclosure schedule) are excluded from coverage. If the transaction has significant environmental risk, R&W insurance might exclude coverage for breaches of the environmental representations, or might provide coverage only in excess of a separate PLL policy. Early on, the purchaser will want to request an indication from the broker regarding the extent of environmental coverage that will be provided as part of R&W insurance.

judicial actions). Settlements may include penalty assessments, ongoing monitoring or reporting requirements and SEPs. Federal and state environmental statutes generally prescribe specific penalty amounts for civil violations calculated on a per violation, per day basis. Injunctive relief, a form of judicial relief, requires an entity or person to achieve compliance by acting, or refraining from acting, in a specified manner. SEPs can be a part of an enforcement settlement and are generally environmental-related improvement or community service projects. Criminal enforcement, reserved for knowing or intentional violations, can result in criminal penalties or incarceration for individual defendants.

### 24 Appeal of regulators' decisions

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

Generally, all federal and state environmental administrative decisions are appealable. Often, one must exhaust administrative appeals before judicial relief is available. Appeal procedures and the entity to which appeals may be made differ based on whether the decision is made by a federal or state agency, the type of decision and the environmental statute under which the decision is made. The EPA's Environmental Appeals Board (EAB) makes the final decision on all administrative appeals under the major environmental statutes administered by the EPA.

## Judicial proceedings

### 25 Judicial proceedings

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

Violations under most environmental statutes can include civil or criminal consequences, or both. Environmental civil liability is strict and the standard of proof is 'preponderance of the evidence', whereas environmental criminal liability requires knowing or intentional violations proven beyond a reasonable doubt.

### 26 Powers of courts

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

Generally, courts do not have authority over environmental administrative actions until all administrative remedies have been exhausted. In civil cases, courts may assess penalties, issue injunctive relief or order a party to undertake clean-up actions or come into compliance. In criminal cases, the court may order a convicted defendant to pay criminal penalties or impose a prison sentence.

**27 Civil claims****Are civil claims allowed regarding infringements of environmental law?**

Contractual civil claims for violations of environmental law are generally permitted under contract or tort causes of action – a court would enforce the environmental provisions of the contract, including any provisions requiring indemnification or corrective action. Non-contractual claims are also permitted under certain environmental statutes (eg, CAA, CWA, RCRA and ESA) that include citizen-suit provisions (ie, provisions allowing private individuals or groups to file lawsuits that seek to enforce environmental laws against private and public entities).

**28 Defences and indemnities****What defences or indemnities are available?**

Many federal environmental statutes and state equivalents include provisions that provide for defences against environmental liabilities and statutes of limitations that limit the time period for bringing claims. For example, under CERCLA, potentially responsible parties (PRPs) may raise a defence to liability if contamination was caused by an act of God, acts of war or acts or omissions of a third party with whom a PRP has no contractual relationship. CERCLA also includes exemptions and protections from liability for certain entities, such as lenders, innocent landowners, companies contracted to perform investigation or clean-up activities and bona fide purchasers. A PRP may also avoid joint and several liability if it can prove that the harm it caused is separate from the harm caused by other PRPs, although this is often difficult to prove.

Parties can also contract around and allocate environmental liability by including indemnity provisions that require one party to indemnify, defend and hold harmless the other party in the event an environmental liability arises.

Given that criminal liability usually requires knowing or intentional behaviour, defences include lack of knowledge or intent and other impediments to criminal liability that are applicable in general criminal law (such as failure to prove the defendant's guilt 'beyond a reasonable doubt' or deficiencies in the investigation and trial process).

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

Ordinarily, a director's or officer's lack of knowledge or intent is the most important defence against individual liability for an environmental violation. However, certain courts have recognised the Responsible Corporate Officer (RCO) doctrine in environmental cases. This doctrine, which generally applies where an RCO has authority over and responsibility for an entity that has violated laws protecting public

safety, can provide a basis for finding corporate officers responsible for environmental violations even when they did not have actual involvement in, or knowledge of, the activities giving rise to a violation. The RCO doctrine has been largely applied in criminal cases, but certain courts have recognised that the doctrine may be applied to civil enforcement matters. Defences to such applications of the RCO doctrine are similar to the general environmental criminal liability defences discussed above.

**30 Appeal process****What is the appeal process from trials?**

In federal courts, trials generally occur at the federal district court level. A judgment from a district court is directly appealable to the United States Courts of Appeals. Each of the 12 circuit courts of appeals reviews judgments from district courts in its circuit. Circuit courts of appeals decisions (and decisions from the highest appeals court in each state) are appealable to the Supreme Court of the United States, which has discretion in which cases it chooses to hear.

Each state has its own court system, but it generally follows the same tiered-approach as the federal court system. Trial court decisions are generally appealable to an intermediate appellate court, and decisions from the intermediate appellate court are appealable to the state's highest appeals court, which has discretionary jurisdiction. Some states may have more than one level of intermediate appellate court, and appellate procedures and jurisdiction vary.

**International treaties and institutions****31 International treaties****Is your country a contracting state to any international environmental treaties, or similar agreements?**

The United States is a party to multiple international treaties, protocols and other agreements, including the UNECE Convention on Long-Range Transboundary Air Pollution, the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), the North American Agreement on Environmental Cooperation and the Protocol on Environmental Protection to the Antarctic Treaty.

**32 International treaties and regulatory policy****To what extent is regulatory policy affected by these treaties?**

Generally, international treaties are not given the effect of law in the United States unless they are 'self-executing' or were implemented by an act having the effect of federal law (eg, by the US Congress). However, US courts may occasionally interpret local, state or federal law so as not to be inconsistent with even the non-self-executing provisions of international treaties.

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