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Environmental Law 2024

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Setterwalls



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Global Practice Guides

Environmental Law

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2024

Chambers Global Practice Guides

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Production Coordinator Genevieve Sibayan

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165 Fleet Street

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EC4A 2AE

Tel +44 20 7606 8844

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CONTENTS

INTRODUCTION

Contributed by Tove Andersson, Anders Linnerborg, Sunniva Rosqvist and Ellen Lewin, Setterwalls p.5

AUSTRIA

Law and Practice p.11

Contributed by Schoenherr

CANADA

Law and Practice p.38

Contributed by Lawson Lundell LLP

Trends and Developments p.58

Contributed by Miller Thomson LLP

CHINA

Law and Practice p.67

Contributed by Jin Mao Law Firm

Trends and Developments p.92

Contributed by Jin Mao Law Firm

DOMINICAN REPUBLIC

Law and Practice p.99

Contributed by Guzmán Ariza

EU

Law and Practice p.120

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Trends and Developments p.143

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FINLAND

Law and Practice p.153

Contributed by HPP Attorneys Ltd

Trends and Developments p.175

Contributed by HPP Attorneys Ltd

FRANCE

Law and Practice p.185

Contributed by UGGC Avocats

Trends and Developments p.209

Contributed by UGGC Avocats

INDIA

Law and Practice p.215

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Trends and Developments p.232

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ITALY

Law and Practice p.240

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Trends and Developments p.264

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JAPAN

Trends and Developments p.271

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KAZAKHSTAN

Law and Practice p.277

Contributed by Haller Lomax LLP

Trends and Developments p.300

Contributed by Haller Lomax LLP

MEXICO

Law and Practice p.306

Contributed by Baker McKenzie

Trends and Developments p.327

Contributed by Briffault Abogados

NETHERLANDS

Law and Practice p.335

Contributed by Loyens & Loeff

PORTUGAL

Law and Practice p.358

Contributed by PLMJ

Trends and Developments p.386

Contributed by VdA

SOUTH AFRICA

Law and Practice p.393

Contributed by Lopes Attorneys Inc

Trends and Developments p.418

Contributed by Lopes Attorneys Inc

CONTENTS

SWEDEN

Law and Practice p.422

Contributed by Setterwalls

USA – ARIZONA

Law and Practice p.437

Contributed by Hiser Joy

Trends and Developments p.454

Contributed by Hiser Joy

USA – NEW YORK

Trends and Developments p.462

Contributed by Phillips Lytle LLP

USA – TEXAS

Law and Practice p.470

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Trends and Developments p.485

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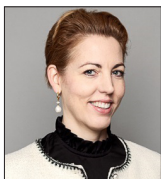
INTRODUCTION

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Setterwalls is a leading full-service law firm providing world-class advice across all areas of commercial law through its 315 employees in Stockholm, Gothenburg and Malmö. The environmental team works in all aspects of environmental law, advising clients on how to prevent and eliminate environmental law problems and risks related to developments, acquisitions, etc. Clients include Swedish and international companies of all sizes as well as public bodies. The firm's experience includes representing Eyrasalt Offshore AB, owned by Skyborn Re-

newables, in a permit proceeding for a new offshore wind farm with up to 286 wind turbines at a maximum height of 370 m; representing RES Renewable in a permit proceeding for a large-scale hydrogen production plant; representing Sydvatten in responding to a possible claim of EUR100–300 million in relation to community damage caused by extreme flooding; and representing Aura Energy and its Swedish subsidiary Vanadis Battery Metals on its application for a mining concession for vanadium.

Contributing Editors



Tove Andersson is a partner at Setterwalls who has worked in the field for over 20 years. She has extensive and widely recognised experience in large-scale environmental law

matters such as permit proceedings in different industries, as well as transactions in environmental and energy law matters. The energy sector, not least the wind power industry, is one of her prime focuses, including also solar power, hydrogen and grid. Further, Tove assists clients in the rock material, mining and waste sectors, among others. She has particular experience and knowledge of issues relating to species protection. Tove is a board member of Sweden's industry association for rock material (SBMI).



Anders Linnerborg is a partner at Setterwalls who has worked in the field for about 35 years. He has vast experience and is renowned for his work relating to industry, energy, water,

infrastructure, materials and minerals, etc. His work includes permit processes, legal advice in relation to questions on environmental liability and advice in commercial transactions. Notably, Anders has unique and unmatched experience and knowledge when it comes to legal issues relating to contaminated land and water supply. He is today one of the most experienced lawyers in the minerals industry field, where he has been a key figure since early 2000.

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Contributed by: Tove Andersson, Anders Linnerborg, Sunniva Rosqvist and Ellen Lewin, **Setterwalls**

Co-Authors



Sunniva Rosqvist has been an associate at Setterwalls since 2017 and a member of the Swedish Bar Association since 2024. She works in all matters concerning environmental law, advising clients on environmental risk in M&A, environmental permit and notification procedures, and supervisory matters, and answering general questions of legal and strategic importance. As a member of Setterwalls' environmental law team, Sunniva regularly advises clients in the energy, waste, rock material, infrastructure and food industries, to name a few. She is a member of the board of a non-profit association for young professionals in the environmental sector (Föreningen för unga inom miljö).



Ellen Lewin is an associate at Setterwalls who has worked in the field for about four years. Ellen helps clients with permit applications and notifications under Swedish environmental law; assists in issues related to contaminated land, waste management, and chemicals, etc; conducts liability assessments; engages in contract drafting and interpretation; and provides legal guidance in other aspects of environmental law.

Setterwalls

PO Box 4501
203 20 Malmö
Sweden

Tel: +46 10 690 04 00
Fax: +46 10 690 04 70
Email: malmö@setterwalls.se
Web: www.setterwalls.se



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Global Overview

The year 2024 has been marked by significant global events that have had profound implications for environmental law and policy. Among these, the conflicts between Russia and Ukraine, and between Israel and pro-Palestinian groups, have not only caused immense human suffering but have also been reported as causing substantial environmental degradation, such as widespread pollution and long-term ecological damage. In environmental terms, the destruction of natural habitats in wartime is a critical concern.

This past year has also been characterised by numerous natural disasters around the world. Hurricanes, floods and wildfires have occurred, leading to devastating consequences. Climate change, loss of biodiversity, and various types of pollution are just some of the major challenges we face today. The United Nations Environment Assembly (UNEA-6), which took place from 26 February to 1 March 2024, concluded with the adoption of 15 resolutions aimed at promoting joint actions against climate change, loss of nature and biodiversity, as well as pollution and waste. The EU has also adopted a range of measures throughout the year to address climate change and achieve resource efficiency. This is evident in the numerous regulations, directives and negotiations that have been relevant within the EU over the past year. Examples include the Corporate Sustainability Reporting Directive (CSRD), the Critical Raw Materials Act (CRMA) and the Net-Zero Industry Act (NZIA), to name just a few.

However, it must be emphasised that the challenge of addressing climate change is a complex task without simple or obvious solutions. Managing climate change and protecting natural resources often lead to conflicts of interest and difficult trade-offs between different priorities.

For example, new environmental initiatives and regulations may require balancing the need to build more mines to increase the supply of critical raw materials against other environmental interests, including protecting important species and biotopes and water quality. Additionally, the protection of minority rights can be affected.

Furthermore, it should be noted that various elections that have taken place have had, or could have, significant effects on environmental policy and legislation, making them a prominent feature of 2024. These include the presidential election in the US and the EU elections, which have a major impact on which environmental initiatives will be undertaken and which interests will be prioritised over others. Additionally, the development of artificial intelligence must be considered, as this is having significant effects on society, and thereby also on the environment regarding, for example, improved monitoring and analysis methods.

It can be concluded that sustainability today is both a given and a necessity that drives change across the world. Some frequent themes that have recurred in relation to sustainability issues in 2024 include sustainability reporting, the circular economy, renewable energy, and biodiversity.

Sustainability Reporting

A particularly relevant issue this year has been sustainability reporting. The purpose of sustainability reporting is to provide the financial market with comparable and reliable information from companies regarding social responsibility, environmental impact, and corporate governance. In the area of sustainability reporting, the EU's Corporate Sustainability Reporting Directive (CSRD) should be mentioned. The CSRD came into force in 2023 and is currently being incorpo-

INTRODUCTION

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rated into the national legislation of EU member states. The CSRD has raised the requirements for companies to report on the environmental and social impacts of their operations.

The CSRD applies to many companies, including large companies as well as small and medium-sized listed companies that meet certain criteria. The rules became applicable in 2024, which means that the first reports will be published in 2025. The CSRD increases transparency, which allows capital to be directed towards sustainable investments. It also facilitates the management of financial risks resulting from climate change. Another potential consequence of the CSRD is a reduction in the occurrence of greenwashing. The directive links to the Paris Agreement, and by expanding the requirements for sustainability reporting, the directive is a step towards achieving the goal of climate neutrality by 2050.

Natural Resources and the Importance of the Circular Economy

Introduction

Climate change is an increasingly significant problem as human use of natural resources continues to grow. Consequently, the management and regulation of the use of natural resources are crucial for achieving a sustainable future. Many global measures have been taken to protect the world's natural resources and promote the circular economy, which is a powerful tool in the transition to a resource-efficient society.

Critical Raw Materials Act

In this context, the Critical Raw Materials Act (CRMA) should be mentioned. In May 2024, the CRMA came into force in the EU. Through this act, the EU Commission has taken the initiative to make the EU more self-sufficient in critical raw materials. The aim is to ensure a stable and sustainable supply of critical raw materials

within the EU to meet its climate and digitalisation goals. To achieve the regulation's objectives, the European Commission has set benchmarks for 2030. These include that at least 10% of the raw materials consumed in the EU should be mined in the EU, at least 40% should be processed within the EU, and at least 25% should come from recycling. Additionally, the EU should import no more than 65% of a specific raw material from a single third country. The regulation includes provisions on recycling to increase the circulation and sustainability of critical raw materials released on the EU market. A central part of the act is also to create efficient permitting processes. Projects involving critical raw materials can be designated as strategic projects by the Commission, which, among other things, means that there are concrete time limits for how long the permitting processes can take.

In connection with the discussion on efficiency of permitting processes, it should also be mentioned that amendments to EU directives, such as 2010/75/EU on industrial emissions as well as 1999/31/Eg, on the landfill of waste, were adopted in 2024 with the aim, among other things, of creating efficient permitting processes. This includes, for example, requiring member states to establish electronic permitting systems (e-permits) by 2035. Additionally, the amendments broadly aim to reduce harmful emissions from industrial installations, thereby benefiting human health and the environment while contributing to energy efficiency, a circular economy, and the phase-out of fossil fuels.

Waste management

Waste management was a significant issue during the UNEA-6, as waste management is a crucial part of the transition to a circular economy. Waste has also been an important issue within the EU. The Battery Regulation and the Waste

INTRODUCTION

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Shipment Regulation are examples of new regulations which have been particularly relevant during 2024. The Commission also took new measures under the REACH Regulation in September 2024 to protect human health and the environment by restricting the use of a subgroup of synthetic chemicals known as PFAS. It is also worth mentioning that in 2022, the UN began negotiations in UNEA for a global agreement to combat plastic pollution. At the time of writing, in late 2024, negotiations for a global agreement to reduce plastic pollution are still ongoing, with the hope that an agreement will be in place by 2025.

Renewable Energy

Updated regulation to accelerate the expansion of renewable energy

When discussing the importance of working towards a circular economy, renewable energy should also be addressed. As a result of the conflict between Russia and Ukraine and its impact on the EU's energy supply and energy prices, the European Council adopted a regulation in 2022 to accelerate the production of renewable energy. The regulation essentially involves upgrading existing facilities to produce renewable electricity and setting deadlines for permitting procedures for certain types of solar energy equipment. In 2024, the regulation was amended and supplemented, and parts of it were extended until 30 June 2025. A noteworthy development in the field of renewable energy is a new proposal from the Commission, which has recently been adopted, regarding the design of the EU's electricity market. The proposal is being developed to promote renewable energy sources and enhance industrial competitiveness while better protecting consumers.

Net-Zero Industry Act

In May 2024, the European Council adopted the Net-Zero Industry Act (NZIA). The purpose of

the NZIA is to improve the EU's manufacturing capacity for zero-emission technology and its key components, as well as to remove barriers to scaling up production in Europe. The NZIA creates a legal framework that enables increased competitiveness in zero-emission technology. A goal established in the NZIA is that by the year 2030, zero-emission manufacturing capacity should meet at least 40% of the EU's annual deployment needs. This would lead to increased security and predictability, and would be a long-term signal for manufacturers and investors. The regulation aims to support the transition to clean energy and a sustainable industrial sector while improving the EU's energy resilience. The NZIA is part of the effort to achieve climate neutrality by 2050.

Given political investments and strong demand, it is highly likely that the increased use of fossil-free energy will continue worldwide.

Biological Diversity

Finally, the topic of biological diversity should be highlighted. Biological diversity is a prominent issue, and numerous efforts are under way at the global level to restore it. The subject of biological diversity was a central issue during the UNEA-6 and is equally significant in the EU. A regulation aimed at restoring nature came into force in the EU in 2024. This new regulation is part of the efforts under the European Commission's Biodiversity Strategy for 2030. By restoring ecosystems, natural habitats and living environments for endangered species, the overarching goal of the regulation is to enable nature to recover, adapt to changes, and once again become rich in biological diversity.

Furthermore, because land is a source of food and habitat, both humans and ecosystems depend on the land being in a good condition.

INTRODUCTION

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Since land is a non-renewable resource, it must therefore be protected and restored. For this reason, there is a proposal within the EU for a Soil Directive, with the goal that all land in the EU should be in a good condition by 2050. The proposal is part of the European Commission's Soil Strategy for 2030. The directive includes provisions on how, for example, contaminated land should be managed. In June 2024, the Council of Ministers adopted its proposed version of the Soil Directive. The next step is for the directive to be negotiated in a so-called trilogue between the European Parliament, the Council of Ministers, and the European Commission.

Summary

Overall, environmental law is a dynamic and complex field, and the year 2024 has underscored the critical importance of global co-operation and robust policy frameworks in addressing environmental challenges. As lawyers in this field of law, we hope this guide will be a valuable resource in navigating the legal landscape of today.

AUSTRIA

Law and Practice

Contributed by:

Christoph Cudlik, Christian Holzer, Christoph Jirak and Julia Kandler
Schoenherr



Contents

1. Regulatory Framework and Law p.15

1.1 Environmental Protection Policies, Principles and Laws p.15

2. Enforcement Authorities and Mechanisms p.16

2.1 Regulatory Authorities p.16

2.2 Co-operation p.16

3. Environmental Protections p.17

3.1 Protection of Environmental Assets p.17

3.2 Breaching Protections p.17

4. Environmental Incidents and Permits p.17

4.1 Investigative and Access Powers p.17

4.2 Environmental Permits/Approvals p.18

4.3 Regulators' Approach to Policy and Enforcement p.19

4.4 Transferring Permits/Approvals p.19

4.5 Consequences of Breaching Permits/Approvals p.19

5. Environmental Liability p.19

5.1 Key Types of Liability p.19

5.2 Disclosure p.20

6. Environmental Incidents and Damage p.21

6.1 Liability for Historical Environmental Incidents or Damage p.21

6.2 Reporting Requirements p.22

6.3 Types of Liability and Key Defences p.23

7. Corporate Liability p.23

7.1 Liability for Environmental Damage or Breaches of Environmental Law p.23

7.2 Environmental Taxes p.24

7.3 Incentives, Exemptions and Penalties p.24

7.4 Shareholder or Parent Company Liability p.25

7.5 ESG Requirements p.25

7.6 Environmental Audits p.26

8. Personal Liability p.26

8.1 Directors and Other Officers p.26

8.2 Insuring Against Liability p.26

9. Insurance p.27

9.1 Environmental Insurance p.27

10. Lender Liability p.27

10.1 Financial Institutions/Lender Liability p.27

10.2 Lender Protection p.27

11. Civil Liability p.27

11.1 Civil Claims p.27

11.2 Exemplary or Punitive Damages p.28

11.3 Class or Group Actions p.28

11.4 Landmark Cases p.28

12. Contractual Agreements p.29

12.1 Transferring or Apportioning Liability p.29

12.2 Environmental Insurance p.29

13. Contaminated Land p.30

13.1 Key Laws Governing Contaminated Land p.30

13.2 Clearing Contaminated Land p.31

13.3 Determining Liability p.31

13.4 Proceedings Against Polluters p.31

13.5 Investigating Environmental Accidents p.31

14. Climate Change and Emissions Trading p.32

14.1 Key Policies, Principles and Laws p.32

14.2 Targets to Reduce Greenhouse Gas Emissions p.33

15. Asbestos and Polychlorinated Biphenyls (PCBs) p.33

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs p.33

16. Waste p.34

16.1 Key Laws and Regulatory Controls p.34

16.2 Retention of Environmental Liability p.35

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods p.35

16.4 Rights and Obligations Applicable to Waste Operators p.35

17. Environmental Disclosure and Information p.36

17.1 Self-Reporting Requirements p.36

17.2 Public Environmental Information p.36

17.3 Corporate Disclosure Requirement p.36

17.4 Green Finance p.36

18. Transactions p.36

18.1 Environmental Due Diligence p.36

18.2 Disclosure of Environmental Information p.37

18.3 Key Issues in Environmental Due Diligence p.37

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leaders in their specialised areas and have a track record of getting deals done with a can-do, solution-oriented approach. Quality, flexibility, innovation and practical problem-solving in complex commercial mandates are at the core of Schoenherr's philosophy.

Authors



Christoph Cudlik is a partner at Schoenherr and has been with the firm since 2014. His main practice area is public law, specialising in all areas of energy and environmental law.

He regularly consults high-profile clients on energy, EIAs, nature protection, waste, water, gas and construction law. Christoph holds a master's degree in law from the University of Vienna (2012) and a bachelor's degree in sustainable resource management from FH Campus Vienna (2021). He has worked for international law firms, the Austrian Ministry for Agriculture, Forestry, Environment and Water Management, and the EC. Christoph has authored numerous publications and regularly lectures on general administrative, constitutional and environmental law.



Christian Holzer has been at Schoenherr since April 2017, where he has been an attorney-at-law since September 2021. He focuses on all aspects of public law, including

environmental, telecommunications, pharmacy and constitutional law. One of his main areas of practice is environmental impact assessment procedures, particularly for road and motorway projects. Christian has strong expertise in advising and representing clients before the Austrian Supreme Administrative Court and the Constitutional Court. He obtained his law degree from the University of Vienna in 2016 and is the author of several legal publications - in particular, on the Aarhus Convention.

Contributed by: Christoph Cudlik, Christian Holzer, Christoph Jirak and Julia Kandler, **Schoenherr**



Christoph Jirak has been part of the regulatory team at Schoenherr since 2017. He specialises in environmental and public law, with a particular focus on plant approvals,

healthcare, radiation protection, aviation and construction law. He focuses heavily on EIA procedures, particularly in the fields of renewable energy, industry, infrastructure and hospitals. Since 2023, he has also been a lecturer at the University of Applied Sciences Vienna Campus on Legal Fundamentals and Environmental Law. Christoph was able to gain valuable experience during his secondment to the legal department of a leading Austrian energy company.



Julia Kandler is an attorney-at-law and has been with Schoenherr since 2023. Her main area of practice is public law, where she specialises in all areas of environmental and

energy law, with a particular focus on renewable energy and the circular economy. Julia graduated from the University of Vienna in 2017, with a specialisation in environmental law. Prior to joining Schoenherr, she worked at the state government of Vorarlberg and as an associate in two national law firms.

Schoenherr

Schottenring 19
1010 Vienna
Austria

Tel: +43 1 534 37 0
Fax: +43 1 534 37 66100
Email: office.austria@schoenherr.eu
Web: www.schoenherr.eu

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ATTORNEYS AT LAW

1. Regulatory Framework and Law

1.1 Environmental Protection Policies, Principles and Laws

The Austrian environmental protection regime is one of the strictest in the world. As an EU member state, Austria is obliged to implement and put into effect the (already strict) EU environmental law. However, Austria's national policies and laws often provide for even more rigorous rules on topics such as permitting requirements, thresholds, rights of third parties and liabilities.

According to the Federal Constitutional Law on Sustainability, Animal Welfare, Environmental Protection, Securing Water and Food Security and Research (*Bundesverfassungsgesetz über die, Nachhaltigkeit, den Tierschutz, den umfassenden Umweltschutz, die, Sicherstellung der Wasser- und Lebensmittelversorgung und die, Forschung*), fundamental principles of environmental law include the preservation of the natural environment (ie, water, air and soil) as the basis of life for future generations. Other fundamental principles of Austrian environmental law include the precautionary principle, the "polluter pays" principle, and the principles of amelioration and no deterioration of elements of the environment.

From a systematic perspective, Austrian environmental policy and law are characterised by the distribution of competencies between the federation and the nine provinces. Thus, some policies are decided upon at the federal level and others at the provincial level. The distribution of competencies is one of the main reasons why all efforts to codify environmental law have – thus far – been in vain. As a result, Austrian environmental law remains scattered across numerous federal and provincial legal acts. Key laws include those set out here.

Federal Acts

As examples, the following apply at the federal level:

- Environmental Impact Assessment Act 2000 (*Umweltverträglichkeitsprüfungsgesetz*, or UVP-G);
- Waste Management Act 2002 (*Abfallwirtschaftsgesetz*, or AWG);
- Water Rights Act 1959 (*Wasserrechtsgesetz*, or WRG);
- Trade Act 1994 (*Gewerbeordnung*, or GewO);
- Air Pollution Control Act 1997 (*Immissionsschutzgesetz-Luft*, or IG-L);
- Mineral Raw Material Act 1999 (*Mineralrohstoffgesetz*, or MinRoG);
- Framework legislation – Electricity Management and Organisation Act 2010 (*Elektrizitätswirtschafts- und -organisationsgesetz*, or EIWOG); and
- Aviation Act 1957 (*Luftfahrtgesetz*, or LFG).

Provincial Laws

As examples, the following apply at the provincial level:

- Nature Conservation Act (*Naturschutzgesetze*, or NSchG);
- Construction Act (*Baugesetze und -ordnungen*, or BauO);
- Land Use and Zoning Act (*Raumordnungsgesetze und -ordnungen*, or RO); and
- Implementing legislation – Electricity Management and Organisation Acts from the Provinces (*Elektrizitätswirtschafts- und -organisationsgesetze der Bundesländer*, or EIWOG der Bundesländer).

2. Enforcement Authorities and Mechanisms

2.1 Regulatory Authorities

In Austria, owing to the complex distribution of competencies between the federal government and the provinces already mentioned in **1.1 Environmental Protection Policies, Principles and Laws**, responsibility for environment-related enforcement is very fragmented. In addition, some authorities – such as the district administrative authority (*Bezirksverwaltungsbehörde*) – act for both the federal and the provincial governments. The provincial governors (*Landeshauptleute*) often act for the competent federal minister. Only an approximate overview of the responsibilities can therefore be given at this point.

Federal Level

At the federal level, competence is divided between the different ministries. The most important environment-related ministries are:

- the Federal Ministry for Climate Protection, Environment, Energy Mobility, Innovation and Technology (*Bundesministerium für Klimaschutz, Umwelt, Energie, Mobilität, Innovation und Technologie*, or BMK);
- the Federal Ministry of Agriculture, Forestry, Regions and Water Management (*Bundesministerium für Land- und Forstwirtschaft, Regionen und Wasserwirtschaft*, or BML); and
- the Federal Ministry of Labour and Economy (*Bundesministerium für Arbeit und Wirtschaft*, or BMAW).

Most environmental matters – such as water, waste, forestry, mineral raw materials, aviation, chemistry and trade law – are assigned to the federal government.

Provincial Level

At the provincial level, the provincial governments (*Landesregierungen*) are the highest authorities. The provinces enforce environmental matters such as spatial planning, environmental impact assessments and nature conservation. For certain matters – for example, in the field of nature conservation – the competent authority is the district administrative authority. In addition, local municipalities are often competent to enforce certain aspects of planning law (eg, land use and zoning plans), as well as construction law.

Given the complex distribution of competencies, the competent authority has to be identified for each relevant matter.

2.2 Co-operation

To facilitate a simplified or accelerated implementation of administrative procedures in Austria, some laws provide for co-ordination mechanisms. One example is “one-stop shop” procedures, which are foreseen, for example, in the Environmental Impact Assessment Act, Waste Management Act or the Trade Act.

Activities potentially affecting the public interest or third-party rights in Austria usually require more than one environmental permit (and usually from more than one competent authority). Based on the “one-stop shop” principle, a single permit from only one competent authority is foreseen for large-scale projects under the Environmental Impact Assessment Act. If the law does not provide for the co-application of the other permitting requirements, the competent authorities are usually required to co-ordinate with the other authorities.

3. Environmental Protections

3.1 Protection of Environmental Assets

To protect environmental assets, the respective Austrian environmental laws in combination with EU environmental law cover different permitting regimes, inspection regulations, participation rights for third parties (eg, NGOs, neighbours, citizen initiatives, etc) and various other protective provisions (eg, designation of special protected areas, enforcement measures, restoration orders, penalties for infringements or implementation of measurement programmes, etc).

3.2 Breaching Protections

In Austria, environmental incidents and breaches of law (including breach of permits) can have consequences under criminal, administrative criminal, administrative, and civil law. The regulatory authorities are only competent for the execution of administrative criminal and administrative law. The prosecution of severe incidents or breaches of environmental law is regulated in the Criminal Code (*Strafgesetzbuch*, or StGB) and lies within the competence of the public prosecutor's office (*Staatsanwaltschaft*). Private damages from environmental incidents and breaches of environmental law must – in principle – be claimed by the damaged party; therefore, investigations relating to private damages lie, within the responsibility of the civil courts.

4. Environmental Incidents and Permits

4.1 Investigative and Access Powers

The investigative and access powers of regulatory authorities are scattered over a wide range of federal and provincial Acts, depending on the nature of the incident or the breach of environmental law in question. They range from access

to private property, the collection of samples, interrogations, and orders (eg, on the operation of machines/plants and the implementation of mitigation measures), to the arrest of those suspected of having committed acts punishable under (administrative) criminal law.

The execution of investigative and access powers is limited by the principle of proportionality, requiring that the specific use of a power is proportional to its specific scope and that no milder measures are available. Thus, before severe means – such as shutdowns or arrests – are implemented, the authorities will usually investigate via the collection of samples or interrogations (eg, the discussion of voluntary mitigation measures). Finally, all acts to access and investigate by administrative powers are contestable, although not all remedies have suspensory effect.

Investigative and Access Powers of Public Prosecution

Severe environmental incidents or breaches of environmental law can lead to investigations by the public prosecutor's office. Depending on the severity and the specific case, the public prosecutor's office might use the full range of investigative and access powers foreseen in the Criminal Procedure Code (*Strafprozessordnung*, or StPO).

The regulatory authorities are tasked not only with the investigation but also the mitigation of environmental damages; therefore, the investigative and access powers of the public prosecutor's office with regard to environmental incidents and breaches of environmental law differ slightly from the regulatory authorities' powers. The public prosecutor's office, for example, wields the power to:

- access and even seize private property (eg, machines or even factories, but also documents and digital data);
- interrogate suspects and witnesses;
- arrest suspects; and
- impose detention awaiting trial (pending authorisation by a court).

However, the public prosecutor's office cannot issue orders for mitigation measures.

The principle of proportionality also applies to the public prosecutor's office's use of these powers.

Investigative and Access Powers of the Civil Courts

The Austrian civil courts have far less investigative and access power than the regulatory authorities and the public prosecutor's office. Although specific procedures allow for injunctions and the preservation of evidence, taking evidence regularly requires deliberate co-operation from the parties. However, the courts expressly can (and will) take a plausible denial of co-operation in investigations into consideration when deciding the respective case.

4.2 Environmental Permits/Approvals

As a general principle, environmental permits are required under Austrian law if the "public interest" or third-party rights (eg, landowners' or fishing rights) may be affected by the envisaged activity. The permitting procedures vary immensely and can range from simple notification obligations to thorough environmental impact assessments lasting up to several years.

Due to the constitutional division of competencies, all efforts for a comprehensive environmental permit have so far been in vain. A single permit from only one competent authority ("one-stop

shop") is only foreseen for very large projects under the Environmental Impact Assessment Act. Thus, activities potentially affecting the public interest or third-party rights in Austria usually require more than one environmental permit (and usually from more than one competent authority). The construction and operation of a single industrial plant can require multiple environmental permits (eg, under the Trade Act, Water Act, Nature Conversation Act, Construction Act and the Federal Forest Act 1975 (*Forstgesetz*)).

The question of which permits a certain activity requires can therefore only be answered on a case-by-case basis. Although the Austrian legal framework on environmental permits might seem complex at first, diligent preparation enables an efficient permitting process even when in conjunction with several authorities.

Procedure

The individual permitting procedures are generally initiated via an application to the competent authority by the person envisaging the specific activity with potential effects on the "public interest" or third-party rights. The applicant sets out the scope of the activity and therefore also for the permitting procedure. Thus, the application must comprise all the necessary documentation for the envisaged activity.

The authorities usually examine the documentation with the help of their own authoritative or non-authoritative experts (ie, experts paid by the applicant but working for – and in the name of – the authority). If the legal requirements for obtaining the permit are met, the applicant has a legal right to the issuance of the permit.

If an environmental permit is denied, the regulatory authorities' decision can be appealed before the administrative courts (and, in some cases,

before another regulatory authority). The administrative court's decisions can be appealed before the Constitutional Court (*Verfassungsgerichtshof*, or VfGH) and the High Administrative Court (*Verwaltungsgerichtshof*, or VwGH).

A recurring topic in permitting procedures under almost all relevant acts of environmental law is the question of parties and their procedural rights. In short, under Austrian law a legal interest is required in order to have a right to be heard and to appeal against decisions in administrative procedures. International and European law, on the other hand, provides for additional rights to be heard and to appeal decisions on environmental permits.

4.3 Regulators' Approach to Policy and Enforcement

As already stated in **1.1 Environmental Protection Policies, Principles and Laws**, the Austrian environmental protection regime is one of the strictest in the world. Austria's national policies and laws often provide for even more rigorous rules than are provided for at EU level, for example, regarding permitting requirements, thresholds, rights of third parties and liabilities.

To determine future options for action for environmental policy, the Federal Environment Agency in Austria produces an environmental monitoring report every three years describing the current environmental situation in Austria. The topics covered include climate protection as well as air pollution control, mobility and energy transition, water protection and biodiversity, as well as sustainable management and the management of resources and chemicals. The facts and figures refer to environmental policy measures that have already been taken and provide an outlook on future options for action in environmental policy.

In the coming years, Austrian regulators are particularly determined to continue reducing CO₂ emissions and energy consumption, to protect biodiversity and to curb the rate of land consumption.

4.4 Transferring Permits/Approvals

Most permitting regimes in Austria stipulate that the permit is issued for the plant or the project; the permit is thus reified. This "in rem effect" means that the rights and obligations established by the permit relate to the plant (due to their project-related nature) and not to a person. Thus, permits are not affected by a change of ownership and can easily be transferred.

In some legal acts (eg, the Water Rights Act or Trade Act), however, personal authorisations are also foreseen. Such permits are not transferable, or only to a very limited extent. The transferability of permits must therefore be checked separately for each transaction and permit.

4.5 Consequences of Breaching Permits/Approvals

For the different types of liability (which also cover breaches of permits/approvals) see **5.1 Key Types of Liability**. In addition to fines and liability penalties, measures to restore legal status or compensation for damages may also be imposed. The violation of environmental permits can also lead to the withdrawal of the respective permits in connection with the plant (eg, withdrawal of a trade licence).

5. Environmental Liability

5.1 Key Types of Liability

Breaches of environmental law (encompassing all kinds of environmental damage as well as environmental incidents) can lead to various

liabilities of offenders under criminal, administrative, administrative criminal and civil law in Austria.

Liabilities Under Administrative Law and Administrative Criminal Law

In practice, breaches of environmental law in Austria usually lead to measures under administrative law and fines under administrative criminal law. Various (environmental) administrative acts grant regulatory authorities the power to investigate breaches of environmental law (see **4.1 Investigative and Access Powers**) and to take all the necessary steps to prevent, mitigate and remediate environmental damage. To this end, regulatory authorities may either order offenders to take the necessary steps or organise the requisite measures themselves. In the latter case, the offender (if identifiable) must bear all the costs of the necessary measures.

Under administrative criminal law, regulatory authorities routinely impose fines on offenders. Alternatively, if a fine cannot be paid, regulatory authorities might even order imprisonment for several weeks. It should be noted that administrative fines can, under certain circumstances, accumulate in Austria. Therefore, a single environmental incident or damage can lead to a multitude of administrative fines – in some cases reaching six-figure (or even higher) sums. According to the Constitutional Court, there might be an upper limit for administrative fines; however, this limit is well over EUR1 million.

Additionally, administrative fines are primarily to be imposed on individuals. Legal entities usually only bear subsidiary liability if a responsible representative is incapable of paying a fine (see **7. Corporate Liability**).

Liabilities Under Criminal Law

Under criminal law, both natural and legal persons (see **7. Corporate Liability**) responsible for offences against the environment can face serious fines. Individuals responsible for severe environmental damages face not only criminal fines under the Austrian Criminal Code but even prison sentences of up to several years.

Liabilities Under Civil Law

Since the relevant environmental acts also protect third-party rights, operators or polluters can also face liabilities under civil law. It should be noted that several environmental acts foresee liabilities without fault. Thus, plant operators or polluters often bear civil liabilities even in cases where no administrative, administrative criminal or criminal measures can take effect.

5.2 Disclosure

Public Environmental Information

Under Austrian law, public authorities and public institutions must grant everyone access to information on the environment. In addition, Austrian environmental information law goes beyond mere free access to environmental information by obliging public authorities to:

- obtain information using their own initiative; and
- make it available to the public.

Informative environmental information is understood to be, among other things:

- data on the state of the environment (eg, water, air, soil and the landscape);
- environmental factors (eg, substances, energy, noise and radiation);
- measures (eg, plans and programmes, and administrative acts); and

- cost-benefit analyses and other economic analyses.

However, the right of access is granted only in relation to environmental information and does not cover the right to inspect specific documents or entire procedural acts.

Information must be provided by:

- administrative authorities;
- organs of regional and local authorities;
- legal persons under public law; and
- natural and legal persons under private law who perform public tasks or provide public service listings under one of the above-mentioned bodies (eg, energy supply companies).

The environmental information right has the character of an *actio popularis* because everyone is granted a right of free access to environmental data.

Limitations on Disclosure

Disclosure may be refused if:

- the request for information relates to an internal communication;
- the request was apparently delivered in an abusive manner;
- the request is too general; and/or
- the request concerns material in the process of being completed, unfinished documents, or similar.

Prior to refusal, the arguments for and against disclosure must be weighed up by the competent authorities.

Compulsory Disclosure

Environmental information that must be actively disseminated in all cases includes:

- the wording of international treaties;
- policies, plans and programmes relating to the environment;
- environmental status reports;
- authorisations with an environmental impact; and
- environmental impact assessments.

The co-ordination task is assigned to the Federal Environment Agency (*Umweltbundesamt*).

6. Environmental Incidents and Damage

6.1 Liability for Historical Environmental Incidents or Damage

As a general principle, the liability for environmental damages can only be imposed on the person(s) responsible for the damage. This principle applies to administrative criminal and criminal law, in particular. Liability for criminal offences committed by a person other than the current operator or landowner is only possible if the current operator knows of the environmental damage and maintains the unlawful situation.

Subsidiary Liability of Current or Purchasing Operators or Landowners

However, several administrative acts foresee the subsidiary liability of current or purchasing operators of facilities, or landowners.

Under the Austrian federal and provincial Environmental Liability Acts (*Umwelthaftungsgesetze*), current operators are obliged to notify the competent authority of – and to take all the necessary measures to prevent, mitigate and remediate – environmental damages, even those resulting from historical activities. Landowners face those obligations only if:

- the operation (eg, of a facility) was terminated; and
- they knew of and accepted the operation.

Furthermore, these operators or landowners usually have an obligation to bear all costs relating to the prevention, mitigation and remediation of (historical) environmental damages if they cannot prove that the environmental damage results from activities of third parties (other than their legal predecessors) or from authoritative orders. Similar provisions exist, for example, in the Water Rights Act and Waste Management Act.

Possibility of Action Against the Original Polluter

If the cost for preventing, mitigating and remediating historical environmental damages is enforced against a person with subsidiary responsibility under administrative law, the Austrian civil law grants the payer actions against the polluter. Such claims are obviously only useful if the original polluter can still be held responsible.

6.2 Reporting Requirements Self-Reporting Requirements

Reporting requirements foreseen in the Seveso Directive and the IPPC Directive have been implemented in Austria in various laws and ordinances, including the Trade Act and the Industrial Accidents Ordinance (*Industrieunfallverordnung*), the Waste Management Act, the Mineral Raw Material Act and the Emission Control Act 2010 (*Emissionsschutzgesetz für Kesselanlagen*).

These obligations are accompanied by purely national reporting requirements throughout the relevant environmental laws. Since the reporting requirements vary greatly by plant type, an assessment must be made on a case-by-case basis. Regulations on public environmental

information are uniformly regulated in the Environmental Information Acts (one federal, nine provincial) and in the Major Accidents Information Ordinance. Reference should also be made to the Helsinki Convention as the international legal basis of industrial accident law.

Notification Obligations

Following a major accident, the operator is obliged to notify the authority – immediately (ie, without culpable delay and prior to detailed investigations) and in the most appropriate manner – of the following:

- the circumstances of the accident;
- the substances involved;
- the available data for assessing the accident's consequences for human health, the environment and material assets;
- immediate measures taken; and
- planned steps to mitigate the medium-term and long-term consequences of the accident and to prevent them in the future.

The following industrial accidents are required to be notified, no matter what the circumstances:

- those involving ignition, explosion or release of a certain quantity of dangerous substances;
- those in which the operator has reason to believe that the outcome has caused property damage or significant consequences for health and the environment; and
- incidents involving dangerous substances that may –
 - (a) result in death or hospitalisation; or
 - (b) cause damage to property of at least EUR2 million.

Failure to comply with the obligation to notify is punishable by law.

Owners of establishments that pose a risk must inform each other about potential domino effects in industrial accidents, and exchange information. Furthermore, they must, at regular intervals, inform persons potentially affected by industrial accidents about the dangers of major accidents and about the necessary behavioural measures to be taken in the event of a major accident - and make this information available on the internet.

6.3 Types of Liability and Key Defences

For the types of liability for environmental incidents or damages in Austria, see 5.1 **Key Types of Liability**. Owing to the multitude of possible liabilities and the different prerequisites for the attribution of liabilities, potential defences against liabilities (and their prospects of success) can only be determined on a case-by-case basis. In general, liability for environmental damages under all legal regimes (criminal, administrative criminal, administrative and civil law) can be avoided if the defendant can prove that:

- there is no damage (eg, if the “damage” turns out to be a natural process or is based on flawed investigations/samples); or
- the damage is attributable to others (including authorities).

Other arguments can include (but are not limited to):

- limitations of time;
- lack of sufficient evidence;
- lack of jurisdiction;
- lack of causality;
- lack of negligence; and
- lack of proportionality.

The effectiveness of defences depends on the specific case. A lack of negligence will not be sufficient to avoid liability without fault (eg, under

certain provisions of civil law) and a limitation of time will not be sufficient to avoid liability if no limitation of time is foreseen (eg, under certain provisions of administrative law). Defences against liability can be found in most cases of environmental damages. Whether liability can be fully avoided – or only be reduced or postponed – depends on the individual case.

7. Corporate Liability

7.1 Liability for Environmental Damage or Breaches of Environmental Law

As mentioned in 5.1 **Key Types of Liability**, environmental damages and breaches of environmental law can lead to a variety of liabilities under Austrian law. Corporations (and other legal entities) can be held accountable only if a provision expressly stipulates such liabilities.

Criminal Law

Under the Statute on Responsibility of Legal Entities (*Verbandsverantwortlichkeitsgesetz*, or VbVG), legal entities can be held liable in two circumstances.

In the first case, a legal entity may be liable if a “decision-maker” (*Entscheidungsträger*) of said entity culpably (ie, intentionally or negligently) and illicitly commits a crime punishable under the Criminal Code:

- in their role as decision-maker;
- for the benefit of the entity; and
- in breach of the entity’s legal obligations.

The second scenario is employee crimes, for which legal entities can only be held liable if an employee of the entity culpably (ie, intentionally or negligently) and illicitly commits a crime punishable under the Criminal Code:

- for the benefit of the entity; and
- that was enabled or substantially facilitated by a decision-makers' disregard for the necessary diligence – in particular, a lack of technical, organisational or personal measures to prevent such offences.

If the prerequisites are met, legal entities can be fined up to 50% of their annual yield (up to a maximum of EUR1.8 million). The criminal liability of legal entities does not exclude the criminal liability of their decision-makers or employees for the same offence.

Administrative Criminal Law

As already mentioned in **5.1 Key Types of Liability**, administrative fines in Austria are primarily imposed on individuals. Legal entities only bear subsidiary liability if a responsible representative is incapable of paying a fine.

Administrative and Civil Law

Corporations and other entities, as well as individuals, can be liable under administrative and civil law. If environmental damage can be attributed to a legal entity, then notification, prevention, mitigation and remediation obligations must be fulfilled by the legal entity under administrative law. If third parties' rights are affected by environmental damage, entities could also be liable under civil law.

7.2 Environmental Taxes

In Austria, various taxes and fees can be classed as environment-related. However, these taxes are very specific and there is not a holistic approach to environmental taxation. With the pricing of CO₂ emissions, climate protection was anchored in the Austrian tax system in 2021. Currently, a fixed amount of EUR45 is levied in taxes for the emission of one tonne of CO₂. This

price will gradually increase until 2025 and will eventually lead to emissions trading in 2026.

The taxes and fees can be divided as follows.

Energy

- mineral oil tax;
- energy taxes (coal, gas, electricity); and
- emission certificates.

Transportation

- engine-related insurance tax;
- standard consumption tax;
- car registration tax;
- car tax;
- flight tax; and
- road-user tax.

Environmental Pollution

- contaminated site remediation contribution; and
- CO₂ tax.

Resources

- property tax;
- hunting and fishing fees; and
- landscape and nature conservation levy.

7.3 Incentives, Exemptions and Penalties

As explained in **5.1 Key Types of Liability**, violations of environmental regulations lead to legal consequences such as penalties, or measures including the withdrawal of authorisations. Compliance with environmental regulations therefore not only prevents damage to the environment and its protected assets, but also protects against penalties.

The second comprehensive mechanism to steer environmental citizenship is economic instruments such as subsidies, taxes and also regulations on the access to certain funds. Examples

of such subsidies in Austria that aim to protect or improve the environment or contribute to the energy transition are subsidies for PV systems on single-family houses, for electric vehicles, for ecological measures or environmentally friendly building renovations. Examples of environmental taxes are listed in **7.2 Environmental Taxes**. Such measures are, of course, intended to encourage people and companies in Austria to act in a sustainable and environmentally friendly manner.

7.4 Shareholder or Parent Company Liability

Under Austrian criminal and administrative criminal law, parent companies cannot be held accountable for environmental damages or breaches of environmental law caused by their subsidiaries - even in the event of the subsidiary's insolvency. Shareholders can be held liable under criminal and administrative criminal law only for their own crimes and if their roles exceed simple (part) ownership (eg, where a shareholder takes part in the management of, or is employed by, a company).

The liability of shareholders or parent companies under administrative law is only possible in very specific cases. As a rule, only subsidiaries are responsible for environmental damage or breaches of environmental law under administrative law. Therefore, regulatory authorities will usually order the subsidiary to take the required measures to prevent, mitigate or remediate environmental damage, or bear the cost of such measures. Examples of liability of parent companies or shareholders include, but are not limited to:

- liability for historical environmental damages – eg, if the affected assets of the subsidiary are transferred to shareholders or parent compa-

nies (see **6.1 Liability for Historical Environmental Incidents or Damage**); or

- direct involvement in environmental incidents.

Austrian civil law primarily stipulates the liability of the damaging party. The possible liability of parent companies or shareholders depends, above all, on the character of the company primarily responsible for the environmental damage. On one hand, shareholders and parent companies of partnerships (*Personengesellschaften*) bear liability for all obligations of the company exceeding its funds. Therefore, civil claims based on environmental damages against partnerships regularly entail the liability of their shareholders.

The liability of shareholders and parent companies of corporations (*Kapitalgesellschaften*), on the other hand, is limited to very specific (and usually highly theoretical) cases, such as directors' liability – if a shareholder is appointed as a managing director – or blatant under-capitalisation.

7.5 ESG Requirements

The new Corporate Sustainability Reporting Directive (CSRD) has reformed and replaced the previous Non-Financial Reporting Directive (NFRD). It introduces more detailed reporting obligations, which are specified by European standardised reporting standards ("ESRS"). In the future, companies must report on their material sustainability in the sense of "double materiality". This means that they must report both on how sustainability aspects affect their business results, position and performance ("outside-in perspective") and on the impact of these aspects on people and the environment ("inside-out perspective").

Affected companies are those that fulfil two of the following three criteria:

- more than 250 employees;
- a balance sheet total of more than EUR20 million; and
- a turnover of more than EUR40 million.

The directive also applies to all capital market-oriented companies with the exception of micro-enterprises. The CSRD came into effect on 5 January 2023 and must be transposed into national law in Austria within 18 months. It has not yet, however, been implemented in Austria.

The Sustainability and Diversity Improvement Act currently implements only the EU NFRD at national level and obliges certain large companies to provide a more general non-financial reporting than foreseen in the CSRD.

7.6 Environmental Audits

Austrian companies may voluntarily undergo environmental audits, such as those based on the Ordinance on the Voluntary Participation of Organisations in a Community Eco-Management and Audit Scheme (the “EMAS Ordinance”). The corresponding regulations have been implemented in Austria in the Environmental Management Act (*Umweltmanagementgesetz*).

Environmental audits must not, however, be confused with regular and irregular site inspections. Such regular and irregular site inspections are foreseen for every industrial site, ranging from bakeries to airports, and from wood mills to chemical plants, etc.

8. Personal Liability

8.1 Directors and Other Officers

Under the Austrian Administrative Criminal Act (*Verwaltungsstrafgesetz*), the directors and other officers that represent a company are the primary persons responsible for compliance with all the relevant provisions of Austrian administrative law. However, a company can inform the relevant authority of the names of the persons responsible for certain matters. If the announcement to the authority is lawful, only the responsible person is liable to the authority for the matter in question (eg, compliance with waste regulations or compliance with all administrative provisions at a certain site). Given that possible penalties include fines ranging from a few hundred euros to six-figure (or even higher) sums, responsible persons must agree to their appointment.

Liabilities under criminal and civil law usually require culpable conduct. On one hand, the liability of directors and other officers under criminal and civil law is thus limited to their own actions. On the other hand, however, this liability cannot be delegated (unlike responsibility under administrative criminal law).

Since corporations and individuals are equal under administrative law (see 7. **Corporate Liability**), directors and other officers are only liable under administrative law if fault may be attributed directly to them (and not the corporation).

8.2 Insuring Against Liability

Directors’ and officers’ (D&O) insurance policies are common in the Austrian insurance market. However, certain insurers will exclude certain liabilities/penalties based on the terms of the insurance and the nature of the misconduct. Therefore, certain liabilities/penalties (eg, for damages caused intentionally or by gross

negligence) could ultimately turn out not to be insurable.

9. Insurance

9.1 Environmental Insurance

A wide range of environmental insurance is offered in the Austrian insurance market. The most common policies cover incidental environmental damages and related liabilities under civil and administrative law (see **5.1 Key Types of Liability**; for D&O policies, see **8.2 Insuring Against Liability**). As usual, the specific risks covered depend on the terms of the policy. Typically included are:

- costs for remediation obligations;
- damage claims; and
- legal expenses.

Environmental damages resulting from intentional breaches of environmental law usually cannot be insured. Most policies cover only cases of (very) mild negligence. Environmental damages resulting from the operation of facilities, for example, may only be covered if all the obligations under environmental law – such as maintenance obligations – and the necessary permits were observed.

10. Lender Liability

10.1 Financial Institutions/Lender Liability

Austrian law does not stipulate liability for environmental damage or breaches of environmental law solely on the basis of business relations with the offender. However, if the business relationship encompasses co-management rights or the transaction/ownership of assets, the finan-

cial institutions or lenders may be liable (see **6.1 Liability for Historical Environmental Incidents or Damage** and **7. Corporate Liability**).

10.2 Lender Protection

Financial institutions or lenders can avoid liability risk by abstaining from (co-)management rights and the ownership of assets. If (co-)management rights and/or ownership of assets are transferred, (financial) environmental due diligence is common (see **18.1 Environmental Due Diligence**).

11. Civil Liability

11.1 Civil Claims

The most important legal basis of civil liability for environmental damages is the Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch*, or ABGB). However, specific liability provisions can also be found in other acts – for example, in the Water Rights Act, the Forest Act, the Genetic Engineering Act 1994 (*Gentechnikgesetz*) and the Nuclear Liability Act 1999 (*Atomhaftpflichtgesetz*). Finally, certain contracts may stipulate some form of civil environmental liability (eg, contracts with protective effects in favour of third parties).

Essential Legal Bases for Civil Claims

Neighbourhood law

Neighbourhood law aims to achieve an appropriate balance between conflicting interests of use. Under neighbourhood law, the exercise of the property rights or (plant) operating rights must not lead to an unreasonable impairment of the rights and interests of others. The Austrian Civil Code thus provides for defences against impermissible emissions (ie, those that exceed emission thresholds), negative emissions (eg, deprivation of light or air) or certain emissions from

licensed installations (ie, a form of compensation for permitted emissions).

General liability for fault

General liability for fault provides for a legal responsibility under civil law for the illegal and culpable violation of legal assets or rights of third parties.

Strict liability

According to the Austrian strict liability system, the injuring party is liable for damage resulting from a permitted hazard that they were able to control. Under this regime, civil claims are possible – for example, for certain damages from permitted water utilisation plants or nuclear facilities.

11.2 Exemplary or Punitive Damages

The concept of punitive damages does not exist in Austrian law. Neither exemplary damages nor punitive damages can be awarded. As far as is apparent, there is currently no need (and no relevant call from stakeholders) to introduce so-called punitive damages in Austria.

11.3 Class or Group Actions

In Austria, class or group actions under civil law only occur in the form of an accumulation of actions, which is known as a “class action Austrian-style”, whereby the claims of many affected parties are transferred to a single plaintiff by means of assignments. In addition, there is the possibility of filing many individual actions or collective actions by qualified organisations (mostly in consumer cases).

Under constitutional and administrative law, class or group actions - such as the cases presented in **11.4 Landmark Cases** - are (strictly speaking) also individual actions that are aggregated by the courts owing to the similar facts.

11.4 Landmark Cases

In the wake of the Volkswagen “diesel scandal” concerning manipulated emission control systems, a class action lawsuit was filed in Austria against Volkswagen by the Association for Consumer Information (*Verein für Konsumenteninformation*, or VKI). This lawsuit was joined by around 10,000 individuals. After years of dispute, an out-of-court settlement was reached, according to which the affected individuals are entitled to a total compensation of EUR23 million (an amount of about EUR2,300 for each person concerned). Additionally, numerous individual lawsuits are still pending or have already been concluded in Austrian courts, in which some individuals have also been awarded a higher amount of individual compensation. The international nature of the case makes it special: according to Volkswagen, 11 million vehicles worldwide were affected by the diesel scandal.

Climate-Damaging Tax Provisions

A further case, which could have become a landmark, concerns the individual applications filed in February 2020 by more than 8,000 people (and by various environmental organisations such as Greenpeace) against specific climate-damaging provisions on tax breaks for kerosene and air travel. The court was asked to examine whether the climate-damaging provisions of the Value Added Tax Act and the Mineral Oil Tax Act violate basic and human rights by actively promoting climate-damaging behaviour. The case was rejected by the Constitutional Court. Despite the rejection, the motions clearly show the direction for future lawsuits.

Schedule for Backing Out of Using Fossil Fuels

In May 2021, an environmental NGO (together with several individuals) applied for an ordinance from the Federal Minister for Digitalisation and

Business Location to govern the schedule for backing out of using fossil fuels. In August 2021, the minister decided that the applicants had no right to such an ordinance. The appeal filed by the NGO against the decision was dismissed by the Vienna Administrative Court. Currently, further appeals to the Constitutional and High Administrative Court are pending.

Extension of Rights Under the Aarhus Convention

In connection with the Aarhus Convention, the Austrian High Administrative Court – in line with the ECJ – extended rights for environmental organisations in environment-related procedures. In a nutshell, the complex legal situation can be described as follows.

In Austria, participation in an administrative procedure is a requirement for challenging administrative decisions, and acknowledged environmental organisations and, under certain conditions, other members of the public have participation rights in procedures where European environmental law could be affected. This has led to numerous adjustments in affected Austrian laws, such as the Water Rights Act, the Waste Management Act, the Air Pollution Control Act, the Forest Act and the Nature Conservation Act. Recent decisions by the High Administrative Court have also extended these rights retroactively.

12. Contractual Agreements

12.1 Transferring or Apportioning Liability

In principle, liability for incidental environmental damages and breaches of environmental law is borne by the person responsible for the incident or the breach (see 5.1 Key Types of Liabil-

ity and 7.1 Liability for Environmental Damage or Breaches of Environmental Law). However, Austrian law provides for several options to transfer or apportion such liabilities.

The most prominent example is the appointment of responsible persons for certain matters (see 8.1 Directors and Other Officers). If a responsible person is lawfully appointed by the authority, this person alone is liable for breaches of administrative criminal law within their responsibilities. The responsibility under criminal, civil and administrative law cannot be transferred under this regime.

Civil liability can be transferred or apportioned by means of contracts if the transfer or apportion is not *contra bonos mores*. According to Austrian jurisprudence, liabilities for gross negligence are – in principle – not transferable. Also, the (ultimate) bearing of fines under criminal and administrative criminal law is *contra bonos mores* if the contract is signed before the event giving rise to liability.

Indemnities are common in Austria and in some cases are explicitly mentioned in legal acts (eg, in the Water Rights Act for damages to fishing rights). Legal limits to indemnities include – but are not limited to – general immorality (*Sittenwidrigkeit*), disproportionality and bribery (eg, in the case of payments to municipalities or persons holding public office).

In short, Austrian law allows for different options to transfer or apportion liabilities under civil and administrative criminal law. Liabilities under criminal and administrative law, however, usually cannot be transferred.

12.2 Environmental Insurance See 9.1 Environmental Insurance.

13. Contaminated Land

13.1 Key Laws Governing Contaminated Land

“Polluter Pays” Principle

Regulations concerning contaminated land can be found in numerous laws in Austria, particularly the Water Rights Act, the Waste Management Act, the Trade Act and the Act on the Remediation of Contaminated Sites (*Altlastensanierungsgesetz*, or ALSAG). Under all acts, the “polluter pays” principle applies. Thus, the primary responsibility for remedying contamination lies with the polluter.

Subsidiary Liability

However, there are also several provisions for the subsidiary liability of the property owner. This subsidiary liability may arise if, for example, the person who is primarily obliged cannot be identified or is no longer legally able to carry out the remediation. This liability may also affect legal successors, in which case it does not matter how many owners lie, between the historical owner and the current owner.

Legislative Provisions

The Water Rights Act is the most important basis for initiating remediation or safety measures. In line with the general concerns about keeping bodies of water (especially groundwater) clean, under the Water Rights Act permits are required where bodies of water might be impacted in a way that impairs their quality. In the absence of such permits, or if the source of danger is in itself sensitive, the water authority must issue a remediation order. Very similar provisions can be found in the Waste Management Act and the Environmental Liability Acts. Therefore, in many cases, remediation measures are prescribed on more than one legal basis.

ALSAG

The Act on the Remediation of Contaminated Sites aims to:

- identify contaminated sites that pose a significant risk to human health or the environment; and
- finance and implement appropriate remediation measures.

ALSAG lays down the framework for risk assessment procedures and the conditions for issuing remediation orders in the case of contaminated sites. In addition, a so-called contaminated site remediation contribution is levied for landfill deposits and incineration of waste.

In Austria, contaminated land is usually classified in one of the following three categories.

- “Contaminated sites” refers only to those areas that were contaminated before 1989 and are registered as contaminated sites in the register of contaminated sites. Since these old deposits and old sites pose a significant risk to human health or the environment, they must either be secured or remediated - or be under observation following remediation.
- “Suspected contaminated sites” are those areas that have been reported by the provinces (*Länder*) to the federal government but are yet to be identified. They are listed in the register of suspected contaminated sites.
- “New damage” refers to contamination that occurred after 1989. Critical deposits and facilities are subject to strict environmental monitoring – the aim of which is to identify, prevent, reduce and remediate environmental problems promptly.

Changes in ALSAG regulations in 2025

ALSAG was amended in 2024, with the majority of the provisions coming into force on 1 January 2025. Changes include the cancellation of subsidiary property owner liability and a value compensation for properties that are being cleaned up by the federal government.

13.2 Clearing Contaminated Land

Regulations concerning contaminated land can be found in numerous laws in Austria, particularly the Water Rights Act, the Waste Management Act, the Trade Act and ALSAG. Under all these laws, the “polluter pays” principle applies. Thus, the primary responsibility for remedying contamination lies with the polluter.

There are also several provisions for the subsidiary liability of the property owner, although these will be amended in 2025 (see **13.1 Key Laws Governing Contaminated Land**).

13.3 Determining Liability

If more than one party has contributed to the contamination, every party is – in principle – liable for their share. However, in relation to third parties (including authorities) this liability is a collective liability. An injured party or the authority may thus demand compensation in full from any of the parties responsible for the contamination. If one of the responsible parties covers such demands, they may still demand compensation from the other parties.

13.4 Proceedings Against Polluters

The prerequisites to bringing proceedings against polluters/landowners/occupiers are generally very low. Depending on the type of proceedings (see **5.1 Key Types of Liability**), some start as soon as a complaint is brought. For other proceedings, the right to bring an action may include ownership of (or another in rem right

over) the contaminated land and the usual prerequisites for an action, such as a certain maturity, legal capacity, etc.

13.5 Investigating Environmental Accidents

The Austrian legal system provides for several ways of prosecuting and investigating damage to the environment.

For example, both the Federal Environmental Liability Act (B-UHG) and the environmental liability laws of the federal states allow affected persons and NGOs to file a complaint with the competent authority if environmental damage under the environmental liability laws has been caused. If an environmental complaint is lodged, the competent authority must take appropriate measures to prevent further damage to the environment or to impose measures to minimise such damage.

Within the framework of supervisory law, persons also have the possibility to suggest measures by means of a supervisory complaint to the competent supervisory authority.

If a complaint is filed against a party responsible for environmental damage, the public prosecutor's office may also intervene if a criminal offence under criminal law has been committed.

Ultimately, decisions on the prosecution of environmental damage are the responsibility of the courts that have subject-matter and local jurisdiction.

14. Climate Change and Emissions Trading

14.1 Key Policies, Principles and Laws

Austria is a member of the Paris Convention on Climate Change (“the Convention”), as is the EU. Therefore, the Convention’s objectives - such as keeping anthropogenic global warming under 2°C - also apply to Austria. The EU climate and energy framework outlines EU-wide targets for 2030, including that:

- the share of renewable energy will be increased to at least 42.5% of (total) final energy consumption by 2030; and
- the member states are invited to work towards a non-binding target of 45% renewables in final energy consumption.

In the heating and cooling sector, three sub-targets are envisaged:

- The share of renewables in gross final national energy consumption will be increased by at least 0.8% per year in the 2021–2025 conversion period and by at least 1.1% per year in the 2026–2030 conversion period, compared to the share in 2020.
- Austria will “endeavour” to further increase the share of renewables in gross final national energy consumption by a (non-binding) target of 1.0% for the period 2021–2025 and 0.7% for the period 2026–2030, compared to the share in 2020.
- Also, the share of renewables and waste heat and cooling will be increased by 2.2% per year in the 2021–2030 period, compared to the share in 2020.

In the transport sector, the share of renewables will reach at least 29% of the final energy consumption or the greenhouse gas intensity of

energy used in this sector will be reduced by at least 14.5%. In addition, the share of advanced biofuels and biogas in the energy supply of transport will be at least 1% by 2025 and at least 5.5% by 2030 (including at least 1% renewable fuels of non-biogenic origin).

In the industrial sector, the aim is an annual increase in the use of renewable energies of 1.6% (non-binding target). The share of renewable hydrogen and other renewable non-biological fuels on the other hand must increase to 42% of the total use of these substances by 2030. By 2035, this share must increase to 60% of non-biological fuels used in the industrial sector.

For the buildings sector, the share of renewable energy in heating and cooling buildings will rise to at least 49% in Europe by 2030.

By 2050, the emission and reduction of greenhouse gases in the EU must balance each other out (“climate neutrality”).

The main national laws concerning these methods are the Emission Certificate Act (*Emissionszertifikatengesetz*, or EZG), the Climate Protection Act (*Klimaschutzgesetz*, or KSG) and the Federal Energy Efficiency Act (*Bundes-Energieeffizienzgesetz*, or EEffG).

The key principles of the Austrian climate strategy are:

- expansion of the share of renewable energy;
- increasing energy efficiency;
- pricing of CO₂ emissions;
- use of renewable hydrogen in the industry sector;
- transformation to a “bio-economy”;
- decarbonisation of the transport sector;

- thermal-energetic renovation of building stock as well as improved efficiency of heating systems; and
- development of strategies for nutrition, consumption and tourism.

A federal tax reform was passed in 2021 that aims to realign the tax system to reflect greater environmental accuracy. From an environmental perspective, the pricing of CO₂ is significant. Since January 2023, the emission of one tonne of CO₂ has been subject to a tax of EUR32.50. This tax rate increased to EUR45 in 2024 and will be further increased to EUR55 in 2025 when it will be transferred to the EU emissions trading system II (EU ETS II). The exact design of the market system is still being developed.

14.2 Targets to Reduce Greenhouse Gas Emissions

The current Austrian government surpassed the EU legal requirements by passing a new climate strategy (current status: August 2024), which provides in particular the following climate targets:

- reducing non-ETS emissions by 48% (compared to 2005) by 2030;
- coverage of 100% of Austrian electricity consumption with renewable energy by 2030;
- achieving climate neutrality by 2040 (2050 at the latest);
- an increase in net carbon storage by 2030 by around 880,000 tonnes of CO₂ compared to the base period 2016–2018; and
- the avoidance of the combustion of heating oil, coal and fossil gas for the provision of heating and cooling in the building sector as far as possible by 2040.

Changes have recently occurred in the area of EU emissions trading. While a reduction target of

43% by 2030 (compared to 2005) was set at the EU level for EU emissions trading in 2018, this target has now been raised to 62%, as a result of the amendment to the Emissions Trading Directive (*Emissionshandelsrichtlinie*) through the “Fit for 55”-package. The annual reduction path will be 4.3% from 2024 and will be increased to 4.4% from 2028.

The national administrative framework for implementing the new regulations was created in Austria through an amendment to the Emission Certificate Act.

15. Asbestos and Polychlorinated Biphenyls (PCBs)

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs

Asbestos

As soon as the harmfulness of asbestos was recognised, certain asbestos products were banned in Austria (as early as 1978). In 1990, it was prohibited (with only a few exceptions) to place objects containing asbestos on the market. Since 2004, the sale and use of objects containing asbestos has been generally prohibited by the Chemicals Prohibition Ordinance (*Chemikalien-Verbotsverordnung*, or ChemVerbotsV). Since 2007, all asbestos waste has had to be collected, treated and disposed of as hazardous waste. Even the import of asbestos waste into Austria is prohibited.

Built-in products containing asbestos should not be removed without cause. Installed asbestos-cement products do not automatically endanger the health of residents. However, either an assessment of the condition of the building material or a comparison of indoor/outdoor air

pollution can serve as the “cause” required for the removal of built-in asbestos products.

During removal, asbestos-containing products must be dismantled and stored in separate collection containers in order to prevent the release of asbestos fibres, while complying with employee protection regulations.

The protection of workers against risks relating to asbestos exposure in the workplace is regulated by the Workers’ Protection Act 1994 (*ArbeitnehmerInnenschutzgesetzes*, or ASchG), which provides – among other things – for the use of personal protective equipment during renovation work. Additionally, specific ordinances provide for:

- limit values;
- suitability;
- follow-up examinations in the case of asbestos exposure; and
- the labelling of asbestos products in workplaces.

Asbestos waste may only be passed on to an authorised waste collector in compliance with the provisions of the Waste Documentation Ordinance (*Abfallnachweisverordnung*, or ANV). According to the Landfill Ordinance (*Deponieverordnung*, or DVO), asbestos waste – including asbestos-cement waste – may only be deposited in landfills for non-hazardous waste under very specific conditions.

Polychlorinated Biphenyls (PCBs)

The production, marketing, and use of PCBs, as well as the production and marketing of finished products containing PCBs, are prohibited in Austria. There are strict labelling requirements, reporting obligations, and usage regulations for electrical equipment containing PCBs in accord-

ance with the provisions of the Ordinance of the Federal Minister for Environment, Youth, and Family on the Prohibition of Halogenated Biphenyls, Terphenyls, Naphthalenes, and Diphenylmethanes (*Verordnung über das Verbot von halogenierten Biphenylen, Terphenylen, Naphthalinen und Diphenylmethanen*).

Strict rules also apply to the disposal of PCB-containing waste according to the provisions of the Waste Management Act. PCB-containing waste must be promptly handed over to an authorised waste collector or processor and thermally disposed of at approved facilities. The extraction from other materials for the purpose of reuse is not permitted. Furthermore, PCB-containing devices that are components of other devices must be removed and collected separately as soon as the respective devices are decommissioned, prepared for reuse, recycled, otherwise recovered, or disposed of – provided this can be carried out with reasonable effort. In waste management reports and records, the PCB content in the waste must be specified.

Regarding potential violations of the waste management regulations, see **5.1 Key Types of Liability** and **7.1 Liability for Environmental Damage or Breaches of Environmental Law**.

16. Waste

16.1 Key Laws and Regulatory Controls

The European Waste Framework Directive (2008/98/EC as amended) is implemented by the Austrian Waste Management Act. It covers a broad range of waste-related regulations, including recycling and recovery targets, definitions, treatment obligations, permitting, and waste shipment regulations.

Key regulatory controls comprise not only the permitting of collection and treatment of waste activities, but also the building and operation of waste treatment (and other waste-related) plants. Documentation requirements are generally vast and may force stakeholders to implement extensive record-keeping systems. Specific regimes cover (among other things) the prerequisites for:

- the operation of collection and recovery systems; and
- the notification of waste shipments.

In the area of waste management, a “circular economy package” (*Kreislaufwirtschaftspaket*) was passed in an amendment to the Waste Management Act in order to implement an EU directive. Among other things, this standardises extended producer responsibility measures to reduce disposable plastic packaging and bans the import of certain wastes for landfilling.

It should be noted that key regulations are not limited to the Waste Management Act. In many areas of waste law, specific ordinances have been issued that are based on the Waste Act. Those ordinances govern (among other things):

- packaging and packaging waste;
- batteries;
- waste electronic and electrical equipment;
- landfills;
- waste labelling;
- the deposit system newly introduced for 2025; and
- waste incineration.

16.2 Retention of Environmental Liability

Many cases of corporate environmental liability can be attributed to missing or false information about waste materials. Compliance with the documentation obligations is therefore a

huge step towards preventing liability. A second main source of liability is the illegal deposition or export of waste. Waste-handlers would therefore be well advised to inspect the authorisation of the consignee.

It is worth highlighting that Austrian waste law requires the presence of a person with the necessary skills for the handling of waste in companies that collect and treat waste. In other companies, responsibilities (and therefore liabilities) under waste law may be delegated to responsible persons under the Administrative Criminal Code (see **8.1 Directors and Other Officers**).

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

The obligations in relation to design, take-back, recovery, recycling and disposal of goods are scattered across several legal areas and even more legal acts in Austria. The most prominent provisions, which can be found in food, machine, pressure equipment and waste law, aim to:

- reduce the environmental impact of goods; and
- regulate ecological design, the use of chemicals, and take-back, recovery or recycling obligations.

Since there are no general obligations that apply to all goods, the specific obligations for goods must be determined on a case-by-case basis.

16.4 Rights and Obligations Applicable to Waste Operators

The Austrian regulations on waste management are based on the European Waste Framework Directive (2008/98/EC as amended). The key laws and regulations applicable to waste operators are listed in detail in **16.1 Key Laws and**

Regulatory Controls. As explained in that section, the key regulatory controls comprise not only the permitting of collection and treatment of waste activities, but also the construction and operation of waste treatment (and other waste-related) plants. Documentation requirements are generally vast and may force stakeholders to implement extensive record-keeping systems.

The consequences of breaching such obligations have already been mentioned in **5.1 Key Types of Liability**.

17. Environmental Disclosure and Information

17.1 Self-Reporting Requirements

See 6.2 Reporting Requirements.

17.2 Public Environmental Information

See 5.2 Disclosure.

17.3 Corporate Disclosure Requirement

In Austria, large corporations, groups of companies and companies of public interest are required to include the information necessary to understand the impact of their activities in their annual management reports. This information should cover:

- environmental, social and labour issues;
- respect for human rights; and
- the fight against corruption and bribery.

Many national laws impose a wide range of reporting and verification obligations on operators (eg, of landfills, hydroelectric plants, industrial installations, etc). Environmental permits may also require recurring information to be submitted to the competent public authorities regarding:

- the environmental status of installations; and
- compliance with the provisions of the relevant permit.

17.4 Green Finance

Green finance agreements are, like traditional financing agreements, entered into between private parties (eg, financial institutions, banks and companies etc). Depending on the specific green finance agreement, the parties undertake (by way of contractual obligations) to fulfil key performance indicators which are currently deemed relevant in the field of green finance due to market standard or applicable legislation. Due to the private nature of green finance agreements, monitoring and enforcement are primarily in the hands of the parties, who in some instances may appoint ESG rating agencies for the monitoring of key performance indicators, and ultimately, to enforce their rights through courts or arbitration bodies.

18. Transactions

18.1 Environmental Due Diligence

Environmental due diligence is typically conducted on M&A, finance and property transactions with targets in Austria. The scope and depth of the due diligence depend on the parties' guidelines and the type of target. Zoning and permit reviews - as well as all aspects of contamination - are typically within the scope of real estate transactions. If the target is an existing company, further aspects such as concessions, permissions and production-related topics can be relevant.

In general, the focus in environmental due diligence is on:

- the historical and current use of the site(s);

- the product(s), production process(es) and related environmental risks;
- the site-related aspects and requirements (eg, the zoning and development plan, contaminations, war relics, and asbestos);
- the existence of - and compliance with - relevant permits, approvals and licensing requirements;
- the identification of completed, pending or announced authority enforcement actions; and
- the quantification of relevant risks and risk mitigation recommendations.

18.2 Disclosure of Environmental Information

There is no general legal obligation for a seller to disclose any environmental information to a purchaser. However, a seller must consider that potential future claims by a purchaser are less likely to succeed if the purchaser was precisely aware of the risks at the time of purchase.

Furthermore, a certain degree of environmental disclosure makes sense, as a total absence of disclosure could arouse the purchaser's suspicion. Disclosure would also be advisable if the purchaser explicitly asks for certain information.

18.3 Key Issues in Environmental Due Diligence

Environmental due diligence helps stakeholders make informed decisions, manage risks and ensure compliance with environmental regulations in the form of proactive environmental risk management.

The key issues – and therefore the focus points – have already been mentioned in **18.1 Environmental Due Diligence**.

CANADA

Law and Practice

Contributed by:

Laura Duke, Christine Kowbel, Emma Russell and Will Shaw
Lawson Lundell LLP



Contents

1. Regulatory Framework and Law p.42

1.1 Environmental Protection Policies, Principles and Laws p.42

2. Enforcement Authorities and Mechanisms p.42

2.1 Regulatory Authorities p.42

2.2 Co-operation p.43

3. Environmental Protections p.43

3.1 Protection of Environmental Assets p.43

3.2 Breaching Protections p.43

4. Environmental Incidents and Permits p.43

4.1 Investigative and Access Powers p.43

4.2 Environmental Permits/Approvals p.43

4.3 Regulators' Approach to Policy and Enforcement p.44

4.4 Transferring Permits/Approvals p.45

4.5 Consequences of Breaching Permits/Approvals p.45

5. Environmental Liability p.45

5.1 Key Types of Liability p.45

5.2 Disclosure p.45

6. Environmental Incidents and Damage p.46

6.1 Liability for Historical Environmental Incidents or Damage p.46

6.2 Reporting Requirements p.46

6.3 Types of Liability and Key Defences p.46

7. Corporate Liability p.47

7.1 Liability for Environmental Damage or Breaches of Environmental Law p.47

7.2 Environmental Taxes p.47

7.3 Incentives, Exemptions and Penalties p.47

7.4 Shareholder or Parent Company Liability p.47

7.5 ESG Requirements p.47

7.6 Environmental Audits p.47

8. Personal Liability p.48

8.1 Directors and Other Officers p.48

8.2 Insuring Against Liability p.48

9. Insurance p.48

9.1 Environmental Insurance p.48

10. Lender Liability p.48

10.1 Financial Institutions/Lender Liability p.48

10.2 Lender Protection p.49

11. Civil Liability p.49

11.1 Civil Claims p.49

11.2 Exemplary or Punitive Damages p.49

11.3 Class or Group Actions p.49

11.4 Landmark Cases p.49

12. Contractual Agreements p.50

12.1 Transferring or Apportioning Liability p.50

12.2 Environmental Insurance p.50

13. Contaminated Land p.50

13.1 Key Laws Governing Contaminated Land p.50

13.2 Clearing Contaminated Land p.50

13.3 Determining Liability p.51

13.4 Proceedings Against Polluters p.51

13.5 Investigating Environmental Accidents p.51

14. Climate Change and Emissions Trading p.51

14.1 Key Policies, Principles and Laws p.51

14.2 Targets to Reduce Greenhouse Gas Emissions p.51

15. Asbestos and Polychlorinated Biphenyls (PCBs) p.53

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs p.53

16. Waste p.54

16.1 Key Laws and Regulatory Controls p.54

16.2 Retention of Environmental Liability p.54

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods p.55

16.4 Rights and Obligations Applicable to Waste Operators p.55

17. Environmental Disclosure and Information p.55

17.1 Self-Reporting Requirements p.55

17.2 Public Environmental Information p.56

17.3 Corporate Disclosure Requirement p.56

17.4 Green Finance p.56

18. Transactions p.56

18.1 Environmental Due Diligence p.56

18.2 Disclosure of Environmental Information p.57

18.3 Key Issues in Environmental Due Diligence p.57

Lawson Lundell LLP is one of the largest and most experienced law firms in Western Canada. It is a leading, full-service business law firm, with more than 200 lawyers located in offices in Vancouver, Calgary, Kelowna and Yellowknife. The environmental practice group comprises 27 lawyers, who provide expertise to clients in a wide range of industries, including banking, construction, energy, forestry, government,

mining, real estate, transportation, and utilities. The team provides advice and assistance to clients in all aspects of environmental law, including commercial transactions, environmental management systems, environmental project assessment, regulatory and licensing requirements, contaminated sites, reclamation, closure and remediation, and environmental offences.

Authors



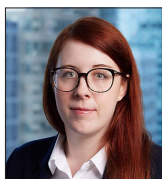
Laura Duke is a partner in Lawson Lundell's Vancouver office and has experience in environmental law, indigenous law, civil litigation, administrative law and constitutional law. She

advises clients in a range of industries – including infrastructure, mining, energy, forestry and real estate – on environmental assessments, regulatory approvals, land use, project development, indigenous consultation, and contaminated sites. Laura is experienced in guiding clients through a variety of environmental assessment processes and has extensive experience with projects in the marine environment.



Christine Kowbel is a partner at Lawson Lundell, where she practises environmental and indigenous law. Christine advises on major project development, environmental

assessment, permitting, operational and compliance matters, as well as the acquisition and sale of industrial projects. She provides specialist mining industry advice on the permitting and regulatory aspects of the exploration, development, operation and closure of mining projects. Other clients include energy, forestry and other natural resource sector companies, as well as banking institutions and real estate developers.



Emma Russell is an associate in the Vancouver office of Lawson Lundell and a member of the firm's environmental and regulatory group. Emma advises and represents clients on a wide

range of issues, with experience in environmental compliance and permitting, jurisdictional disputes, contaminated sites, the duty to consult, regulatory prosecutions, the regulation of public utilities, and the economic development of reserve lands. She has appeared at all levels of court in British Columbia (BC) and before various administrative bodies, including the BC Utilities Commission and the BC Environmental Appeal Board.



Will Shaw is a partner in the environmental and regulatory group at Lawson Lundell, where his practice focuses on environmental, public utility and regulatory law. Will has assisted

proponents of mining, energy and infrastructure projects in navigating the environmental assessment process. He also assists clients in developing and implementing environmental compliance programmes in regulated areas. Will has worked on due diligence with regard to potential environmental liabilities in major corporate transactions and has represented defendants in regulatory enforcement matters ranging from environmental offences and occupational health and safety matters to the sale of restricted products.

Lawson Lundell LLP

Suite 1600 Cathedral Place
925 West Georgia Street
Vancouver
British Columbia
V6C 3L2
Canada

Tel: +1 604 685 3456
Fax: +1 604 669 1620
Email: inquiries@lawsonlundell.com
Web: www.lawsonlundell.com



1. Regulatory Framework and Law

1.1 Environmental Protection Policies, Principles and Laws

In Canada, all levels of government share responsibility for the protection of the environment – federal (national), provincial/territorial (regional), municipal (local), and indigenous (over reserve lands and certain lands granted pursuant to treaty agreements).

In general, federal laws apply to projects and operations on federal lands or in relation to certain subjects within federal jurisdiction, such as fisheries, ports and federal works and undertakings (often projects crossing multiple provinces/territories – for example, interprovincial pipelines or railways). Key federal laws governing environmental protection include:

- the Canadian Environmental Protection Act 1999;
- the Fisheries Act;
- the Impact Assessment Act;
- the Migratory Birds Convention Act 1994;
- the Transportation of Dangerous Goods Act;
- the Species at Risk Act; and
- the Canadian Navigable Waters Act.

Provincial/territorial laws generally apply only to those projects or operations located within the specific province or territory. Examples of legislation includes British Columbia's Environmental Management Act, Ontario's Environmental Protection Act and Alberta's Environmental Protection and Enhancement Act. Practically speaking, owing to Canada's division of powers, most businesses will be primarily regulated by provincial or territorial environmental law rather than by federal law.

Municipalities have narrower jurisdiction to enact environmental laws within their boundaries, as – unlike provincial and federal governments, which are provided legislative authority in Canada's constitution – municipalities are only allowed to pass by-laws where specifically authorised to do so under statute. The specific details of these powers vary by jurisdiction; however, in general, municipalities often regulate in respect of waste disposal and hazardous materials, building codes, and business licences.

Increasingly, First Nations are also taking an active role in regulating with regard to the environment on reserve lands and sometimes on lands granted pursuant to treaties with the federal and provincial/territorial governments. This jurisdiction may arise either independently or through partnerships with provincial or federal authorities (eg, via stewardship agreements).

2. Enforcement Authorities and Mechanisms

2.1 Regulatory Authorities

The key federal regulatory authorities in Canada include:

- Environment and Climate Change Canada;
- Fisheries and Oceans Canada;
- the Impact Assessment Agency of Canada;
- Crown-Indigenous Relations and Northern Affairs Canada;
- Transport Canada;
- Parks Canada; and
- Natural Resources Canada.

Other key regulatory authorities exist in each province or territory – many of which will co-ordinate regulation and enforcement with their federal counterparts. This includes, for example,

provincial Ministries for the environment or for the protection of wildlife, as well as regulatory agencies such as provincial impact assessment agencies and provincial enforcement agencies.

2.2 Co-operation

The federal and provincial regulatory bodies often co-operate with one another. In the context of impact assessments, this typically occurs through equivalency agreements or similar mechanisms. In the context of enforcement, joint inspections or investigations may occur, as well as co-ordination on prosecutions.

There are also partnerships between federal and provincial governments and First Nations across Canada.

3. Environmental Protections

3.1 Protection of Environmental Assets

In general, environmental assets are protected through statutory law and associated regulations. Activities that may harm those assets are typically prohibited unless authorised through a licence or permit, which may include requirements to reduce the likelihood of harm, monitor whether harm is occurring, and mitigate any harm that occurs.

3.2 Breaching Protections

Consequences for breaching environmental statutes and regulations may include compliance orders, administrative penalties, fines and even imprisonment. Many statutes also allow for creative sentencing, which can include measures customised to the particular circumstances of a case.

In general, acting outside the scope of a permit, authorisation or licence will constitute a

breach of the underlying statutory scheme. As such, such actions will potentially be subject to the above-mentioned penalties, as well as the potential revocation of the permit, authorisation or licence.

4. Environmental Incidents and Permits

4.1 Investigative and Access Powers

Most regulatory authorities employ officers or other enforcement personnel, who are often granted the power to conduct inspections and investigations. These inspections and investigations may be routine or occur in response to suspected regulatory breaches. By way of example, a federal fisheries officer may enter and inspect a facility or vessel if they have reasonable grounds to believe that federal fishery regulations are being breached, and during this inspection may open containers, examine fish or take samples of them, conduct tests, or take copies of documents. The scope of an officer's search powers depends on the enabling statute and in some cases search warrants will be required.

The level of enforcement for the breach of environmental laws varies according to the severity of the incident, as well as the government agency involved and the underlying statutory scheme. Regulatory authorities often prefer to seek compliance with environmental law through voluntary agreements to address and mitigate the harm caused rather than escalating enforcement mechanisms.

4.2 Environmental Permits/Approvals

Environmental permits are commonly issued by federal and/or provincial/territorial governments, with the specific permit required varying based on the nature and location of the activity at issue.

As part of increasing governance and stewardship over the environment, some First Nations also have their own permitting process or may have a process co-ordinated with the federal or provincial governments. Some activities will also require municipal or regional permits and authorisations. Environmental permits are generally obtained by applying to the appropriate authority with responsibility over the permitting scheme.

The same project may require multiple permits from different government authorities, including across multiple levels of government. By way of example, work on or near a fish-bearing waterway may require a permit under the federal Fisheries Act from Fisheries and Oceans Canada, as well as an authorisation from the appropriate provincial authority (eg, in British Columbia, it may also require a permit under the Water Sustainability Act). In some circumstances, the various environmental permits required for a project may be obtained through a harmonised process, but this is not always the case. Depending on the nature of the project, a federal or provincial environmental assessment (or both) may be required before permits can be issued.

Environmental permits are usually time-limited, but the duration will depend on the nature of the activity being permitted. Permits can often be renewed, but an additional regulatory process may be required to secure renewal. Permits typically contain conditions that accord with the requirements of the legislation under which they are granted.

In many cases, the applicable legislation explicitly states that environmental permits will only be granted to individuals or businesses that can show they are qualified to hold them. As an example, the federal Nuclear Safety and Con-

trol Act forbids transfers of licences unless the licensee can show that they are authorised to carry out the particular activity granted under the licence.

Some, but not all, permitting regimes will provide for appeal rights if a permit is denied or if the permit-holder is not satisfied with the permit conditions. Typically, such appeals are made to a quasi-judicial authority (often an administrative tribunal) or a member of the federal government (a minister). The decision to grant or refuse a permit may also be reviewable by the courts through an application for judicial review.

Where indigenous rights have the potential to be impacted by a permit or authorisation, the federal and provincial governments have a constitutional obligation to consult with impacted indigenous groups prior to issuance. Although this legal obligation rests with the government, consultation is often initiated by project proponents in order to avoid delays in permitting. The extent of the duty to consult has been the subject of considerable litigation in Canada and remains an area of ongoing legal development.

4.3 Regulators' Approach to Policy and Enforcement

In general, Canada is moving towards a more proactive approach to enforcing environmental policy - although this depends in large part on the specific agency responsible. Environmental prosecutions are increasingly common and many agencies publish enforcement decisions as a form of both specific and general deterrence. Penalties are often increased for repeat offenders, whereas penalties may be reduced for those who co-operate with enforcement activities and voluntarily remediate any environmental harm caused.

4.4 Transferring Permits/Approvals

Most environmental permits can be transferred, but governmental consent may be required to do so. The permit transfer process can be lengthy in some circumstances and may trigger consultation obligations with impacted indigenous groups, and may depend on the manner in which the proposed acquisition is structured. Usually, a change of control will not trigger the need for governmental consents, but the language of the permit and the underlying legislation should be carefully reviewed to make that determination. In some cases, transfers may be prohibited unless the transferee can show that they are authorised to carry out the particular activity granted under the licence.

4.5 Consequences of Breaching Permits/Approvals

The consequences for breaching an approval or permit are set out in the governing legislation; additional consequences may also be set out in the authorisation or permit itself. Consequences can include compliance orders, suspension or revocation of the approval or permit, administrative penalties, fines and imprisonment.

See also 3.2 Breaching Protections.

5. Environmental Liability

5.1 Key Types of Liability

The key types of liability faced by project proponents or operators in Canada for environmental damage or breaches of environmental law include monetary fines, remediation orders, the loss of environmental permits, and prosecution. Where environmental harm can be pursued through civil action (eg, with regard to contamination), there is also a risk of court-ordered damages.

Environmental legislation typically includes a provision that makes it an offence to fail to comply with the legislation. Environmental legislation also often provides that any non-compliance occurring over time constitutes a separate offence for each day the breach occurs. The result is that offenders are at risk of multiple convictions and large monetary fines if environmental breaches continue for a period of time.

Employees, agents, directors and officers may be held personally liable for environmental offences. However, this is uncommon.

5.2 Disclosure

There are requirements to self-report environmental incidents or damage to regulators in Canada - although the specific contours of these requirements vary by statutory scheme. In general, mandatory reporting requirements may arise in relation to spills or releases of environmentally harmful substances such as oil, sewage and ozone-depleting substances, but may also apply to “near misses” where no substance is actually spilled into the environment. Larger spills or releases may also be required to be reported to the public at large.

Failure to comply with incident disclosure obligations may be an offence itself or may be used against an offender as an aggravating factor on sentencing.

Permit- and authorisation holders also often have annual reporting requirements. Failure to meet these requirements may be a breach of the permit conditions and, by extension, the underlying statute or regulation.

6. Environmental Incidents and Damage

6.1 Liability for Historical Environmental Incidents or Damage

Liability for contaminated land typically falls to current and former landowners and/or the person responsible for the contaminating substances – not on federal or provincial governments. However, depending on the specific statutory scheme, non-owners may also be liable where they had certain types of involvement in the site or with the contamination or damage. For more detail on this, see **6.3 Types of Liability and Key Defences**.

6.2 Reporting Requirements

Remediation of historical environmental damage typically comes about at the direction of government or on the initiative of current landowners, who may be barred from developing a property until remediation occurs. The government may impose reporting requirements during the course of remediation, so as to ensure progress is being made and applicable standards are being met. Failing to report as required may be a violation of environmental law. See also **3.2 Breaching Protections**.

6.3 Types of Liability and Key Defences

Most environmental legislation in Canada is based on the “polluter pays” principle. This provides that the party causing the harm should be the one who bears the associated cost.

There are several types of liability for environmental incidents or damage in Canada. Project proponents, operators, or suppliers and transporters of products may face liability for:

- failing to comply with specific environmental regulations or permits;
- the ownership, operation or control of contaminated sites; or
- the supply of products to contaminated sites.

A defence of due diligence is usually available to parties accused of breaching environmental legislation. The due diligence defence contains two branches: reasonable care (ie, the accused took all reasonable care to avoid the incident and it occurred in any event) and mistaken belief of fact (ie, the accused reasonably believed in a set of facts that, if true, would render the conduct innocent). Other common-law and equitable defences may be available, depending on the offence alleged. In some cases, no defence is available at all (absolute liability).

In addition, contaminated sites regimes in some Canadian jurisdictions provide for broad statutory liability for historic environmental incidents or damage. For example, in British Columbia, liable persons may include both current and former operators or owners of the contaminated land, even if that person did not cause or contribute to the contamination (though certain statutory exemptions exist). Statutory contaminated sites claims are often brought alongside claims for nuisance, negligence and/or trespass from private parties affected by contamination.

Recovery of costs associated with the remediation of contaminated sites is typically pursued through private law claims. For further details, please see **11.1 Civil Claims**.

- pollution or harm to the environment;

7. Corporate Liability

7.1 Liability for Environmental Damage or Breaches of Environmental Law

Corporate entities that damage the environment or breach environmental legislation can be held liable for the harm caused. Among other things, this can include damage caused by oil spills and sewage pollution, as well as breaches of regulations around wildlife, fisheries, the transportation of dangerous goods, the disposal of hazardous materials and contaminated sites.

7.2 Environmental Taxes

Canada has environmental taxes in place, which are imposed on activities or products that have a negative impact on the environment. They are designed to limit environmentally harmful behaviour through a price incentive and are levied on the tax bases of energy, transportation, pollution and natural resources, among other things. Examples include federal and provincial fuel consumption taxes and provincial taxes on mineral use, waste management and carbon emissions. Other provisions may allow businesses to recoup costs or receive accelerated depreciation write-offs for pollution control or energy conservation equipment and machinery.

7.3 Incentives, Exemptions and Penalties

In Canada, many government programmes at both the federal and provincial levels offer incentives for companies seeking to improve their environmental performance and reduce emissions. In some cases, where compliance with new environmental obligations will require significant changes to processes or facilities, exemptions may be granted.

7.4 Shareholder or Parent Company Liability

It is uncommon in Canada for the shareholders or the parent company of a polluting corporate entity to be held liable for the environmental damage. However, certain Canadian contaminated sites statutes contains broad liability provisions that could capture shareholders or a parent company that owns, controls or manages a contaminated piece of property. Also, in very rare circumstances, a party or government may seek permission from the court to “pierce the corporate veil” and sue the parent company or shareholders for actions taken by the subsidiary.

7.5 ESG Requirements

At a high level, there is no blanket mandatory ESG reporting in Canada. The federal financial institution authority recently mandated climate-related reporting for federally regulated banks and insurance companies, with the first reports due in 2024 and 2025 (depending on the size of the institution). Other ESG-related subjects, including corporate diversity and human rights in supply chains, are subject to mandatory reporting in some circumstances.

7.6 Environmental Audits

Environmental audits are generally not required by law in Canada, but are promoted by governments as a tool for organisations to identify compliance concerns and environmental risk. In recognition of the value of environmental audits, regulators will generally not request access to environmental audit results during the course of routine inspections, but may seek access if the regulator believes that an offence occurred.

Environmental regulators may also refer to routine inspections as “compliance audits” or similar. For more detail on this type of audit, see 4. **Environmental Incidents and Permits.**

8. Personal Liability

8.1 Directors and Other Officers

Environmental legislation often allows for pursuing personal liability against directors and officers of an organisation for environmental breaches. Penalties for environmental damage or breaches of environmental law can include:

- being fined or imprisoned for the corporation's pollution, even if the corporation has never been prosecuted or convicted;
- being fined for the corporation's failure to obtain the necessary permits or approvals, follow required environmental processes or report spills;
- being prosecuted for failure to take all reasonable care to prevent the corporation from causing or permitting pollution;
- being heavily fined or imprisoned for the corporation's contempt of court where there are repetitions of events that led to a previous environmental conviction; and
- being personally liable for the costs of remediating historic and current property contamination associated with any real estate that the corporation owns, controls or occupies, or formerly owned or controlled.

However, practically speaking, personal liability against directors and officers is still relatively uncommon in Canada. Historically, it has typically only been sought where the individual is seen to have engaged in morally blameworthy conduct that contributed to the breach.

8.2 Insuring Against Liability

Most directors and officers in Canada rely on director and officer insurance to insure them against any errors and omissions made in the course of their duties. However, the standard terms of these policies often exclude pollu-

tion liability. Given the serious consequences of potential environmental breaches, it is not uncommon for directors and officers to seek additional coverage for this risk – although such coverage may be expensive.

Directors and officers may seek further indemnification from the company itself for any liability that arises from their role in the company; however, this is of little practical utility if the company has become insolvent as a result of environmental penalties.

9. Insurance

9.1 Environmental Insurance

Most commercial general liability policies in Canada exclude pollution liability. Organisations can purchase optional pollution liability extensions, which are subject to strict exclusions, or can seek out broader environmental liability policies. These policies can provide coverage for liability arising from – among other things – a sudden or gradual pollution event, waste management services, storage tanks and contractors.

10. Lender Liability

10.1 Financial Institutions/Lender Liability

It is unlikely that financial institutions or lenders would be liable for environmental damage caused by one of their clients. However, in some jurisdictions, contaminated sites legislation contains broad liability provisions that could – in theory – apply to a lender who owns, controls or manages a piece of property. By way of example, a lender that realises on security taken on real property assets that are contaminated may

have sufficient “control” over the property to incur liability.

10.2 Lender Protection

To protect themselves from liability risk, lenders should investigate the potential environmental liabilities inherent in an undertaking before investing and should ensure that money is allocated for meeting environmental contingencies. Further, lenders can make it a term of any lending agreement that the owner or operator of a site meets and/or exceeds any applicable environmental regulations. Finally, lenders may seek indemnities or the provision of an insurance policy naming them an additional insured in order to mitigate potential environmental liability.

For the reasons discussed in **10.1 Financial Institutions/Lender Liability**, lenders should also exercise caution when realising on security where the underlying property may be contaminated.

11. Civil Liability

11.1 Civil Claims

Civil claims for compensation or other remedies can be brought through common-law causes of action, such as nuisance, negligence, trespass or loss of property value, or through statutory causes of action set out in environmental legislation.

As discussed in **6.3 Types of Liability and Key Defences**, in certain Canadian jurisdictions, cost allocation for remediation of contaminated sites is dealt with through civil claims based on statutory causes of action. Such claims are often pursued alongside claims for nuisance, negligence and/or trespass.

11.2 Exemplary or Punitive Damages

Canadian courts of inherent jurisdiction almost always have jurisdiction to award exemplary or punitive damages. However, generally speaking, courts are unlikely to award such damages unless the conduct in question is high-handed, malicious, arbitrary or highly reprehensible. The bar for awarding punitive damages is high, yet punitive damages have been awarded for breaches of environmental responsibilities in certain Canadian jurisdictions.

11.3 Class or Group Actions

Class actions are available for environment-related civil claims. However, class actions in Canada must first be “certified” by a court in order to proceed. This process ensures that the claim raises common issues and that a class proceeding is the preferred way to resolve those issues. Few environment-related cases have made it past this initial threshold.

11.4 Landmark Cases

Two appellate decisions, released in 2013 and 2014, confirmed that class action regimes are not often appropriate to remedy environmental harms: *Canada (Attorney General) v MacQueen*, 2013 NSCA 143 and *Windsor v Canadian Pacific Railway Ltd*, 2014 ABCA 108. Although environmental causes of action may seem to involve common issues among class members, proof of those claims is often an individual issue and therefore ill-suited to class-based determinations.

With regard to contaminated sites, *Jl Properties Inc v PPG Architectural Coatings Canada Ltd*, 2015 BCCA 472 is a leading case. This appellate decision from British Columbia provides commentary on the regulatory regime in that province, the status of pre-legislation comfort letters and due diligence by the defendants, the

operation of limitation periods on environmental damage, and the scope of reasonably incurred remediation costs.

12. Contractual Agreements

12.1 Transferring or Apportioning Liability

In general, indemnities and other contractual arrangements can be used to transfer or apportion liability for environmental pollution or breaches of law. However, third parties – including regulators – are not likely to be bound by such agreements and are entitled to prosecute or seek compensation from the party who is liable at law. Polluters relying on such indemnities and contracts must then seek indemnification or compensation after the fact, which may involve filing a civil claim.

12.2 Environmental Insurance

See 9.1 Environmental Insurance.

13. Contaminated Land

13.1 Key Laws Governing Contaminated Land

In Canada, most contaminated sites will be under the jurisdiction of provincial or territorial environmental authorities. In general, the federal government only has jurisdiction over federal lands (a small percentage of Canada's total lands) or potentially in certain other areas connected to federal jurisdiction.

Contaminated sites are typically defined as areas of land where the soil, sediment, vapour or groundwater contains a prescribed substance in quantities or concentrations exceeding risk-based criteria, standards or conditions. Pre-

scribed substances generally include hazardous substances such as sulphur, petroleum hydrocarbons, heavy metals and chlorofluorocarbons (CFCs).

As discussed in 6.3 Types of Liability and Key Defences, at a high level, Canadian law is based on the “polluter pays” principle and may impose liability both on former and current operators and owners of a site. In some jurisdictions, this is provided for in statute, which may class certain categories of individuals as being responsible for remediation and enable cost recovery for remediation among these classes. However, there is significant variation among Canadian jurisdictions on the specifics of these statutory schemes.

In general, regulatory authorities have the power to issue remediation orders to ensure remediation is carried out. This may occur if the contamination is severe or if the responsible person will not voluntarily carry out the remediation requirements. A person liable for remediating contaminated land can often seek recourse from the original polluter or former landowner. Such actions may be available in contract law, tort law, or through the above-mentioned statutory cause of action.

Often, liability for known and unknown contamination may be addressed in purchase and sale contracts. Parties seeking to rely on contractual terms to recover their costs or limit liability will need to seek a remedy through those mechanisms.

13.2 Clearing Contaminated Land

Environmental legislation in most provinces permits regulators to order current owners and operators, as well as those who formerly owned or controlled contaminated property, to carry out

remediation measures. Those who are responsible for cleaning up the contaminated lands will generally engage qualified environmental professionals to oversee and carry out the remediation to ensure it meets all legal standards.

13.3 Determining Liability

Liability is generally determined both according to the “polluter pays” principle and on a joint and several basis.

The “polluter pays” principle provides that those who pollute will generally be responsible for the costs associated with the pollution they cause. More than one person can be liable for remediation of contaminated land, with liability typically apportioned according to the degree of fault or contribution by the parties to the pollution.

In British Columbia, remediating parties may claim both litigation legal costs and legal costs incurred throughout the actual remediation of the contaminated site. However, based on the “joint and several” nature of liability, any individual defendant may be liable for the entirety of the remediation costs if they are the only extant or non-impecunious party. Particularly given the historical nature of many contaminated sites, this can practically mean that “polluter pays” gives way to a “last person standing” basis for liability.

13.4 Proceedings Against Polluters

Generally, proceedings can be brought against polluters, landowners or occupiers of land who are responsible for contamination. This can occur through statutory causes of action set out in the applicable environmental protection legislation or through common-law causes of action such as nuisance, negligence, trespass or loss of property value.

13.5 Investigating Environmental Accidents

Investigations into environmental accidents are led by the responsible federal or provincial regulatory authority and will likely include site investigations, the collection of documentary evidence from those responsible, and interviews with relevant witnesses and stakeholders. Authorisation- and permit-holders generally have a duty to comply with such investigations and, where compliance is not forthcoming, many regulators also have powers to compel a person or company to provide documents or attend interviews.

14. Climate Change and Emissions Trading

14.1 Key Policies, Principles and Laws

Although a large part of the Canadian economy is resource-based, the country’s economy varies greatly from coast to coast (as do politics). As such, the strategies implemented to combat climate change have been highly varied. As it currently stands, a patchwork of different environmental policies are in effect across the country, with varying adherence to policies concerning carbon credits, renewable energy credits and emission standards.

14.2 Targets to Reduce Greenhouse Gas Emissions

Canada is a signatory to the major international climate change conventions. As a party to the Paris Agreement, Canada has committed to an economy-wide target to reduce greenhouse gas emissions by 40–45% below 2005 levels by 2030. The Canadian Net-Zero Emissions Accountability Act formalises Canada’s target to achieve net-zero emissions by 2050 and establishes a series of interim emissions reduction targets at five-year milestones towards that goal.

Although the federal government signed the Paris Agreement and has set emission targets, Canada is a federal system and both the federal and provincial levels of government have the jurisdiction to regulate matters concerning the environment. In recognition of the collaborative approach needed for progress on climate change, the federal and provincial Ministers of the Environment developed the Pan-Canadian Framework on Clean Growth and Climate Change, which was built on four pillars:

- pricing carbon pollution;
- complementary actions to reduce emissions;
- adaptation and climate resilience; and
- clean technology, innovation, and jobs.

The federal government subsequently issued a further climate plan in 2020: A Healthy Environment and a Healthy Economy. The plan builds on the efforts that are currently underway through the Pan-Canadian Framework. Furthermore, in March 2022, the federal government introduced Canada's 2030 Emissions Reduction Plan, which provides a roadmap for the Canadian economy to achieve 40–45% emissions reductions below 2005 levels by 2030, building upon the actions outlined in Canada's previous climate plans. In September 2022, the federal government released Canada's Methane Strategy, which builds on the 2030 Emissions Reduction Plan by providing a pathway to achieve methane emissions reductions of 35% by 2030, compared to 2020 levels.

Canada also maintains a number of legal requirements with regard to energy efficiency. Regulations apply to a range of products, including appliances, light bulbs, heating and cooling systems, and vehicles. There are also many programmes to incentivise and support electrification, the construction of energy-efficient build-

ings and the development of energy-efficient industries and businesses.

In 2017, the federal government announced that provincial and territorial governments needed to implement their own carbon pricing system meeting minimum federal standards or the federal government would impose its own programme. This plan has since come into force and survived a court challenge to the Supreme Court of Canada: *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11. As a result, every jurisdiction in Canada has a price on carbon pollution, either through its own pricing system tailored to local needs or through the application of the federal pricing system. If a province or territory decides not to price pollution or proposes a system that does not meet the standards set by the federal government, the federal system or “backstop” is put in place.

In 2022, the federal government registered the Clean Fuel Regulations under the Canadian Environmental Protection Act 1999. These regulations are aimed at reducing greenhouse gas emissions in Canada by setting carbon intensity limits for fuels by fuel types and requiring fuel suppliers to lower the carbon intensity of the fuels they produce in accordance with those limits. Suppliers can maintain compliance with the established limits by participating in a credit market established by the Clean Fuel Regulations. Credits can be created by undertaking projects that reduce the carbon intensity of fuels, supplying low carbon fuels, or supplying fuel or energy to advanced vehicle technology (eg, electric or hydrogen vehicles). The carbon intensity reduction requirements under the Clean Fuel Regulations came into force on 1 July 2023.

In August 2023, the federal government released draft Clean Electricity Regulations, which – at

a high level - would impose an emissions cap on fossil-fuel generating units exporting to the grid. These regulations were put forward as part of the federal government's emissions reduction plan and specifically aimed at increasing electrification and decarbonising the grid. In February 2024, the government released a "What We Heard" report and updated the draft regulations, seeking additional feedback. Final regulations are expected later in 2024.

15. Asbestos and Polychlorinated Biphenyls (PCBs)

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs

Asbestos management in Canada is governed through both occupational health and safety legislation and environmental legislation. At the federal level, this includes statutes such as the Hazardous Products Act and the Canada Consumer Product Safety Act, as well as the Prohibition of Asbestos and Products Containing Asbestos Regulations. These regulations prohibit the import, sale and use of asbestos, as well as the manufacture, import, sale and use of products containing asbestos (with some exceptions).

The responsibility for removing or managing asbestos present in a building generally lies with the building owner. However, in some provinces, the occupier of a building (eg, a tenant or project developer) may also bear some responsibility.

In general, landowners or occupiers must conduct a pre-work assessment before commencing certain building work. Any asbestos found must be carefully managed prior to renovations or alterations. Legislation mandates that specific procedures are implemented during asbes-

tos removal, including in relation to ventilation, waste containers and decontamination.

Asbestos was used frequently in Canadian insulation, fireproofing and construction until the 1980s. Canada was also an active producer of asbestos until 2011. As a result, Canadian exposure to asbestos has been relatively widespread and asbestos-related diseases continue to be one of the top causes of workplace death in Canada.

Despite this, asbestos litigation against employers is relatively uncommon. Canada has publicly funded healthcare and most provinces operate a mandatory workers' compensation scheme, which means that the majority of workers injured by asbestos exposure will receive medical treatment and compensation without resorting to litigation. Where asbestos litigation has been undertaken, it has been initiated by workers' compensation boards (the bodies responsible for administering the workers' compensation schemes), and brought against manufacturers of asbestos products to recover the costs of paying out compensation to workers and their families.

To establish a claim for damages for asbestos exposure, a litigant must demonstrate actual physical harm or injury. However, the long latency period of asbestosis and mesothelioma means that the injury or harm may not be realised and litigation not commenced for decades. This has created challenges for Canadian courts. Litigants have often been exposed to asbestos from a variety of sources over a long period of time, making causation and the proper apportionment of liability a difficult issue.

Polychlorinated biphenyls (PCBs) refers to a group of synthetic chemicals. Owing to their persistent nature, low levels of PCBs are found in

the environment and accumulate and remain in the human body for years. For several decades in the mid-20th century, PCBs were used widely as ingredients in many industrial materials. However, health concerns raised in the 1960s and 1970s and the 1988 fire and evacuation at Saint-Basile-le-Grand, Quebec eventually led to robust government regulation concerning the chemicals. PCB production in Canada has been banned since 1980; however, this ban does not include PCBs used in existing electrical applications.

The use of PCBs is governed by a complex scheme of federal and provincial legislation primarily aimed at storage, transportation and disposal. Overall, the federal PCB Regulations intend to prevent the release of PCBs into the environment and accelerate their phasing out. The regulations establish prohibitions on the release, manufacturing and use of PCBs, permitted activities involving PCBs, and end-of-use deadlines for equipment and products containing PCBs. The regulations also place limitations and prohibitions on the storage of PCBs and establish labelling and reporting requirements.

International and interprovincial PCB transportation is governed by the federal Cross-border Movement of Hazardous Waste and Hazardous Recyclable Material Regulations. These regulations reflect Canada's commitments to international obligations, such as those arising from the Basel Convention of the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. Similar regulations, such as the British Columbia Hazardous Waste Regulation, are in place at the provincial level to regulate intra-provincial storage and transportation.

One of the leading cases with regard to PCBs in Canada is *R v Hydro-Quebec* (1997) 3 SCR

213, 151 DLR (4th) 32. In this case, Hydro-Quebec was criminally charged for discharging PCBs into a nearby river over a certain period of time. Hydro-Quebec challenged the constitutional validity of the legislative provisions under which the charges were laid against them. The Supreme Court of Canada upheld the validity of the provisions. This decision set a meaningful precedent in Canada by clarifying the authority of the federal government to legislate and regulate toxic substances and the environment. The decision also marked an important moment in the acknowledgment and recognition of the dangerous and toxic nature of PCBs.

16. Waste

16.1 Key Laws and Regulatory Controls

In Canada, the responsibility for managing and reducing waste is shared among federal, provincial, territorial and municipal governments. The federal government regulates the import and export of waste nationally, as well as the interprovincial movement of waste. The provinces and territories regulate the use and disposal of waste within their borders - although, practically speaking, this power is often delegated to municipalities or districts. Both "extended producer responsibility" and "product stewardship" programmes are used to manage products at their end of life.

16.2 Retention of Environmental Liability

Whether or not a producer or consigner of waste retains liability for waste after it has been disposed of by a third party depends on the jurisdiction. In some provinces, the applicable legislation includes an automatic ownership transfer provision that is triggered once waste is accepted by an authorised waste management

facility, thereby limiting the liability of producers or consigners.

In provinces where such a provision does not exist, any past or present owner or person that possessed, controlled or managed the waste may remain exposed to liability for waste after it has been disposed of – even if by a third party. However, generally speaking, some direct involvement in the release is necessary in order for the liability to crystallise. Under both schemes, producers or consigners remain liable for any damage caused while the waste was in their possession or in transport.

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

Producers in Canada are not generally required to take back, recycle or dispose of goods once they become waste (although there are some exceptions – for example, in British Columbia, sellers of ozone depleting substances are required to take back those substances). However, legislation across Canada is used to impose some or all of the costs of the recovery, recycling and disposal of goods on the producers of waste. These laws are intended to incentivise producers to design products that can be disposed of responsibly.

In June 2022, the federal government published the Single-Use Plastics Prohibition Regulations under the Canadian Environmental Protection Act 1999. Under these regulations, the manufacture, import, export and sale of six categories of single-use plastics will be banned by the end of 2025, including checkout bags, cutlery, and straws. The regulations adopt a staggered timeline for putting the ban into place, beginning with prohibitions on the manufacture and import of the identified plastics for sale in Canada in

the initial stage (effective as of December 2022) and leading to a more total prohibition on manufacture, import, and export sales by the end of 2025. At the time of writing, this regulation is subject to an ongoing court challenge.

16.4 Rights and Obligations Applicable to Waste Operators

Waste operators are generally required to hold permits and authorisations for the waste they generate and are strictly regulated as to how they may dispose of such waste (both through their permits and authorisations, as well as through the applicable legislation). Consequences of breaching such obligations are discussed at 3.2 Breaching Protections and include:

- compliance orders;
- suspensions or revocations of permits and authorisations;
- administrative penalties;
- fines;
- and imprisonment.

17. Environmental Disclosure and Information

17.1 Self-Reporting Requirements

There are requirements to self-report environmental incidents or damage to regulators in Canada. These requirements often apply to spills or releases of environmentally harmful substances such as oil, sewage and ozone-depleting substances, but can also apply to “near misses” where no harmful substance is actually spilled. Larger spills or releases may also need to be reported to the public at large. See also 5.2 Disclosure.

17.2 Public Environmental Information

Canadian government agencies often publish environmental information on their websites. The public may also request government documents and information through access to information requests, which apply to nearly all public authorities and bodies and can compel production of a wide range of government documents.

17.3 Corporate Disclosure Requirement

The disclosure of environmental information in annual reports is still largely voluntary in Canada. However, under Canadian securities rules, reporting issuers (which are largely public companies) must disclose all material information, including material information about environmental and social issues. Reporting issuers may also have disclosure obligations under the policies of a particular stock exchange.

As noted in 7.5 ESG Requirements, environmental reporting is required for certain federally regulated banks and insurance institutions.

17.4 Green Finance

The regulation and enforcement of green finance in Canada is still in the early stages of development.

In May 2021, the government of Canada launched the Sustainable Finance Action Council (SFAC) to help lead the Canadian financial sector towards integrating sustainable finance into standard industry practice. The SFAC has a mandate to support the growth of a well-functioning sustainable finance market in Canada, in order to strengthen the mobilisation of private capital in support of Canada's emissions reductions targets and climate adaptation and resilience goals.

On 3 March 2022, Canada's Department of Finance released Canada's Green Bond Framework, which was developed in accordance with the International Capital Market Association Green Bond Principles. The proceeds of green bonds issued are used to finance eligible green expenditures under categories such as clean transportation, energy efficiency, terrestrial and aquatic biodiversity, and renewable energy.

In March 2023, the SFAC issued a new taxonomy framework on transition finance and green finance, which contains ten recommendations addressing the merits, design and implementation of a green and transition finance taxonomy for Canada. The framework recommends publishing a complete and detailed taxonomy by the end of 2025.

Private green financing arrangements are also available in Canada and may be developed in accordance with various unlegislated standards.

18. Transactions

18.1 Environmental Due Diligence

Environmental due diligence is typically conducted on M&A, finance and property transactions in Canada. The level of due diligence required varies according to the level of risk a particular property and/or industry may present – for example, a property used as a gas station or dry cleaner generally poses a higher risk. The general trend is towards increasing environmental due diligence.

In a share sale, the assets and liabilities of the target company move to the purchaser – meaning that the purchaser will absorb any outstanding environmental liabilities for historic environmental damage or breaches of environmental law.

In an asset sale, the purchaser typically does not inherit the pre-acquisition environmental liabilities associated with the purchased assets. However, by law, the purchaser may inherit liability for the pre-existing environmental condition of the assets - especially in the case of a contaminated site. A purchaser may also be liable where it takes over an ongoing situation of regulatory non-compliance.

Typically, a purchaser of Canadian shares or assets will request any of the relevant environmental studies, reports, permits and orders, key correspondence from regulatory authorities and other critical environmental documents from the vendor. A purchaser can also:

- search public registries for information regarding the target company's environmental compliance;
- conduct interviews with senior environmental employees of the target company; and/or
- obtain an environmental audit or site assessment.

Private companies may provide Phase I and Phase II environmental site assessments, with Phase I assessments consisting of database and visual searches and Phase II assessments consisting of site inspection, sample collection and analysis, and recommendations regarding the site and potential remediation.

18.2 Disclosure of Environmental Information

There are no "typical" environmental warranties, indemnities or similar provisions in a share or asset sale; the allocation of risk depends on the contract negotiated by the parties. It is common in Canadian business transactions to include representations, warranties and indemnities that will affect the allocation of environmental

risk and liability. These provisions may address the state of the property, the absence of contamination, and the company's environmental compliance status. Often, such warranties and indemnities will be time-limited.

As regards sales of real property, in some jurisdictions, provincial legislation requires that a vendor who knows or should know that the property has been used for an industrial or commercial purpose provides a site disclosure statement to a prospective purchaser. More commonly, the requirement to disclose environmental information to a purchaser is built into Canadian contracts. Robust representations and warranties regarding the property or the company's environmental status will create liability on vendors where those statements prove untrue.

18.3 Key Issues in Environmental Due Diligence

Assessing permitting is often a key issue in environmental due diligence. It is important for a purchaser to ensure that the entity being acquired has all required permits and authorisations for its operations and to understand the key terms of those permits, including any time-limited rights or obligations and expiry dates. Permitting due diligence in Canada is made more complicated by the four possible levels of government involved (federal, provincial or territorial, municipal, and – in certain cases – indigenous) – each of which may have multiple agencies issuing permits for one operation.

Permitting due diligence also requires examining the permit terms and the enabling legislation to determine if there are any transfer restrictions or requirements. These are common in Canadian law and must be adhered to for the transfer of permits to be valid.

Trends and Developments

Contributed by:

Bryan Buttigieg, Adina-Cristina Georgescu, Christie A McLeod and Camille Ingarao
Miller Thomson LLP

Miller Thomson LLP is one of Canada's leading national business law firms, with more than 530 lawyers in ten offices across Canada offering a complete range of legal services. Its environmental law group consists of six lawyers, each with a diverse practice. The team has more than 30 years of experience dealing with environmental issues related to contaminated land. Several members of the team are 20-year veterans in this area of law. The team regularly advises on environmental due diligence matters arising in M&A transactions and routinely assists clients in acquiring and selling properties

and businesses, as well as with environmental insurance, indemnities, permitting, compliance, remediating and redeveloping contaminated sites, and negotiating contracts. The firm's lawyers have represented indigenous groups in addition to resource companies and have developed extensive regulatory expertise in advancing projects. They also represent mining, hydro and oil and gas companies in obtaining environmental assessment approvals and have represented indigenous bands in respect of environmental impact issues.

Authors



Bryan Buttigieg is one of Canada's top environmental law experts and is the leader of Miller Thomson LLP's environmental law group. His practice spans litigation and

regulatory defence, focusing on environmental and occupational health and safety issues. Bryan provides transactional support for brownfields, site remediation, and environmental financing. A trained mediator with the Canadian Centre for Environmental Arbitration and Mediation, he advises on claims for environmental damages, handles transactions involving contaminated properties, and helps clients manage regulatory compliance. Bryan represents clients in administrative appeals and defends against charges under acts such as the Environmental Protection Act, ensuring adherence to regulatory best practices.



Adina-Cristina Georgescu specialises in administrative, municipal, urban planning, environmental, and energy law at Miller Thomson LLP. In environmental law, she advises

on private nuisance, regulatory compliance, environmental authorisations, soil characterisation, contamination notices, and waste management. Adina-Cristina is active in leadership roles, serving on the board of directors for APL Énergies and as chair of the Quebec chapter of the Canadian Property Tax Association since 2016. Additionally, she is a board member of the Canadian Bar Association's Municipal Law Section, contributing expertise to various professional bodies and guiding clients through complex environmental and regulatory issues.

CANADA TRENDS AND DEVELOPMENTS

Contributed by: Bryan Buttigieg, Adina-Cristina Georgescu, Christie A McLeod and Camille Ingarao,
Miller Thomson LLP



Christie A McLeod is a member of Miller Thomson LLP's advocacy group and regularly advises indigenous communities and companies on environmental, indigenous,

administrative and regulatory law matters, as well as ESG issues. She has appeared before the British Columbia (BC) Court of Appeal, the BC Supreme Court, the BC Provincial Court, the Territorial Court of Yukon, and the Nunavut Court of Justice. Christie regularly writes and speaks about human rights and environmental issues, including the climate crisis, and undertakes climate advocacy efforts in her spare time. She also serves as a director of Lawyers for Climate Justice and a policy adviser for the Fossil Fuel Non-Proliferation Treaty Initiative.



Camille Ingarao specialises in administrative, municipal, urban planning and environmental law at Miller Thomson LLP. She has particular expertise in zoning, land use planning,

environmental policy, municipal taxation and expropriation matters. Camille focuses her practice on compliance with applicable statutes and regulations, recognition and application of acquired rights, and obtaining and contesting permits, certificates of authorisation or occupancy, as well as regulatory amendments or other authorisations (minor exemptions, special construction, modification or occupancy projects for buildings, conditional uses, site planning and architectural integration plans, comprehensive development plans, etc), and recognising or contesting rights of way or easements.

Miller Thomson LLP

40 King Street West
Suite 5800
Toronto
Ontario
M5H 3S1
Canada

Tel: +1 416 595 8500
Fax: +1 416 595 8695
Email: toronto@millerthomson.com
Web: www.millerthomson.com



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National Developments

The federal government continues its active support of carbon capture and storage (CCS) technology. The passing of Bill C-59 in June 2024 implemented several measures that were introduced in the 2023 budget and fall economic statement, including the creation of a carbon capture, utilisation and storage (CCUS) investment credit. In July 2024, the federal government announced CAD89.1 million for ten greenhouse gas emissions reduction projects funded through the Nature Smart Climate Solutions Fund. These projects are to take place in Alberta, British Columbia, Manitoba, New Brunswick, Ontario and Quebec and aim “to fight climate change while benefiting biodiversity by safeguarding carbon-rich ecosystems from destruction to keep carbon in the ground”. One report places Canada as the third-largest spender on CCS behind Norway and the USA, with an estimated USD3.8 billion spent during the past 40 years.

The future of CCS, however, remains open to debate. While Canadian governments and the oil industry may continue to hold out hope for the success of the technology, not all investors feel the same. In May 2024, Capital Power announced that it was discontinuing pursuit of its CAD2.4 billion Genesee CCS project near Warburg, Alberta – stating that, although their involvement in the project confirmed that CCS is “a technically viable technology and potential pathway to decarbonisation”, the project “was not economically feasible” at this time.

Vancouver, British Columbia – Climate Change Adaptation

As 2030 draws ever closer, more jurisdictions are overtly acknowledging the reality that mitigation efforts to address the impacts of climate change are unlikely to achieve the necessary targets and

therefore climate change adaptation strategies must be considered.

In Canada, the City of Vancouver is perhaps at the forefront of such efforts, with a detailed adaptation strategy published in 2024. This is the third update to Vancouver’s strategy since the original strategy was published in 2012, which was said to be the first of its kind in Canadian municipal adaptation.

In the updated adaptation strategy, Vancouver’s strategy notes:

“[C]hanges in climate are already being witnessed firsthand. In the last five years, British Columbia has experienced the most fatal climate-related event (2021 heat dome), the most costly weather event (2021 flooding), and the most destructive and expensive wildfire season on record (2023). Other climate impacts include repeated damage to Vancouver’s shoreline infrastructure and periods of the worst air quality in the world due to wildfire smoke.”

The Vancouver strategy identifies five main climate-related hazards facing Vancouver (extreme heat, poor air quality, drought, extreme rainfall, and sea level rise) and takes a risk-based approach to adaptation planning. In addition to the expected projections, updated objectives, and action plan, the strategy is notable for its focus on equity concerns, prioritising adaptation measures that support populations it identifies as disproportionately impacted by each of the climate-related hazards. By way of example, with regard to the hazard of extreme heat, the strategy identifies populations known to be vulnerable to extreme heat – namely, adults aged 60 years or older, people who live alone, people with pre-existing health conditions such as diabetes, heart disease or respiratory disease,

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people with mental illnesses or substance use disorders, people with limited mobility and people experiencing homelessness, as well as outdoor workers, pregnant women, and infants and young children. The strategy further observes (in a statement that is likely true for most of Canada) that “most existing homes, apartments and buildings in Vancouver were not designed for rising temperatures but to retain heat and [they] largely lack mechanical cooling or adequate passive cooling design”.

When called out explicitly in this way, the sheer challenge and cost of implementing effective adaptation strategies becomes starkly apparent. This is something that will surely occupy the thoughts of Canadian governments and citizens for years to come.

Alberta

The Emergency Statutes Amendment Act 2024 received criticism in some quarters because it was seen to expand Cabinet’s powers to deal with emergencies at the expense of environmental protection. Specifically, amendments to the Water Act allowing Cabinet to order inter-basin transfers raised concern, given that such transfers typically require long-term planning to address potentially serious ecological and economic impacts.

This legislation can be seen as part of a trend of “red tape reduction” executive actions taken across some Canadian jurisdictions. Such moves are often linked to some stated crisis (eg, an emergency in Alberta, or perhaps a housing crisis in Ontario, as mentioned in the Canadian chapter of the 2023 Global Practice Guide with regard to the Greenbelt changes). Although such legislation is used to justify rapid action by Cabinet (or a Minister), provisions like this will inevitably raise criticism that they are being adopted at

the expense of regulatory, public or indigenous consultation and community review. They also raise a fundamentally challenging question as to how best to achieve a balance in a democratic society between efficient (but potentially unfair or inadequately informed) decision-making by a few elected officials and ongoing and extensive public participation, which could be expensive and time-consuming and lead to decisions not being made in a timely manner. The question is likely to continue to be explored across Canadian jurisdictions in the coming years, especially as politicians grapple with responding to climate change concerns and impacts.

Ontario

Climate change litigation is occurring across the world, with one database tracking more than 1,000 such cases in the USA alone and several hundred cases in other countries. In October 2024, the Ontario Court of Appeal issued a ruling in one such case, Mathur v Ontario. This could prove to be a landmark case in requiring scrutiny under the Canadian Charter of Rights and Freedoms (the “Charter”) of government climate-related actions.

Sophia Mathur is one of seven Ontario youth – some of whom are indigenous – who asked the court to declare that the greenhouse gas emissions reduction target and plan enacted by the Ontario government (“Ontario”) under the Cap and Trade Cancellation Act (CTCA) was unconstitutional and a breach of their Section 7 and Section 15 rights under the Charter. In April 2023, the court of first instance dismissed the application in a lengthy decision. That decision was unanimously reversed by the Ontario Court of Appeal and the matter was sent back to the lower court for further adjudication. The essence of the Ontario Court of Appeal’s decision is stated early in the judgment:

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“The application does not seek to impose on Ontario any new positive obligations to combat climate change. By enacting the CTCA, Ontario voluntarily assumed a positive statutory obligation to combat climate change and to produce the Plan and the Target for that purpose. Ontario was therefore obligated to produce a plan and a target that were Charter compliant. The application judge did not address whether Ontario failed to produce a plan and a target that was Charter compliant in accordance with its statutory mandate. As a result, the ss. 7 and 15 Charter issues raised by the appellants remain to be determined.

“The interveners raised relevant, important issues that were not determined by the application judge, either because they were not raised before her or did not affect her analysis, or because she declined to address them since they were not pleaded in the notice of application. They included whether the Target breached the Charter rights of Indigenous peoples in Ontario and their s. 35 rights under the Constitution Act, 1982; the integration of the public trust doctrine; the application of international law, including international environmental law, in the interpretation of Charter rights; the application of the best interests of the child principle; and the recognition and impact of certain unwritten constitutional principles, including societal preservation and ecological sustainability.”

In remitting the case back to the lower court to assess whether the CTCA does improperly infringe on the appellants’ Charter rights, the Ontario Court of Appeal accepted and adopted various findings of fact made by the application judge, as follows.

- “The application judge found, correctly in our view, that based on the evidence before her,

“it is indisputable that, as a result of climate change, the [appellants] and Ontarians in general are experiencing an increased risk of death and an increased risk to the security of the person”.

- “The application judge observed that Ontario would have to reduce its 2005 emissions by approximately 52% (ie, 22% more than the 30% Target) by 2030 to limit average global warming to 1.5 degrees Celsius. She found that the gap between the Intergovernmental Panel on Climate Change prescription and the Target is “large, unexplained and without any apparent scientific basis”.
- “The application judge correctly noted that a law is arbitrary where “there is no connection between the effect of a provision and its purpose”: Sharma, at para. 111; or “where there is no rational connection between the object of the law and the limit it imposes on life, liberty or security of the person”.

While respecting the courts’ traditional reluctance to dictate to governments which specific legislation should be passed, the Ontario Court of Appeal seemed to hint that climate legislation that is not science-based might not survive Charter scrutiny:

“The application judge should have considered whether, in setting a Target that she found “falls severely short of the scientific consensus as to what is required”, Ontario committed itself to a level of greenhouse gas emissions that will create or contribute to a disproportionate impact on the basis of an enumerated or analogous ground. The argument is that the Target permits emissions beyond what the scientific community deems acceptable, which evidence was not challenged by Ontario.”

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At the time of writing, it was not known whether Ontario would seek leave to appeal to the Supreme Court of Canada. One way or another, the Mathur litigation is far from over. This case, along with the myriad of other climate litigation occurring around the world, perhaps signals a growing judicial acceptance of the impacts of climate change and a willingness to scrutinise the fairness of legislative actions taken in the name of climate mitigation.

Quebec

Energy transition in Quebec: the 2030 Energy Policy and its implementation

The 2030 Energy Policy defines Quebec's energy transition strategy until 2030. Its objectives include promoting a low-carbon economy, making optimal use of Quebec's energy resources and taking full advantage of the potential of energy efficiency. To achieve these objectives, the government has adopted five targets to be met by 2030, including increasing the share of renewable energy in total energy production by 25% and increasing bioenergy production by 50%.

The first implementation action amended the Act requiring Quebec's energy regulator, *Régie, de l'énergie, du Québec*, to introduce the concept of renewable natural gas (RNG). This, in turn, led to the adoption of a regulation that requires natural gas distributors to deliver a minimum volume of RNG to their customers each year.

2030 Plan for a Green Economy

The 2030 Plan for a Green Economy aims to reduce greenhouse gas emissions by 37.5% compared to 1990 by 2030 through the implementation of measures such as increasing the electrification of transportation and buildings, reducing the free allocation of emissions allow-

ances to the industrial sector, and increasing the use of other forms of renewable energy.

Although several renewable hydrogen production projects aimed at adding hydrogen to natural gas are already under development in Quebec, these projects have evolved until now in the absence of standards and regulations adapted to allow the development of this new form of renewable energy.

However, on 30 September 2021, the National Assembly adopted Bill 97. Among other things, Bill 97 amends the Act requiring the *Régie, de l'énergie, du Québec* to include hydrogen as a "renewable source" natural gas. Thus, like RNG, hydrogen will now be qualified as natural gas from a renewable source. This should allow for the accelerated development of the green hydrogen industry in Quebec.

In May 2023, the government of Quebec presented the 2023–28 Implementation Plan (the "Implementation Plan") of the 2030 Plan for a Green Economy. The Implementation Plan is structured around five axes:

- reducing greenhouse gas emissions;
- building the economy of tomorrow;
- adapting to climate change;
- creating a predictable environment that is conducive to the climate transition; and
- accelerating the development of knowledge.

Under the first axis, the Implementation Plan aims to decarbonise buildings and includes the implementation of a system for declaring and rating the energy performance of buildings.

Under the third axis, the Ministry of Municipal Affairs and Housing (*Ministère des Affaires Municipales et de l'Habitation*) must aim to

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ensure that all municipalities can assess their climate risks and draw up an adaptation plan. Accordingly, all municipalities should have developed a risk assessment and adaptation plan by 2030.

Net zero greenhouse gas for Quebec buildings as soon as 2040

In December 2020, the City of Montreal adopted its 2020–30 Climate Plan (the “Climate Plan”), which aims to achieve carbon neutrality by 2050. Specifically, the Climate Plan calls for a complete ban on the use of fossil fuels in all municipal buildings and their replacement with renewable energy by 2030.

While the city’s carbon neutrality goal was set to be met by 2050, the current administration announced in May 2022 that it was bringing it forward by ten years by publishing its Roadmap Towards Zero-Emission Buildings in Montreal by 2040 (the “Roadmap”). The city plans to impose gradual greenhouse gas reduction performance thresholds for existing buildings, so that all buildings will be supplied with 100% renewable energy by 2040.

Montreal’s by-law on greenhouse gas emissions from new buildings, adopted on 18 December 2023, forbids heating appliances emitting combustion-related greenhouse gases in new buildings – although certain exceptions may apply depending on the type building and appliance. Application of this by-law is being phased in between 2024 and 2025, depending on the date on which a building permit application is submitted, as follows:

- for small buildings, from 1 October 2024; and
- for other buildings, as of 1 April 2025.

These new obligations are in addition to By-law 21-042 concerning greenhouse gas emission disclosures and ratings of large buildings adopted in 2021, which requires building owners to disclose the level of greenhouse gas emissions resulting from energy consumption by their buildings. As of January 2023, this by-law applies to any building with a floor area of 5,000 square metres or more or with 50 or more dwelling units.

Other cities and municipalities in the province are moving to adopt climate plans and to impose new obligations for building owners, with the aim of reducing greenhouse gas emissions. This will have a direct financial and administrative impact on building owners, who will need to comply with new standards and requirements within a relatively short timeframe.

Contaminated soil management

In June 2021, Quebec adopted the final version of the highly awaited Regulation regarding the traceability of excavated contaminated soil. The Regulation applies to all transportation of excavated contaminated soils on or after 1 January 2023, regardless of the date on which the excavation work began. As of that date, stakeholders involved in the management of contaminated soils – for example, owners of contaminated soil, transporters and receiving sites – must register with Traces Québec, which is the government system for the traceability of excavated contaminated soils.

Other measures have also been taken to tighten the framework for contaminated soils. These include amendments to the Land Protection and Rehabilitation Regulation and to the Regulation regarding contaminated soil storage and contaminated soil transfer stations, as well as the adoption of the Regulation regarding the regula-

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tory scheme applying to activities on the basis of their environmental impact (*Règlement sur l'Encadrement d'Activités en Fonction de leur Impact sur l'Environnement*, or REAFIE).

Decarbonisation of buildings

As part of the 2030 Plan for a Green Economy's strategies to reduce greenhouse gas emissions and decarbonise building heating, the installation of an oil-fired heating system or the replacement of an oil-fired heating system with a fossil-fuel appliance is forbidden – as of 31 December 2023 – under the Regulation regarding oil heating appliances.

The municipality of Prévost became the first municipality in Quebec to regulate the decarbonisation of buildings on its territory. By-law 831 on the decarbonisation of buildings and other measures to reduce greenhouse gases came into force on 2 October 2023. As of 31 December 2023, By-law 831 limits the use of propane and natural gas in the municipality's future residential and institutional buildings, and also prohibits the installation of certain new natural gas-powered appliances (eg, patio heaters).

On 25 April 2024, the council of the Montreal Metropolitan Community (*Communauté Métropolitaine de Montréal*, or CMM) adopted the Regulation on greenhouse gas emissions from residential, commercial and institutional buildings. The Regulation prohibits the installation of fossil fuel-fired or water heaters in all new residential, commercial and institutional buildings – although certain exceptions may apply, depending on the type of building and appliance. It will be applicable to 82 municipalities once it receives the approval of the Minister of the Environment to come into force.

Declaration and rating of buildings' environmental performance

On 27 March 2024, the Quebec government adopted the Act regarding the environmental performance of buildings, which falls under the objective of the Implementation Plan to decarbonise buildings by notably implementing a system for declaring and rating the energy performance of buildings. The attribution of an environmental performance rating is public information accessible via a registry and may have an impact on the value of a building or the owner's financing opportunities.

The application of the Act will depend on the adoption of one or more regulations pertaining to a range of matters, including:

- standards for the environmental performance of buildings – in the form of:
 - (a) construction standards
 - (b) an environmental performance rating
- cases and conditions requiring an owner to obtain a report on a building's environmental performance;
- cases and conditions for compliance with a construction standard; and
- cases and conditions under which the owner of a building must take the necessary measures to ensure compliance with the environmental rating.

At the time of this update, no regulations have been adopted under the Act regarding the environmental performance of buildings.

Meaning of "important ecological value" in de facto expropriation

As of 8 December 2023, new amendments to the Act regarding land use planning and development (ALUPD) have changed the legal framework concerning de facto expropriation in the

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presence of wetlands, water habitats, and environments of important ecological value. These amendments allow a public body to dispossess a private owner of its immovable property without having to compensate them, insofar as this dispossession is deemed to be justified within the meaning of the ALUPD if it is notably intended to protect wetlands, water habitats, or environments of important ecological value.

Broadly worded, the new provisions give rise to multiple interpretations, including that of the notion of “important ecological value”, which is not defined in the ALUPD. The courts have yet to rule on these matters. In *Ville de Saint-Bruno-de-Montarville v Sommet Prestige Canada Inc* (2024 QCCA 804), the Quebec Court of Appeal recently returned a case to be reassessed by the

Superior Court in light of the new legal framework, which applies immediately. The Superior Court will have to determine whether the immovable property subject to de facto expropriation is also subject to an environment of important ecological value – in which case, de facto expropriation will be justified and the owner will not be compensated.

Conclusion

Canadian environmental law continues to evolve at a rapid pace. All jurisdictions are expected to continue to actively promote new legislative initiatives. The courts will most likely find themselves faced with interpretative challenges and their interventions in these new legislative frameworks will be detrimental to the implementation of such frameworks.

CHINA

Law and Practice

Contributed by:

Rongliang Wu, Mei Wan, Qirong Huang and Xueqi Huang
Jin Mao Law Firm

Contents

1. Regulatory Framework and Law p.71

1.1 Environmental Protection Policies, Principles and Laws p.71

2. Enforcement Authorities and Mechanisms p.71

2.1 Regulatory Authorities p.71

2.2 Co-operation p.72

3. Environmental Protections p.72

3.1 Protection of Environmental Assets p.72

3.2 Breaching Protections p.73

4. Environmental Incidents and Permits p.73

4.1 Investigative and Access Powers p.73

4.2 Environmental Permits/Approvals p.73

4.3 Regulators' Approach to Policy and Enforcement p.74

4.4 Transferring Permits/Approvals p.74

4.5 Consequences of Breaching Permits/Approvals p.74

5. Environmental Liability p.75

5.1 Key Types of Liability p.75

5.2 Disclosure p.77

6. Environmental Incidents and Damage p.78

6.1 Liability for Historical Environmental Incidents or Damage p.78

6.2 Reporting Requirements p.78

6.3 Types of Liability and Key Defences p.78

7. Corporate Liability p.79

7.1 Liability for Environmental Damage or Breaches of Environmental Law p.79

7.2 Environmental Taxes p.79

7.3 Incentives, Exemptions and Penalties p.79

7.4 Shareholder or Parent Company Liability p.80

7.5 ESG Requirements p.81

7.6 Environmental Audits p.81

8. Personal Liability p.82

8.1 Directors and Other Officers p.82

8.2 Insuring Against Liability p.82

9. Insurance p.82

9.1 Environmental Insurance p.82

10. Lender Liability p.83

10.1 Financial Institutions/Lender Liability p.83

10.2 Lender Protection p.83

11. Civil Liability p.83

11.1 Civil Claims p.83

11.2 Exemplary or Punitive Damages p.84

11.3 Class or Group Actions p.84

11.4 Landmark Cases p.84

12. Contractual Agreements p.85

12.1 Transferring or Apportioning Liability p.85

12.2 Environmental Insurance p.85

13. Contaminated Land p.85

13.1 Key Laws Governing Contaminated Land p.85

13.2 Clearing Contaminated Land p.85

13.3 Determining Liability p.86

13.4 Proceedings Against Polluters p.86

13.5 Investigating Environmental Accidents p.86

14. Climate Change and Emissions Trading p.86

14.1 Key Policies, Principles and Laws p.86

14.2 Targets to Reduce Greenhouse Gas Emissions p.87

15. Asbestos and Polychlorinated Biphenyls (PCBs) p.87

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs p.87

16. Waste p.88

16.1 Key Laws and Regulatory Controls p.88

16.2 Retention of Environmental Liability p.88

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods p.88

16.4 Rights and Obligations Applicable to Waste Operators p.89

17. Environmental Disclosure and Information p.89

17.1 Self-Reporting Requirements p.89

17.2 Public Environmental Information p.90

17.3 Corporate Disclosure Requirement p.90

17.4 Green Finance p.90

18. Transactions p.90

18.1 Environmental Due Diligence p.90

18.2 Disclosure of Environmental Information p.91

18.3 Key Issues in Environmental Due Diligence p.91

Jin Mao Law Firm was founded in 1988. It is a leading law firm in China, offering a comprehensive legal service with a professional, high level of specialisation. Jin Mao has more than 200 lawyers and the service areas cover foreign investment, finance, infrastructure and real estate, corporate, environment and climate change, resource and energy, health and safety, bioscience and hi-tech, labour and corporate social responsibility, IP, logistics and maritime, arbitration and litigation. Jin Mao was recognised as National Outstanding Law Firm and

Shanghai Outstanding Law Firm by the Bar Association. In the field of environmental, health and safety (EHS) legal service, Jin Mao has a team providing enterprises, NGOs and governmental authorities with a professional EHS service, encompassing EHS regulations and the standard database, legal advice, training, permits, EHS compliance assessment, EHS due diligence, M&A, climate change, greenhouse gas trading, ESG, emergency response, government interactions, hearings, administrative review, arbitration and litigation.

Authors



Rongliang Wu is a partner at Jin Mao Law Firm and has an educational background in engineering and EHS (environmental, health and safety) management. He is a

Certified Safety Engineer of China and the director of the Shanghai Bar Association's Environment, Resources and Energy (ERE) Committee, as well as deputy director of the All-China Bar Association's ERE Committee. Rongliang has extensive experience in EHS legal services, including consultation, legal advice, permits, M&A, climate change, work safety, corporate social responsibility, ESG, hearings, arbitration and litigation. Engaged by an NGO, he played an important role in the Changzhou poisonous land case.



Mei Wan is a partner at Jin Mao Law Firm, with 12 years' legal practice experience. She is the director of the Shanghai Lawyers Association's ESG Professional Committee and has

been engaged by the Ministry of Ecology and Environment as an evaluation expert in environmental enforcement since 2018. Mei's environmental practice includes environmental compliance assessment, legal consultation, training, M&A, IPO due diligence, carbon trading, ESG, green finance, hearings, arbitration and litigation. She has particular experience in providing services for the world's leading manufacturing enterprises.

Contributed by: Rongliang Wu, Mei Wan, Qirong Huang and Xueqi Huang, Jin Mao Law Firm



Qirong Huang is a partner at Jin Mao Law Firm and is a Certified Safety Engineer of China, with an educational background in chemical engineering. Qirong has more than 15 years'

experience in reputed multinational corporation manufacturing, EHS (environmental health and safety) and operations. He also has more than five years' broad legal experience in EHS consultation, legal advice, project permitting, M&A, compliance assessment, work safety, chemical safety, fire protection and occupational health.



Xueqi Huang is an assistant lawyer at Jin Mao Law Firm and specialises in ESG legal services, including consultation, training, public interest litigation, environmental infringement and

other environmental legal services. Xueqi also focuses on civil and commercial dispute resolution, commercial arbitration, corporate governance and compliance counselling as well as international legal services. She has experience as a legal assistant in the head office of a listed company, as well as internship experience in courts and other high-profile law firms in Shanghai.

Jin Mao Law Firm

40F, Bund Centre
222 East Yan'an Rd
Shanghai 200002
China

Tel: +86 21 6249 6040
Fax: +86 21 6249 5611
Email: Rogers.wu@jinmao.com.cn
Web: www.jinmao.com.cn



金茂律師事務所

— Jin Mao Law Firm —

1. Regulatory Framework and Law

1.1 Environmental Protection Policies, Principles and Laws

China's environmental protection includes laws, administrative regulations, local regulations, departmental rules and provincial government rules. It also includes national standards (*Guo Biao*, or GB), industry standards (*Hángyè Guīfàn*, or HJ) and local standards (*Difāng Biāozhǔn*, or DB).

Environmental laws have formed a system using the framework “1+N+4”, as follows.

- “1” refers to the Environmental Protection Law, which plays a fundamental and comprehensive role.
- “N” refers to specific environmental protection laws, including laws on pollution prevention and control of industrial exhaust gas, waste water, solid waste, soil pollution, noise and radioactive substances, as well as the Environment Impact Assessment Law, the Marine Environmental Protection Law, and the Wetland Conservation Act.
- “4” refers to laws aimed at ecological environmental protection of special geographic areas, specific regions or watersheds, including the Yangtze River Protection Law (2021-03-01), the Yellow River Protection Law (2023-04-01), the Black Land Protection Law (2022-08-01), and the Ecological Protection Law for the Qinghai-Tibet Plateau (2023-09-01).

At the same time, the State Council also issued the Regulations on Environmental Protection of Construction Projects, the Regulations on Sewage Disposal Permits, etc. The provincial and city-level People's Congress and its standing committee have also formulated local environ-

mental protection regulations. Additionally, there are many standards related to environmental management and pollutant discharge limits.

The Supreme People's Court can issue judicial interpretations on how the law is to be applied. Since 2023, the Supreme People's Court and the Supreme People's Procuratorate have updated the “Interpretation of Several Issues Concerning the Application of Law in Handling Criminal Cases of Environmental Pollution”, the “Interpretation of Several Issues Concerning the Application of Law to the Trial of Cases of Disputes Over Liability for Ecological and Environmental Tort”, and issued “Several Provisions of the Supreme People's Court Concerning Evidence in Civil Litigation for Ecological and Environmental Tort”.

In 2024, the Standing Committee of the National People's Congress officially launched the compilation work of the Ecological Environment Code. It will systematically integrate, compile and revise the existing ecological environment legal systems and will be submitted for deliberation within one year.

2. Enforcement Authorities and Mechanisms

2.1 Regulatory Authorities

The Ministry of Ecology and Environment (MEE) manages and supervises the environmental protection work of the whole country. At the same time, it retains the National Nuclear Safety Administration and establishes the National Office for the Import and Export of Ozone-Depleting Substances. The MEE's main responsibilities include tackling climate change and the usual environmental supervision.

At the local level, the Environmental Protection Law stipulates that the local people's governments should be responsible for the environmental quality of their own region. The Ecological and Environmental Department (EED), above the county level, should manage and supervise the environmental and ecological work of the entire region.

2.2 Co-operation

Central Environmental Protection Inspection System

There is a major system for promoting ecological civilisation and eco-environmental protection. The Central Ecological Environment Protection Inspection Group is an organisation formed and approved by the Central Committee of the Communist Party of China (CPC) and the State Council to undertake specific ecological environment protection inspection tasks.

It mainly supervises local CPC committees and local governments, departments with important eco-environmental protection responsibilities, and relevant enterprises whose production and business activities have a significant impact on the ecological environment. Supervision is carried out once every five years.

Environmental protection inspection mainly focuses on three aspects:

- major decision-making and deployment of the means for implementation by the CPC committee and the government with regard to environmental protection at the national and provincial levels;
- outstanding environmental problems and dealing with the situation; and
- the implementation of environmental protection responsibilities.

In addition to the central environmental protection inspections, environmental protection inspection mechanisms have also been established at the provincial level.

State Departments

There are many departments responsible for environmental protection, such as:

- the National Development and Reform Commission (NDRC) - responsible for the comprehensive research and formulation of economic and social development policies, overall balance, and the promotion of strategic adjustment and upgrading of industrial structure, including energy policy development;
- the Ministry of Housing and Urban-Rural Development (MOHURD) - responsible for the energy efficiency of buildings, waste water treatment facility plans, etc;
- the Ministry of Industry and Information Technology (MIIT) - responsible for developing and implementing industry plans, policies and standards, including the New Energy Industry Plan and energy-saving in traditional industries;
- the Ministry of Transport (MOT) - responsible for the environment with regard to the transport industry, etc.

3. Environmental Protections

3.1 Protection of Environmental Assets

The Environmental Protection Law is the primary law, with other specific environmental laws covering particular environmental assets (see **1.1 Environmental Protection Policies, Principles and Laws**). In addition, the Wildlife Protection Law of China came into force on 1 May 2023 in order to protect wildlife, save precious and

endangered wildlife, maintain biodiversity and ecological balance, and promote harmonious coexistence between humans and nature.

On 18 October 2023, the Supreme People's Court released ten typical cases of judicial protection of national parks. Adhering to the principle of the strictest rule of law, whereby the illegal exploitation of national strategic resources is severely punished within the range of legal penalties, the court strictly controls the application of probation – with the development and utilisation of judicial resources. In civil public interest litigation cases of ecological damage, even though the perpetrators have been sentenced to criminal liability, they have also been seriously pursued for civil liability. This reflects the principles of accountability for damage and the strictest rule of law. These cases provide reference for subsequent cases.

3.2 Breaching Protections

The penalties for violating the Environmental Protection Law and related laws depend on the consequences of the offence. If it constitutes a criminal offence, criminal liability will be pursued in accordance with the law. If it does not yet constitute a crime, it will be punished in accordance with the Administrative Penalties Law and the Measures on Administrative Penalties for the Ecological Environment. (For more details, please refer to **5.1 Key Types of Liability**.)

According to the Civil Code, pollution of the environment and damage to the ecology are subject to tort liability. This includes stopping the infringement, removing obstructions, eliminating dangers, repairing the ecological environment, and apologising and compensating for damages. (For more details, please refer to **5.1 Key Types of Liability**.)

4. Environmental Incidents and Permits

4.1 Investigative and Access Powers

MEE and EED investigators have the right to:

- enter relevant sites for inspection, reconnaissance, voice recording, photographing, video recording, and on-site sampling, monitoring and testing;
- question the business entities and relevant personnel and request them to explain relevant matters and provide relevant materials; and
- review and copy production records, waste water discharge records, and other relevant documents.

When facing government inspection, dishonesty or obstructing law enforcement will be fined by the EED. This is required across the entire environmental law system, including Article 98 of the Law on the Prevention and Control of Air Pollution, Article 81 of the Law on the Prevention and Control of Water Pollution, and Article 103 of the Solid Waste Law.

4.2 Environmental Permits/Approvals

Approval of Environmental Impact Assessments

According to the Environmental Impact Assessment Law and the Regulations on the Environmental Protection Management of Construction Projects, construction projects that may cause significant or mild environmental impacts must carry out environmental impact assessments (EIAs) and compile EIA reports (forms), and obtain approval from the local EED or the MEE.

Pollutant Discharge Permits

Discharges based on the Regulation on the Administration of Pollutant Discharge Permits

(PDPs) are officially implemented. Pollutant-discharging industries are required to obtain a PDP or carry out emissions registration before the emissions/waste are discharged.

Drainage Permit

According to the Regulations on Urban Drainage and Sewage Treatment, enterprises, institutions and individual industrial and commercial households engaged in industrial, construction, catering, medical and other activities need to apply to urban drainage authorities for a drainage permit if they discharge sewage into urban drainage pipelines. This permit is issued by a construction authority rather than the EED. Drainage permits are valid for five years.

X-Ray Radiation Safety Licence

According to the Regulations on the Safety and Protection of Radioisotopes and Radiation Devices, an enterprise that produces, sells and uses radiation and radiological devices must obtain a Radiation Safety Licence in accordance with the provisions therein. The licence is valid for five years.

Hazardous Waste Business Licence

According to the Solid Waste Law, enterprises engaged in collecting, storing, utilising and disposing of hazardous waste should apply for a Hazardous Waste Business Licence or a Hazardous Waste Collection Licence, in accordance with relevant state regulations. The former is valid for five years and the latter for three years.

4.3 Regulators' Approach to Policy and Enforcement

The regulatory approach includes environmental permits, environmental administrative supervision and inspection, and environmental administrative penalties. Environmental permit refers to an administrative decision made by an environ-

mental law enforcement agency (in response to the application by an individual or organisation), after examination, to permit or not permit the applicant to engage in a certain activity.

Environmental administrative supervision and inspection refer to actions taken by the environmental law enforcement agencies in order to achieve the function of environmental management. The administrative counterpart is whether environmental protection laws and regulations and specific administrative requirements are being complied with.

An environmental administrative penalty is an administrative sanction imposed by a specific environmental law enforcement agency on a citizen or organisation that violates environmental laws and regulations. It is divided into behavioural penalties, property penalties, and warnings.

4.4 Transferring Permits/Approvals

Article 9 of the Administrative Licensing Law stipulates that administrative licences obtained in accordance with the law shall not be transferred, except for those that are transferable in accordance with legal conditions and procedures as stipulated by laws and regulations. The main exceptions are:

- land use permits obtained by way of concessions; and
- mining permits for mineral resources.

4.5 Consequences of Breaching Permits/Approvals

Administrative Penalties

Violations of environmental permits or approvals can lead to administrative penalties imposed by the environmental protection authorities. These penalties may include fines, warnings, or orders

to cease operations or rectify the violations. (For more details, see **5.1 Key Types of Liability**.)

Revocation or Suspension of Permits

Environmental authorities may revoke or suspend the permits or approvals for the specific activity that led to the violation. This can effectively shut down the operation until compliance is achieved.

Criminal Charges

In cases of severe violations, such as illegal discharges of hazardous pollutants or in the event of significant harm to the environment, individuals or entities responsible may face criminal charges. This can result in imprisonment and substantial fines. (For more details, see **5.1 Key Types of Liability**.)

Environmental Remediation or Compensation

Violators may be required to remediate environmental damage or pay compensation for environmental damage caused by their actions. This may include the cost of environmental restoration or remediation.

5. Environmental Liability

5.1 Key Types of Liability

China's environmental legal liability includes criminal liability, administrative liability and civil liability. The subject of liability includes enterprises, enterprise managers and individuals that commit pollution damage acts.

Environmental Criminal Liability

Environmental criminal liability mainly includes the following crimes:

- environmental pollution (Article 338 of the Criminal Law);

- destroying a computer information system (Article 226 of the Criminal Law); and
- issuing false proof documents for EIAs and environmental monitoring reports (Article 229 of the Criminal Law).

According to the Amendment to the Criminal Law (XI), enterprises or enterprise managers may be the criminal subjects of organising or carrying out serious environmental pollution. Generally, the enterprises will be criminally fined, whereas individual crimes will be sentenced to less than seven years' imprisonment and fined. However, the imprisonment can increase to a maximum of 15 years if the following illegal acts occur and cause serious environmental consequences:

- discharging, dumping or disposing of any hazardous waste in protective areas;
- discharging, dumping or disposing of any hazardous waste in important rivers and lakes as determined by the State;
- acts causing the serious loss of farmland; and
- acts causing any serious injury, illness or disability or the death of a person.

The Supreme People's Court and the Supreme People's Procuratorate updated the Interpretation of Several Issues Concerning the Application of Law in Handling Criminal Cases of Environmental Pollution, which entered into force on 15 August 2023. The conviction and sentencing standards for environmental pollution crimes were adjusted. The statutory penalties for the crime of polluting the environment were also adjusted from the original two grades to three grades and the criteria for ascending grades of sentencing were amended and improved. The rules for dealing with the behaviour of environmental data falsification were clarified, as were the rules of leniency and severity in handling criminal cases of environmental pollution.

Environmental Administrative Liability

Environmental administrative liability for environmental damage mainly involves administrative penalties and administrative compulsory enforcement measures. The Administrative Penalties Law and the Measures on Administrative Penalties for the Ecological Environment stipulate the types of administrative punishments, including:

- warning and circulation of disciplinary notice;
- fines, as well as confiscation of illegal gains and illegal property;
- temporarily detaining the licence, lowering the level of qualification, revoking the licence, and prohibiting application for an administrative licence within a certain period;
- restricting the development of production and business operation activities, prohibiting engagement in business, ordering the suspension of production or business operation and the suspension of production for rectification, as well as ordering closure and restricting employment;
- orders to demolish within a time limit;
- administrative detention; and
- other administrative penalties as prescribed by laws and administrative regulations.

According to the Administrative Penalties Law, an administrative authority may seek penalties against a citizen, legal person or another organisation for violation of the administrative order in accordance with the law by reducing rights and interests or increasing obligations – for example, a fine, or confiscation of illegal gains and illegal property. According to the Environmental Protection Law, those who fail to rectify the illegality within the timeframe imposed may also be fined per day, which could significantly increase the penalty.

If the violation is serious, the licence may be temporarily detained, and the level of qualification could be lowered or revoked. Other options are restricting production and business operation or ordering the suspension of production or business operation, as well as closing down and administrative detention (the last being a punishment measure imposed on the main person in charge).

In addition to the Administrative Penalties Law, the MEE has promulgated the Measures on Administrative Penalties for Ecological Environment, which stipulate the process of imposing administrative penalties. (For more details, see **3.2 Breaching Protections.**)

Besides administrative penalties, enterprises committing illegal acts may also face administrative compulsory enforcement measures such as sealing up and confiscating the property.

Environmental Civil Liability

Environmental civil liability primarily refers to the liability for environmental pollution and ecological damage. According to the Civil Code, civil penalties include:

- cessation of the infringement;
- removal of obstacles;
- elimination of danger;
- restitution of property;
- restoration to the original condition;
- repair, reworking or replacement;
- continued performance;
- compensation for loss;
- payment of liquidated damages;
- elimination of adverse effects and rehabilitation of reputation; and
- offering an official apology.

Where any law provides for punitive damages, such a law shall apply.

Where environmental pollution or ecological damage causes harm to others, the tortfeasor shall assume the tort liability. The infringed party may claim compensation for losses, an apology, or restoration to the original state.

For damage to the ecological environment, provincial and municipal governments and their designated agencies or an organisation prescribed by law have the right to claim damages from the infringer. Article 1232 of the Civil Code stipulates a punitive compensation system for environmental pollution and ecological damage under specific conditions.

Environmental civil liability adopts the principle of no-fault liability and the inverse principle of proof liability. If a dispute arises due to environmental pollution or ecological damage, the actor shall bear the burden of proof for demonstrating the existence of grounds for not bearing liability or mitigating liability as stipulated by law and that there is no causal relationship between their behaviour and the damage.

In addition to this, public interest litigation is involved in civil liability (see **11.1 Civil Claims**).

5.2 Disclosure

The Administrative Measures for the Legal Disclosure of Environmental Information of Enterprises were issued by the MEE and came into force on 8 February 2022. The measures stipulate the enterprises that are specifically required to disclose environmental information such as key emission units and implement mandatory clean production audits. The measures stipulate that enterprises must disclose the following:

- basic information on enterprise production and ecological environmental protection;
- enterprise environmental management information, including information on ecological and environmental protection administrative licences, environmental protection tax, environmental pollution liability insurance and environmental protection credit evaluation;
- pollutant generation, management and emission information, including information on pollution prevention and control facilities, pollutant emissions, toxic and hazardous substance emissions, industrial solid waste and hazardous waste generation, storage, flow, utilisation and disposal, and self-monitoring;
- carbon emissions information, including emissions, emissions facilities, and other information;
- ecological environment emergency information;
- information on ecological and environmental offences; and
- annual temporary environmental information disclosed in accordance with the law.

Enterprises that violate the provisions of the Administrative Measures for the Legal Disclosure of Environmental Information of Enterprises and do not disclose environmental information, or disclose environmental information that is untrue or inaccurate, will face penalties of ordering correction, notification and disciplinary criticism, as well as fines.

Starting from 1 May 2024, companies listed on the Main Board and the ChiNext Board in China are required to disclose relevant information in accordance with the sustainability report guidelines announced by the exchanges. This includes information on multiple aspects such as addressing climate change, pollution control and ecosystem protection.

6. Environmental Incidents and Damage

6.1 Liability for Historical Environmental Incidents or Damage

Historical pollution problems mainly concern soil and groundwater pollution. Given that the historical pollution prevention and control facilities and environmental management system were not satisfied, there may be landfill waste, chemical leakage and sudden accidents that result in soil and groundwater pollution.

When the land is handed over to the next owner or returned to the government, it may be found that the damage caused by the historical pollution accident still exists. The land needs to be investigated and evaluated according to the current laws and regulations or even organised for restoration. Responsibility for restoration is still allocated according to the “polluter pays” principle. The “Changzhou poisoned land event” has proved that the unit that caused historical pollution should bear the environmental tort liability.

6.2 Reporting Requirements

According to the Measures for Reporting Information on Environmental Emergencies issued by the MEE, environmental reporting requirements mainly include:

- types of environmental incidents;
- reporting timelines;
- reporting methods;
- information required;
- investigation and documentation; and
- penalties for non-compliance.

6.3 Types of Liability and Key Defences

In China, environmental accidents may lead to legal liability, including criminal, administrative and civil liability.

Criminal Liability and Key Defences

According to the Criminal Law, criminal liability for environmental pollution can be up to 15 years’ imprisonment and a fine. The main defences against criminal liability are:

- the limitation period has expired;
- the identification of the liable person is inaccurate;
- the authenticity, legality and relevance of evidence;
- the legitimacy of the procedure; and
- the suspect’s attitude to admitting a mistake, which can be used as a defence of diminished responsibility.

Administrative Liability and Key Defences

The main defences against environmental administrative liability are:

- limitation period – if normal/general illegal acts are not found within two years, there should be no administrative punishment, but this will be extended to five years for those acts that involve citizens’ lives, health and safety, financial safety, and causing harmful consequences;
- the identification of the responsible person is inaccurate;
- the fact determination is inaccurate and the evidence lacks authenticity, legitimacy and relevance;
- the law enforcement procedures are not in compliance with law;
- the suspects did not commit intentional or negligent mistakes; and
- the illegal circumstances are minor or the consequences are not serious.

In recent years, various places have introduced a “list of exemptions for minor offences” and dis-

cretionary rules – for example, the Yangtze River Delta Integrated Ecological Penalty Regulations.

Civil Liability and Key Defences

China's civil liability for compensation adopts the principle of "filling up". In recent years, there have been cases of compensation of hundreds of millions of Chinese yuan. The main defences against environmental civil liability are:

- the limitation period of three years (for continuing acts, from the date of the end of the act) has expired;
- force majeure exists; and
- there has been fault on the part of a third party or the victim.

7. Corporate Liability

7.1 Liability for Environmental Damage or Breaches of Environmental Law

Enterprises violating laws and regulations related to environmental protection may be subject to criminal, civil or administrative liability. (For more details, see 5.1 Key Types of Liability.) In addition, this may have a negative impact on the environmental credit evaluation of the enterprise. It will be subject to negative public evaluation results, suffer loss of eligibility for government procurement, be impacted regarding bank loan financing, and be subject to more frequent supervision and other disciplinary actions.

7.2 Environmental Taxes

According to the Environmental Protection Tax Law, enterprises, public institutions and other producers and operators that directly discharge taxable pollutants into the environment are regarded as payers of environmental protection tax and should do so in accordance with the law. Taxable pollutants include noise, air pollutants,

water pollutants and solid waste, as stipulated in the Table of Environmental Protection Tax Items and the Table of Taxable Pollutants and Equivalent Values.

Natural resource tax is also regarded as a kind of green tax. China's Resource Tax Law stipulates that taxable products include energy minerals (oil, natural gas, coal, geothermal, etc), metal minerals, non-metallic minerals, hydrous minerals, and salt.

The Resource Tax Law stipulates that enterprises and individuals developing taxable resources within Chinese territory and other sea areas under their jurisdiction must pay resource tax in accordance with this law. The specific scope of the resource tax shall be determined by the Table of Resource Tax Items and Rates.

7.3 Incentives, Exemptions and Penalties

Incentives for Good Environmental

Citizenship

Tax incentives

The following tax incentives apply, as per the Environmental Protection Tax Law and its Implementation Regulations.

- If the concentration of taxable atmospheric or water pollutants is lower than 30% of the national and local pollutant discharge limits, an environmental protection tax of 75% shall be levied. If the concentration of taxable atmospheric or water pollutants is lower than 50% of discharge limits, an environmental protection tax of 50% shall be levied.
- Those legally established urban and rural sewage centralised treatment sites and domestic waste centralised treatment sites that discharge corresponding taxable pollutants that do not exceed the national and local

discharge standards are exempt from environmental protection tax.

The following tax incentives apply, as per the Regulations for the Implementation of the Enterprise Income Tax Law.

- The environmental treatment industry and certain businesses that invest in pollution control equipment, energy conservation and emission reduction technologies may qualify for tax incentives – for example, waste water treatment plants can be refunded at the rate of 70% of VAT.
- However, if the taxpayer is subject to administrative penalties exceeding CNY100,000, they shall not enjoy the VAT refund policy within six months. If two administrative penalties exceeding CNY100,000 occur within 12 months, the VAT refund policy shall not be enjoyed for 36 months from the month of the second penalty decision.

Green credit

Financial institutions in China have started to provide preferential credit terms to businesses that meet certain environmental criteria, thereby encouraging green financing and sustainable practices. An environmental credit system has been developed in accordance with the provisions of the Enterprise Environmental Credit Evaluation Measures (for trial implementation). Enterprises are classified into four levels (A,B,C and D), according to their environmental behaviour.

A corporate credit repair system has also been developed – for example, in Shanghai, according to the Shanghai Municipal Enterprises and Public Institutions Ecological Environment Credit Repair Management Regulations (for trial implementation). Enterprises and institutions with

ecological and environmental credit failures that take the initiative to rectify ecological and environmental violations may, in accordance with the prescribed conditions and procedures, apply for restoration to the department that imposed the ecological and environmental administrative penalty.

Environmental certification

Obtaining environmental certifications, such as the “Green Label” or “Environmental Management System” certifications, can enhance a company’s reputation and market access. This creates incentives for environmental responsibility.

Penalties for Bad Environmental Citizenship

The penalties for bad environmental citizenship are mainly criminal, civil and administrative liability or a lower credit rating. (For more details, see 5.1 Key Types of Liability.)

7.4 Shareholder or Parent Company Liability

A parent company has independent legal status and normally is not impacted by the environment liability caused by its subsidiaries. However, if the parent company has engaged in acts that are related to the causes of an environmental accident (eg, excessive control), the subsidiaries’ illegal behaviours could also be attributed to the parent company. Hence, in particular cases, the shareholders might bear civil, administrative or even criminal liability.

A waste water company in Nanjing has repeatedly discharged high-concentration waste water and toxic and hazardous sludge hazardous waste into the Yangtze River, causing enormous ecological and environmental damage. The waste water company paid the ecological environment restoration fee in the final reconciliation agree-

ment and its parent company assumed joint and several liability.

In the “3.21” accident caused by the explosion of hazardous waste, even the legal representative and general manager of the parent company had assumed criminal liability.

7.5 ESG Requirements

ESG requirements focus on the disclosure of enterprises’ information. The requirements for enterprises are a combination of mandatory disclosure and voluntary disclosure. More and more enterprises are beginning to establish ESG strategies and corresponding governance institutions, promoting the integration of ESG and sustainable development concepts with the enterprises’ strategies.

The Hong Kong Stock Exchange has divided the ESG disclosure requirements into three stages since 2015.

The China Securities Regulatory Commission (CSRC) revised the “Guidelines for the Governance of Listed Companies” by adding content on environmental protection and social responsibility. This establishes the basic framework for ESG information disclosure of Chinese listed companies.

The MEE has issued and implemented the “Management Measures for Legal Disclosure of Enterprise Environmental Information”. This specifies the subject and content of legal disclosure of enterprise environmental information (see 5.2 Disclosure for further details).

On 25 July 2023, the State-Owned Assets Supervision and Administration Commission of the State Council released the “Research on the Preparation of ESG Special Reports for Central

Enterprise Holding Listed Companies”, which includes the “Reference Index System for ESG Special Reports of Central Enterprise Holding Listed Companies” to further standardise the ESG information disclosure of central enterprise-holding listed companies. This is a milestone in the development process of local ESG in China. Local state-owned assets supervision and administration commissions have also put forward more requirements for social responsibilities and ESG.

On 12 April 2024, the three major stock exchanges in Shanghai, Shenzhen and Beijing respectively issued self-regulatory guidelines for listed companies in a document entitled Sustainability Report (Trial). Listed companies on the Main Board and the STAR Market should disclose the “Sustainability Report of Listed Companies” or the “Environmental, Social and Corporate Governance Report of Listed Companies” in accordance with these guidelines and the relevant regulations of the exchanges. The self-regulatory guidelines require listed companies to use the double materiality approach in order to identify sustainability disclosure topics.

7.6 Environmental Audits

Regular Inspection

Companies operating in China, especially those engaged in industries with potential environmental impacts, may be subject to regular environmental inspection conducted by the relevant environmental protection authorities (eg, the MEE and the EED).

Cleaner Production Audit

This is an audit mechanism to assess the environmental protection status of an enterprise, with the aim of reducing environmental pollution and resource wastage. Depending on how

the audit is participated in, it can be categorised as either voluntary or mandatory.

Voluntary audits are audits that are voluntarily applied for by the enterprise, whereby the degree of participation and audit criteria are decided by the enterprise itself. According to the Interim Measures on Cleaner Production Audits, mandatory audits are conducted by the government or relevant organisations to compel some enterprises to carry out audits. Audit standards and the degree of participation are determined by the government or organisation.

8. Personal Liability

8.1 Directors and Other Officers

According to the Criminal Law and relevant provisions, if the environmental pollution crimes are unit crimes, the directly responsible persons in charge and other responsible persons should be fined and punished. The “directly responsible person in charge” includes the actual controller of the unit, the principal person in charge or the authorised person in charge, and senior management personnel.

In environmental administrative liability, administrative detention measures are targeted at company executives and other directly responsible persons. The detention is less than 15 days for the following acts:

- refusing to stop construction when there is no EIA;
- refusing to stop discharging even though there is no valid discharge permit;
- dishonesty with regard to discharging and data; or
- producing or using forbidden pesticide.

8.2 Insuring Against Liability

China does not yet have an environmental liability insurance system for individual executives. There may be some commercial insurance companies that offer something similar. However, except for the situation of environmental accidents causing damage, the aforesaid violation of laws resulting in administrative or criminal liability may be excluded from the insurance coverage.

9. Insurance

9.1 Environmental Insurance

China’s current environmental pollution liability insurance is divided into compulsory and voluntary insurance.

The Environmental Protection Law stipulates encouragement of environmental pollution liability insurance. The Solid Waste Law, which took effect in September 2020, stipulates that units collecting, storing, transporting, utilising and treating hazardous waste should take out environmental pollution liability insurance in accordance with relevant state regulations.

In China, the pilot work of environmental insurance was first carried out in 2007. However, the Measures for Compulsory Environmental Pollution Liability Insurance (Draft) – published in 2017 – still remains at the stage of seeking public opinions and has not been further reviewed. According to the draft, compulsory environmental pollution liability insurance covers personal damage to third parties, as well as property damage, ecological damage, and emergency treatment and clean-up costs.

In 2021, the Shenzhen Municipal Government issued the Implementation Measures for Com-

pulsory Liability Insurance for Environmental Pollution in Shenzhen City, which is the only legally mandatory insurance type in the field of national ecological environment. The measures require the following enterprises to take out compulsory liability insurance for environmental pollution:

- enterprises in Shenzhen that are subject to key management of pollutant discharge permits;
- enterprises included in the list of key pollutant discharge units in Shenzhen; or
- enterprises with a relatively large or greater environmental risk level determined in the enterprise's emergency plan for sudden environmental events.

The insurance liability scope of compulsory liability insurance for environmental pollution includes damage to the person and property of a third party, damage to the ecological environment, and emergency disposal and clean-up expenses – as well as necessary and reasonable legal expenses such as litigation fees, arbitration fees, and lawyer fees – resulting from environmental incidents or environmental pollution caused by production and business activities.

10. Lender Liability

10.1 Financial Institutions/Lender Liability

The Environmental Protection Law does not directly regulate the environmental protection responsibilities of financial institutions and lenders. Accordingly, the China Banking Regulatory Commission (CBRC) issued Green Credit Guidelines to provide guidance for the development of green credit for banking financial institutions, and proposed that environmental risk assessment and management should be strengthened.

The CBRC also proposed that pre-loan due diligence should be undertaken and customers with non-compliant environmental and social performance should not be granted credit.

10.2 Lender Protection

According to China's Green Credit Guidelines, banking financial institutions must establish and constantly improve a system of environmental procedures – including social risk management policy – developing the customer's environmental and social risk assessment standard and social risk evaluation and classification. The results should be the basis of rating, credit access, management and exit.

If necessary, qualified and independent third parties may also be engaged to evaluate or audit the activities of banking financial institutions, so as to fulfil their environmental and social responsibilities.

11. Civil Liability

11.1 Civil Claims

Where an enterprise or an individual causes personal injury or property damage to others due to environmental pollution or ecological damage, the party that commits the infringing act shall bear tort liability. The infringed party may file a civil lawsuit in accordance with the relevant provisions of tort liability in the Civil Code and relevant environmental protection laws.

If pollution causes harm to the public interest, the legally prescribed authorities (the People's Procuratorates) and qualified environmental NGOs may file civil environmental public interest litigation against the polluter. The people's governments at the provincial or municipal level and their assigned departments (eg, environ-

mental authorities) may ask for compensation through negotiation. If the negotiation fails to reach an agreement, then the above-mentioned authorities have a right to sue in court, which is known as a “lawsuit for damages to ecological environment”.

The other situation is default. If both parties have agreed on environmental protection obligations in the contract, the party in breach of the contractual obligations – for example, environmental obligations agreed in the context of M&A of companies – will be liable for breach of contract.

11.2 Exemplary or Punitive Damages

Punitive damages are clearly stipulated in the Civil Code (which did not exist before December 2020). Where the infringer intentionally pollutes the environment and damages the ecology in violation of the law and causes serious consequences, the infringed will have the right to request corresponding punitive damages. There are three conditions:

- violation of laws;
- intentional violation; and
- causing serious consequences.

The Interpretation of the Supreme People’s Court on the Application of Punitive Damages to the Trial of Ecological and Environmental Tort Dispute Cases, which came into effect on 1 January 2022, specifically regulates this measure.

11.3 Class or Group Actions

In China, the Civil Procedure Law regulates the joint action by one party consisting of numerous persons, which may be brought by a representative elected by such persons. The procedural acts of such representative will be binding on all members of the party they represent.

If the object of the action is of the same category and a party consists of numerous persons, and upon institution of the action the number of persons is not yet determined, the court may issue a public notice stating the particulars of the case and the claims and requesting that the claimants register with the court within a certain period of time.

Claimants who have registered with the people’s court may elect a representative to engage in litigation; if no such representative can be elected, the court may discuss the matter of determining a representative with the registered claimants. The procedural acts of a representative will be binding on the party they represent.

11.4 Landmark Cases

The case of Lujiazui Group and the “toxic land” in Suzhou originated from a change in the nature of Shougang Group’s old factory area in Suzhou, which was then acquired by Lujiazui Group through auction. Soil pollution was found during the process of real estate development and construction. In 2021, a soil pollution investigation at the Suzhou Reading School found serious pollution at the site. Subsequently, investigations by Lujiazui Group into other plots also confirmed the existence of serious pollution risks.

In November 2023, Lujiazui Group sued Shougang Group and others in court owing to a soil pollution infringement dispute, claiming more than CNY10 billion. Shougang Group responded that it had truthfully disclosed the partial pollution of the land and accused Lujiazui Group of causing “secondary pollution” due to incorrect construction methods.

Currently, the case is still under trial. This case is a significant warning to enterprises. Before conducting land transactions and development,

they must attach great importance to preliminary work such as soil pollution investigations.

12. Contractual Agreements

12.1 Transferring or Apportioning Liability

Article 153 of the Civil Code stipulates that a juristic act violating the imperative provisions of any law or administrative regulation shall be void, unless the imperative provisions do not result in the nullity of the juridical act.

The parties may agree on the allocation of the responsibility and liability for the prevention and control of pollution through agreement, without violating the mandatory provisions of laws and administrative regulations. When environmental violations occur, one party has the right to require the other party to bear the corresponding liability for pollution. However, the responsibility for pollution prevention and control agreed through an agreement cannot be a defence against the infringed claiming compensation, nor can it be a defence against administrative punishment.

12.2 Environmental Insurance

For more information on this issue, see 9.1 Environmental Insurance.

13. Contaminated Land

13.1 Key Laws Governing Contaminated Land

The laws and regulations governing soil pollution in construction land are as follows:

- the Soil Pollution Prevention and Control Law;
- Management Measures for the Soil Environment of Contaminated Land;

- Management Measures for the Soil Environment of Industrial and Mining Land (Trial);
- Soil Environmental Quality, Soil Pollution Risk Control Standards for Construction Land (Trial) (GB 36600 – 2018); and
- local soil pollution control regulations – for example, the regulations on soil pollution prevention in Shanghai (effective as of 1 October 2023) and Jiangsu Province (effective as of 1 September 2022).

According to the law, the person (or persons) responsible for soil pollution has the obligation to implement soil pollution risk control and remediation. If the person(s) responsible for soil pollution cannot be identified, the land use rights-holder shall carry out soil pollution risk control and remediation, including soil pollution investigation, risk assessment, risk control, remediation, risk control effect assessment, remediation effect assessment, and later-stage management. Article 94 of the Soil Pollution Prevention and Control Law stipulates the “substituted fulfilment” system.

13.2 Clearing Contaminated Land

According to Article 45 of the Soil Pollution Prevention and Control Law, the main bodies that bear the responsibility for soil pollution control include:

- the person responsible for soil pollution;
- the land use rights-holder; and
- the local people’s government and its relevant departments.

The Soil Pollution Prevention and Control Law has always emphasised the principle of “polluter pays”. There are two ways in which an environmental public interest litigation defendant can assume responsibility for environmental remediation – namely, either by organising the

implementation of environmental remediation or by bearing the costs of remediation. Therefore, in the event that the polluter does not have the ability or willingness to do so, it can fund the implementation of soil remediation entrusted to a third party.

13.3 Determining Liability

Based on the Interim Measures for the Determination of Persons Responsible for Soil Pollution on Construction Land and the Interim Measures for the Determination of Persons Responsible for Soil Pollution on Agricultural Land, the administrative liability of persons responsible for soil pollution can be determined. The foregoing two measures do not apply when determining the person liable for soil pollution in civil disputes over soil pollution between responsible parties and individuals.

Civil liability is determined on the basis of the “polluter pays” principle and the Civil Code in relation to torts provisions.

13.4 Proceedings Against Polluters Tort Liability Litigation

According to Article 96 of the Soil Pollution Prevention and Control Law, a person can bear tort liability according to the law. In civil disputes arising from soil pollution, the parties concerned may apply to the competent ecological and environmental authorities of the local people’s government for mediation and processing or may bring a lawsuit to court.

Public Interest Litigation

According to Article 97 of the Soil Pollution Prevention and Control Law, if soil pollution damages national interests or social public interests, procuratorates and NGOs may bring a lawsuit to court in accordance with the Environmental

Protection Law, the Civil Procedure Law, the Administrative Procedure Law and other laws.

As for organisations, according to Article 58 of the Environmental Protection Law, social organisations that meet certain conditions may bring a lawsuit to court against acts polluting the environment, damaging the ecology, and damaging public interest. (For more detail, see **11.1 Civil Claims**.)

13.5 Investigating Environmental Accidents

The process of investigating environmental accidents is based on the Measures for Investigation and Punishment of Environmental Emergencies promulgated by the EED from 1 March 2015 onwards. The investigation process is as follows:

- handle the scene and take emergency measures to control pollution;
- on-site investigation, extract evidentiary materials, and report;
- find out the cause and nature of the incident and handle the accidents according to law on the basis of preliminary investigation;
- implement the handling suggestions; and
- prepare an environmental emergencies investigation report, including an overview of the incident, causes, responsibility determination, and handling suggestions.

14. Climate Change and Emissions Trading

14.1 Key Policies, Principles and Laws

China now has a “1+N” system for climate change policy.

- “1” refers to the “Working Guidance for Carbon Dioxide Peaking and Carbon Neutrality in

Full and Faithful Implementation of the New Development Philosophy”, which was issued on 24 October 2021 and is based on the development stage and national conditions of China.

- “N” refers to the State Council’s issuance of the Action Plan for Reaching Carbon Dioxide Peak Before 2030 on 24 October 2021.

The State Council has also issued the Interim Regulations on the Management of Carbon Emission Trading and the MEE has issued the Measures for Carbon Emissions Trading Management (Trial), Management Measures for Voluntary Greenhouse Gas Emissions Reduction Trading (for Trial Implementation).

In addition, China has enacted the renewable energy Cleaner Production Promotion Law. This year, the Standing Committee of the National People’s Congress released the second-reading draft of the Energy Law of the People’s Republic of China and solicited opinions from the public. The law on addressing climate change is also in the process of legislative formulation.

China has also released carbon emissions calculations and verification standards for 24 industries (eg, power generation, steel, civil aviation, chemical, and cement). The first national standard for product carbon footprint accounting, “Requirements and Guidelines for Quantifying Carbon Footprints of Greenhouse Gas Products”, was officially implemented on 1 October 2024.

The MEE – together with the NDRC, the People’s Bank of China, the China Banking and Insurance Regulatory Commission (CBIRC) and the CSRC – jointly issued the “Guidelines on Promoting Investment and Financing in Response

to Climate Change”, with the aim of promoting climate investment and financing.

14.2 Targets to Reduce Greenhouse Gas Emissions

The carbon emission targets are mainly “30, 60”. China proposes that carbon dioxide emissions peak by 2030 and strives to achieve carbon neutrality by 2060.

According to the 14th Five-Year Plan and the Long-term Goals for 2035, by 2025, energy consumption and CO₂ emissions per unit of GDP will be reduced by 13.5% and 18% – respectively – from 2020 levels.

15. Asbestos and Polychlorinated Biphenyls (PCBs)

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs

Although China has not completely banned asbestos mines and asbestos products, it has long been aware of the harm caused by asbestos dust to the environment and the human body. In 2007, China issued the National Standard for Occupational Health Management of Asbestos Operations (GBZ/T 193-2007). From the perspective of occupational health monitoring, the standard provides effective and feasible occupational disease-prevention measures and operation procedures for preventing asbestos dust emission during asbestos operations and for controlling dust pollution.

PCBs

Since 1974, China has not manufactured power capacitors containing PCBs. In August 1979, China stipulated that electrical equipment with PCBs as the medium would no longer be imported. If import is truly necessary, it must be report-

ed to the competent department of the State Council for approval.

In 1991, China formulated the Regulations on Preventing PCB Electrical Equipment and Its Waste From Polluting the Environment and the Control Standard on PCBs for Waste Slags. The latter was superseded by the Standard for Pollution Control on PCB-Contaminated Waste in 2017. The standards clearly stipulate the categories of waste containing PCBs, as well as the environmental protection requirements for the entire process of cleaning, collecting, packaging, transporting, temporarily storing, storing, and harmlessly treating and disposing of waste containing PCBs.

Since 1998, PCB waste has been controlled as hazardous waste in China.

16. Waste

16.1 Key Laws and Regulatory Controls

The key laws and regulations on waste management in China are as follows:

- the Solid Waste Prevention and Control Law (2020 revised);
- the Law on the Promotion of a Circular Economy;
- the Regulations on the Management of Medical Waste; and
- the Measures for the Management of Hazardous Waste Business Licences.

Depending on waste type and harmfulness, the Solid Waste Prevention and Control Law sets requirements for industrial solid waste, domestic garbage, construction waste, agricultural solid waste, hazardous waste pollution prevention,

and stricter management and punishment of industrial solid waste and hazardous waste.

Many local governments have issued regulations on the management of domestic garbage. These regulations set requirements for the classification, collection, transportation and disposal of domestic garbage.

16.2 Retention of Environmental Liability

According to Article 36 of the Solid Waste Prevention and Control Law, entities generating industrial solid waste must establish and improve a system of responsibility for the prevention and control of pollution of the environment throughout the entire process of generating, collecting, storing, transporting, utilising, and disposing of industrial solid waste.

Entities must verify the qualification and technical capacity of the entrusted party and sign a written legal contract, which should also stipulate the requirements for pollution prevention and control responsibilities and consequences for all parties. Anyone who fails to verify the technical capability of the transportation and disposal enterprises, or fails to stipulate the requirements for pollution prevention and control in the written contract, will be subject to administrative punishment and will bear joint responsibility with the entrusted party that causes environmental pollution and ecological damage.

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

Article 66 of the Solid Waste Prevention and Control Law stipulates that an extended producer responsibility (EPR) system must be established for electrical and electronic products, lead storage batteries, and automotive traction batteries. The producers of electrical and electronic prod-

ucts, lead storage batteries, automotive traction batteries and other products must – as required – implement a used product recovery system that fits the sales of the products themselves, disclose the system to the public, and achieve effective recovery and utilisation.

The design and manufacture of products and packaging must comply with the state regulations on cleaner production. Enterprises that produce, sell or import products and packages that are listed in the compulsory recovery list must recycle such products and packages in accordance with the relevant regulations.

In addition, the state encourages the R&D, production, sale and use of agricultural film that is environmentally degradable and harmless.

16.4 Rights and Obligations Applicable to Waste Operators

Waste operators have the right to transport, utilise, and dispose of industrial solid waste.

According to the Soil Pollution Prevention and Control Law, the process of soil pollution remediation and treatment must not cause new pollution to the soil and the surrounding environment. Waste, solid waste and hazardous waste generated in the land remediation activities must be handled in accordance with laws and regulations.

Waste operators transferring contaminated soil should develop a transfer plan detailing the transport time, mode, route, destination, final disposal measures, and amount of contaminated soil. This is to be reported in advance to the ecological environment authorities of the original location and the receiving destination.

Waste operators must not transfer solid waste out of the administrative areas of provinces, autonomous regions and municipalities directly under central government for storage and disposal without approval. Waste operators must establish solid waste management accounts and record them truthfully.

For liability for breaches of these obligations, see **5. Environmental Liability**.

17. Environmental Disclosure and Information

17.1 Self-Reporting Requirements

According to the Emergency Response Law, when an accident or disaster occurs, enterprises must immediately organise the emergency rescue team and staff to rescue victims, evacuate people, resettle threatened persons, control hazards, indicate the danger zone, block the dangerous sites, and take other necessary measures to prevent the harm from expanding. At the same time, enterprises must report to the local people's government at the county level.

The Measures for Emergency Management of Environmental Emergencies stipulate that, when an enterprise causes an environmental emergency accident, it must:

- immediately initiate an environmental accidents emergency plan to cut off or control pollution;
- take other necessary measures to prevent harm from expanding;
- give timely notice to related units and residents; report to the local county level environmental department; and
- co-operate with investigation and processing.

17.2 Public Environmental Information

Chapter V of the Environment Protection Law stipulates information disclosure and public participation. Citizens, legal persons and other organisations have the right to access environmental information, participation and supervision and the right of environmental protection.

The Administrative Measures for the Legal Disclosure of Environmental Information of Enterprises stipulate the relevant environmental information that enterprises should disclose. (For more details, see **5.2 Disclosure**.)

According to the Regulations on the Disclosure of Government Information, administrative organs should take disclosure as normal and non-disclosure as an exception, as well as follow the principles of fairness, justice, legality and convenience. There are two forms of disclosure of government information by administrative organs – namely, voluntary disclosure and application disclosure.

17.3 Corporate Disclosure Requirement

Some enterprises are mandatorily required to disclose environmental information in accordance with the Administrative Measures for the Legal Disclosure of Environmental Information of Enterprises. (see **5.2 Disclosure** for details.)

17.4 Green Finance

China has initially established a multi-level green financial product matrix covering green loans, green bonds, green insurance, green funds and investments, green leasing and financial leasing, green trusts, and carbon financial products. The key entities responsible for overseeing and promoting green finance include:

- People's Bank of China, which sets policies and guidelines related to green finance and

works on promoting environmentally responsible financial practices;

- the CBIRC, which is responsible for regulating and supervising the banking and insurance sectors; and
- the CSRC, which is in charge of regulating and supervising the securities market in China.

18. Transactions

18.1 Environmental Due Diligence

Investigation of Excessive Emissions Involving Change of Land Use or Recovery and Transfer of Land Use Right

According to Article 67 of the Soil Pollution Prevention and Control Law, land use right-holders must conduct soil pollution investigations – in accordance with regulations – before the use of land for production and the operation of key units under soil pollution supervision is changed or their land use right is withdrawn or transferred.

The State has issued the Guidance for Environmental Investigation, Assessment and Restoration of Industrial Enterprise Sites (Trial) and technical guidelines for soil pollution investigation, monitoring and risk assessment in construction land (from HJ.1-2019 to HJ 25.6-2019) to guide due diligence work.

Environmental Risk Assessment and Investigation in Credit Financing Procedures

Banking financial institutions are required to conduct environmental due diligence in accordance with regulations and standards before granting credit lines (as mentioned in **10.2 Lender Protection**). However, national environmental protection laws do not require environmental due diligence.

Financial institutions may entrust professional institutions to assist in the assessment of green investment. According to the regulations, financial institutions are also required to evaluate the ability of investment project subjects to manage environmental risks.

Scope of Environmental Due Diligence

In order to prevent and control potential environmental legal liability risks, some enterprises carry out special environmental due diligence voluntarily before listing and M&A. The scope and depth of environmental due diligence in specific M&A will be determined by each client according to their own needs.

Environmental due diligence is the basis for enterprises to carry out follow-up environmental risk prevention and control. Increasingly, enterprises attach importance to the pre-investigation and entrust corresponding professionals (eg, lawyers and technical experts) to carry out corresponding investigations, which can help enterprises to effectively identify and control corresponding risks.

18.2 Disclosure of Environmental Information

In the process of product sales, procurement vendors have a legal obligation to disclose some environment-related information, such as a seller's request to the buyer to provide a material safety data sheet.

The Administrative Measures on Restricted Use of Harmful Substances in Electrical and Electronic Products stipulate that sellers of electrical and electronic products must not sell any products that violate the national or industrial stand-

ards for limiting the use of harmful substances in these products.

In the process of M&A, it is not a mandatory legal requirement for the seller to disclose information to the buyer. However, the principle of good faith stipulated in Article 7 of the Civil Code is the basic principle that civil subjects should follow when engaging in civil activities.

18.3 Key Issues in Environmental Due Diligence

Regulatory Compliance

There may be compliance issues, such as enterprises lacking environmental permits or not holding them in accordance with regulations, enterprises violating environmental laws and regulations, and construction projects not conducting EIAs in accordance with the law.

Pollution and Contamination

There may be pollution and pollution liability issues, including site pollution and the risk of pollution migration. There may also be non-compliance in waste management, such as improper disposal of hazardous waste.

Known and Potential Liabilities

Identification of any existing environmental liabilities – for example, ongoing or pending lawsuits related to environmental damage, or regulatory orders for remediation. Unclear and potential future liabilities allocation clauses can lead to disputes between buyers and sellers over responsibility when environmental issues occur. In representation and warranty clauses, if the seller's statements about the environmental situation are false, the buyer may suffer losses.

Trends and Developments

Contributed by:

Rongliang Wu, Mei Wan, Qirong Huang and Xueqi Huang
Jin Mao Law Firm

Jin Mao Law Firm was founded in 1988. It is a leading law firm in China, offering a comprehensive legal service with a professional, high level of specialisation. Jin Mao has more than 200 lawyers and the service areas cover foreign investment, finance, infrastructure and real estate, corporate, environment and climate change, resource and energy, health and safety, bioscience and hi-tech, labour and corporate social responsibility, IP, logistics and maritime, arbitration and litigation. Jin Mao was recognised as National Outstanding Law Firm and

Shanghai Outstanding Law Firm by the Bar Association. In the field of environmental, health and safety (EHS) legal service, Jin Mao has a team providing enterprises, NGOs and governmental authorities with a professional EHS service, encompassing EHS regulations and the standard database, legal advice, training, permits, EHS compliance assessment, EHS due diligence, M&A, climate change, greenhouse gas trading, ESG, emergency response, government interactions, hearings, administrative review, arbitration and litigation.

Authors



Rongliang Wu is a partner at Jin Mao Law Firm and has an educational background in engineering and EHS (environmental, health and safety) management. He is a

Certified Safety Engineer of China and the director of the Shanghai Bar Association's Environment, Resources and Energy (ERE) Committee, as well as deputy director of the All-China Bar Association's ERE Committee. Rongliang has extensive experience in EHS legal services, including consultation, legal advice, permits, M&A, climate change, work safety, corporate social responsibility, ESG, hearings, arbitration and litigation. Engaged by an NGO, he played an important role in the Changzhou poisonous land case.



Mei Wan is a partner at Jin Mao Law Firm, with 12 years' legal practice experience. She is the director of the Shanghai Lawyers Association's ESG Professional Committee and has

been engaged by the Ministry of Ecology and Environment as an evaluation expert in environmental enforcement since 2018. Mei's environmental practice includes environmental compliance assessment, legal consultation, training, M&A, IPO due diligence, carbon trading, ESG, green finance, hearings, arbitration and litigation. She has particular experience in providing services for the world's leading manufacturing enterprises.

Contributed by: Rongliang Wu, Mei Wan, Qirong Huang and Xueqi Huang, Jin Mao Law Firm



Qirong Huang is a partner at Jin Mao Law Firm and is a Certified Safety Engineer of China, with an educational background in chemical engineering. Qirong has more than 15 years'

experience in reputed multinational corporation manufacturing, EHS (environmental health and safety) and operations. He also has more than five years' broad legal experience in EHS consultation, legal advice, project permitting, M&A, compliance assessment, work safety, chemical safety, fire protection and occupational health.



Xueqi Huang is an assistant lawyer at Jin Mao Law Firm and specialises in ESG legal services, including consultation, training, public interest litigation, environmental infringement and

other environmental legal services. Xueqi also focuses on civil and commercial dispute resolution, commercial arbitration, corporate governance and compliance counselling as well as international legal services. She has experience as a legal assistant in the head office of a listed company, as well as internship experience in courts and other high-profile law firms in Shanghai.

Jin Mao Law Firm

40th Floor
Bund Centre
222 East Yan An Road
Shanghai
20002
China

Tel: +86 21 6249 6040
Fax: +86 21 6249 5611
Email: Rogers.wu@jinmao.com.cn
Web: www.jinmao.com.cn



金茂律師事務所
— Jin Mao Law Firm —

Continuous Strengthening of Ecological Environment Legislation and Supervision Law Enforcement

China is compiling the Ecological Environment Code in an orderly manner. The Standing Committee of the National People's Congress' 2024 legislative work plan has included the compilation of the Ecological Environment Code. Compiling the Ecological Environment Code is an opportunity to comprehensively sort out the successful experiences and practical laws characterising Chinese environmental justice and summarise the practice and theory of environmental civil litigation, environmental administration, environmental criminal litigation, environmental public interest litigation, ecological damage compensation, etc. This will provide support for the institutional design of the Ecological Environment Code, thereby achieving a positive interaction between justice and the compilation of the Ecological Environment Code and between the Ecological Environment Code and the promotion of justice work.

Refinement and improvement of supporting regulations

China is actively working on the formulation and revision of regulations such as the Ecological Environment Monitoring Regulations and the Chemical Substances Environmental Risk Management Regulations, as well as the formulation and revision of supporting regulations and rules for the Marine Environmental Protection Law and the Ozone-Depleting Substances Management Regulations. For areas lacking standards (eg, the management of new pollutants), corresponding standards and specifications will be formulated as soon as possible. China is also continuously promoting the construction of an ecological environment standards system.

Administrative Penalties: Continuous Strengthening of Environmental Law Enforcement

In 2024, central ecological environment protection supervision continues to be carried out in terms of:

- furthering the promulgation of the Regulations on the Work of Ecological Environment Protection Supervision;
- deepening the reform of the vertical management system of ecological environment institutions below the provincial level for monitoring, supervision and law enforcement;
- improving the ecological environment administrative penalty system;
- strengthening non-site law enforcement means;
- enhancing the efficiency of supervision and law enforcement; and
- seriously investigating and dealing with illegal acts of falsification by third-party environmental service institutions in respect of environmental impact assessments (EIAs) and monitoring.

Strengthening connection between ecological environment administrative law enforcement and criminal justice

The comprehensive administrative law enforcement reform of ecological environment protection has involved the Ministry of Public Security and the Supreme People's Procuratorate, etc, carrying out special actions to severely crack down on the environmental crimes of illegal hazardous waste and the illegal falsification of key pollutant discharge units' automatic monitoring data for four consecutive years. A special rectification action for the problem of falsification by third-party environmental service institutions is also being continuously advanced.

Pollutant Discharge Permits

The pollutant discharge permit (PDP) is a certificate that contains all environmental management requirements for the production and operation period. The PDP has become the main basis for enforcement supervision by the authorities at the Ministry of Ecology and Environment.

There are three types of PDP:

- permit with focused management;
- permit with simplified management; and
- emissions registration.

The PDP covers information such as production processes, the discharging points, the emission concentration limits and quotas, and the self-monitoring requirements (online and manual).

Implementation of PDPs

As per the requirements, enterprises must disclose the implementation information (including the quarterly implementation report and annual implementation report) on the national administrative online platform. The authorities at the Ministry of Ecology and Environment will keep track of the information uploaded by the enterprises to improve the efficiency of their supervision. Anyone can access the online platform and some basic information is also available to the public.

Recommendations for PDP owners

In order to better cope with the law enforcement trend of a “one permit” governance system, enterprises with PDPs should focus on the following main aspects.

- Information checking – compare the information on the PDP with the EIA document, the on-site situation and the relevant standards.

- Pollutant emission and total control – the emission concentration of pollution factors should meet the corresponding standard and the total emissions should not exceed the quota listed on the PDP.
- Environmental monitoring – enterprises should conduct the routine environment monitoring and record findings as required by the PDP.
- Document management – the details of the environmental management ledger should be recorded properly and should be kept for at least five years.
- Submission of reports – annual reports are due before January 15th each year and quarterly reports are due before April 15th, July 15th and October 15th each year.

Accelerated Construction of Carbon Emission Double Control System and Active Promotion of Development of Green and Low-Carbon Transformation Methods

In 2024, the State Council issued the “Work Plan for Accelerating the Construction of the Carbon Emission Double Control System”. This established a new mechanism for the comprehensive transformation from energy consumption double control to carbon emission double control, in addition to accelerating the construction of a dual control system for the total amount and intensity of carbon emissions.

Improvement of carbon emission-related planning system

Carbon emission indicators are set to be incorporated into planning. Action plans for carbon peaking and carbon neutrality are being formulated and the legal system related to carbon emission double control must be improved. The revision of systems such as the energy-saving review method for fixed asset investment projects and the energy-saving management

method for key energy-consuming units will be accelerated and include requirements for carbon emission double control.

Development of regulatory role of national carbon emission rights trading market

The work plan aims to improve the regulatory mechanism of the national carbon emission rights trading market, gradually expand the industry coverage range, explore the quota paid distribution mechanism, improve the level of reporting and verification, and promote the reduction of carbon emissions by enterprise compliance. It also aims to improve the national voluntary greenhouse gas emission reduction trading market, gradually expand the support fields, and promote a wider range of emission reductions. The improvement of the green certificate trading market must also accelerate and the consumption of green electricity shall be promoted.

In addition, the plan includes establishing a local carbon emission target evaluation and assessment system, exploring a carbon emission early warning and control mechanism in key industry fields, improving the carbon emission accounting mechanism in key industry fields, and establishing a carbon emission monitoring and early warning mechanism in other industry fields. The enterprise energy conservation and carbon reduction management systems are also to be improved. Other measures include conducting carbon emission evaluation of fixed asset investment projects, incorporating greenhouse gas emission control into EIAs, and accelerating the establishment of a product carbon footprint management system.

Gradual Improvement of National Carbon Emission Trading Market System

The national carbon market includes a mandatory carbon emission trading market and a voluntary emission reduction trading market. The two carbon markets operate independently and are connected through the quota clearance offset mechanism, forming the national carbon market system together.

Mandatory carbon emission trading market

Since 2023, the State Council has promulgated and implemented the Interim Regulations on Carbon Emission Trading Management. The national carbon emission trading market has basically formed a running system structure that includes carbon emission data accounting, reporting and verification, quota distribution and clearance, and market trading and supervision.

The competent government department is responsible for formulating the quota distribution plan and issuing the annual carbon emission quotas to key emitting units. Key emitting units need to account for and report the carbon emission data of the previous year each year and accept the data verification carried out by the competent government department. Key emitting units must submit quotas for compliance that are not less than their actual emissions before the deadline for compliance.

Voluntary emission reduction trading market

In January 2024, the national greenhouse gas voluntary reduction trading market was officially launched. Next, the national carbon emission trading market's industry coverage will be steadily expanded, and the construction of the national greenhouse gas voluntary reduction trading market will be improved. National carbon market greenhouse gas emission management regulations will be introduced to strengthen the daily

supervision of carbon market data quality. The implementation of the methane emission control action plan will be promoted.

Comprehensive Green Transformation and ESG Disclosure

Comprehensive green transformation entails the promotion of the green and low-carbon transition in all areas of economic and social development, including the optimisation of industrial structure, the transformation to green industries, and the green transformation and upgrading of traditional industries. The production method emphasises the application of green production technology and improves the level of resource recycling. Social development is guided by green factors, including the formation of green consumption concepts and lifestyles.

Policies for comprehensive green transformation

In 2024, the Central Committee of the Communist Party of China and the State Council issued the Opinions on Accelerating Comprehensive Green Transformation of Economic and Social Development. This covers many aspects, including:

- constructing a high-quality green and low carbon development space pattern;
- accelerating the green and low-carbon transformation of industrial structure, promoting the transformation and upgrading of traditional industries, and developing green and low-carbon industries;
- steadily advancing the green and low-carbon transformation of energy;
- promoting the green transformation of transportation;
- promoting the green transformation of urban and rural construction and development;

- implementing a comprehensive conservation strategy, involving energy-saving and carbon reduction, resource conservation and intensive use, and a recycling economy;
- promoting the green transformation of consumption patterns;
- playing a supporting role in scientific and technological innovation;
- improving the green transformation policy system, covering fiscal, financial, investment and other policies and building a green development standards system; and
- strengthening international co-operation.

Green financial support for green and low-carbon development

In March 2024, many departments in China jointly issued the “Guiding Opinions on Further Strengthening Financial Support for Green and Low-Carbon Development”. Generally, it is necessary to strengthen the financial support for green and low-carbon development and construct a relevant system. The guiding opinions mention that the green financial standards system will be optimised, the development of green financial products and markets will be promoted, and the constraint mechanism based on information disclosure will be strengthened, including encouraging financial institutions and financing subjects to carry out environmental information disclosure. Credit rating agencies will be encouraged to establish and improve a rating system for green financial products and supported in incorporating ESG factors into the credit rating method and model.

ESG information disclosure guidelines

On 12 April 2024, the three major exchanges in mainland China respectively issued the “Guidelines for the Sustainable Development Report of Listed Companies” (“the Guidelines”) and officially implemented them from 1 May 2024.

The Guidelines require listed companies to use the dual importance method to identify sustainable development disclosure topics. The disclosure subject should identify:

- whether each topic is expected to have a significant impact on the company's business model, business operations, development strategy, financial status, operating results, cash flow, financing methods and costs, etc, in the short, medium and long term; and
- whether the performance of the enterprise in the corresponding topic will have a significant impact on the economy, society and environment.

The Guidelines of the Shanghai, Shenzhen and Beijing exchanges integrate mandatory disclosure and voluntary disclosure. Companies within the disclosure scope shall disclose the Sustainable Development Report for 2025 for the first time no later than 2026.

In May 2024, the Ministry of Finance of China officially issued "China's Enterprise Sustainable Disclosure Standards – Basic Standards (Draft for Solicitation of Opinions)" (the "Basic Standards (Draft for Solicitation of Opinions)") and the "Drafting Explanation of Enterprise Sustainable Disclosure Standards – Basic Standards (Draft for Solicitation of Opinions)" (the "Drafting Explanation"). The overall goal is that, by 2027, China's enterprise sustainable disclosure basic standards and climate-related disclosure standards will be successively introduced. By 2030, a unified national sustainable disclosure standards system will be basically established.

Work Safety Management

As an important part of EHS management, workplace safety and environmental protection often fall within the responsibility of the same depart-

ment of an enterprise. The key recommendations based on the amended Work Safety Law are as follows.

- Senior managers of other management departments must also undertake corresponding work safety management responsibilities. The management group, especially the main person-in-charge, is responsible for the company's workplace safety. A safety responsibility system must be established and implemented for all employees.
- The enterprise must establish the risk prevention mechanism known as risk hierarchical control, which means the enterprise shall identify the dangerous and harmful factors existing in production and operation activities, determine the risk severity, and then determine the priority of risk control and risk control measures, so as to achieve the necessary measures to improve the safety of the production environment and reduce and eliminate production accidents.
- The enterprise must establish a hidden danger examination and treatment mechanism, including hazard identification and evaluation, hidden danger treatment records management (including closed-loop management of hidden danger trouble-shooting, reporting, rectification and review), hidden danger rectification and evaluation.
- Enterprises may need to deal with more frequent law enforcement inspections and illegal acts will lead to more severe administrative penalties. For work safety accidents or violating behaviour, the company will be fined as per the law – as will the main responsible person-in-charge, other responsible persons, work safety management professionals, and the directly responsible person-in-charge and other directly responsible persons.

DOMINICAN REPUBLIC

Law and Practice

Contributed by:

Giselle Pérez Reyes and María Virginia Ditrén

Guzmán Ariza



Contents

1. Regulatory Framework and Law p.102

1.1 Environmental Protection Policies, Principles and Laws p.102

2. Enforcement Authorities and Mechanisms p.102

2.1 Regulatory Authorities p.102

2.2 Co-operation p.103

3. Environmental Protections p.103

3.1 Protection of Environmental Assets p.103

3.2 Breaching Protections p.104

4. Environmental Incidents and Permits p.104

4.1 Investigative and Access Powers p.104

4.2 Environmental Permits/Approvals p.105

4.3 Regulators' Approach to Policy and Enforcement p.105

4.4 Transferring Permits/Approvals p.106

4.5 Consequences of Breaching Permits/Approvals p.106

5. Environmental Liability p.107

5.1 Key Types of Liability p.107

5.2 Disclosure p.107

6. Environmental Incidents and Damage p.107

6.1 Liability for Historical Environmental Incidents or Damage p.107

6.2 Reporting Requirements p.107

6.3 Types of Liability and Key Defences p.108

7. Corporate Liability p.108

7.1 Liability for Environmental Damage or Breaches of Environmental Law p.108

7.2 Environmental Taxes p.108

7.3 Incentives, Exemptions and Penalties p.108

7.4 Shareholder or Parent Company Liability p.109

7.5 ESG Requirements p.109

7.6 Environmental Audits p.109

8. Personal Liability p.110

8.1 Directors and Other Officers p.110

8.2 Insuring Against Liability p.110

9. Insurance p.110

9.1 Environmental Insurance p.110

10. Lender Liability p.111

10.1 Financial Institutions/Lender Liability p.111

10.2 Lender Protection p.111

11. Civil Liability p.111

11.1 Civil Claims p.111

11.2 Exemplary or Punitive Damages p.112

11.3 Class or Group Actions p.112

11.4 Landmark Cases p.112

12. Contractual Agreements p.112

12.1 Transferring or Apportioning Liability p.112

12.2 Environmental Insurance p.113

13. Contaminated Land p.113

13.1 Key Laws Governing Contaminated Land p.113

13.2 Clearing Contaminated Land p.113

13.3 Determining Liability p.114

13.4 Proceedings Against Polluters p.114

13.5 Investigating Environmental Accidents p.115

14. Climate Change and Emissions Trading p.115

14.1 Key Policies, Principles and Laws p.115

14.2 Targets to Reduce Greenhouse Gas Emissions p.116

15. Asbestos and Polychlorinated Biphenyls (PCBs) p.116

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs p.116

16. Waste p.116

16.1 Key Laws and Regulatory Controls p.116

16.2 Retention of Environmental Liability p.116

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods p.116

16.4 Rights and Obligations Applicable to Waste Operators p.117

17. Environmental Disclosure and Information p.117

17.1 Self-Reporting Requirements p.117

17.2 Public Environmental Information p.117

17.3 Corporate Disclosure Requirement p.118

17.4 Green Finance p.118

18. Transactions p.118

18.1 Environmental Due Diligence p.118

18.2 Disclosure of Environmental Information p.118

18.3 Key Issues in Environmental Due Diligence p.119

Guzmán Ariza advises clients on all legal issues and provisions of the Dominican environmental law that seeks to regulate business activities to protect public health and the environment. The firm's environmental practice is best known for its work on the environmental aspects of real estate and tourism projects, although its team has successfully worked on environmental matters for the hospitality industry, construction industry and even the entertainment industry. **Guzmán Ariza** routinely advises hotel developers, assisting with land and asset transactions as well as obtaining construction permits. The

environmental team at the firm is highly experienced in issues relating to sustainability, environmental impact, compliance, permits, and environmental litigation and disputes, as well as in technical and legal feasibility studies such as environmental impact assessments (EIAs) and environmental impact statements (EISs), environmental reports, environmental compliance records and minimum impact certifications. Partner **Giselle Pérez Reyes** and senior counsel **María Virginia Ditrén** together constitute an unparalleled team of savvy lawyers in this important practice area.

Authors



Giselle Pérez Reyes is the head of the environment department of **Guzmán Ariza** and the firm's main practitioner of environmental law, providing comprehensive advice for

large-scale energy, solid waste, hydrocarbon, tourism and real estate projects on issues related to land use, the legal and environmental feasibility of master plans, and matters related to the community and social programmes, among others. She focuses on regulatory law, environmental authorisations, protected areas and projects with a high environmental impact, and also conducts audits in relation to environmental legal compliance in the construction and agribusiness sectors. **Giselle** is a pioneer in the practice of environmental law in the Dominican Republic and one of its most experienced practitioners.



María Virginia Ditrén is a knowledgeable environmental and regulatory attorney with extensive professional experience in the country. As senior counsel, she represents

Guzmán Ariza's clients on a wide range of environmental legal and policy matters across various industry sectors, including real estate, tourism and renewable energy, among others. Her work includes supporting environmental due diligence for corporate and real estate transactions, regulatory compliance and permitting.

Guzmán Ariza

12 Pablo Casals Avenue
Ens Serrallés
Santo Domingo
DN 10125
Dominican Republic

Tel: +1 809 255 0980
Fax: +1 809 255 0940
Email: info@drlawyer.com
Web: www.Drlawyer.com



GUZMÁN ARIZA

ATTORNEYS AT LAW

1. Regulatory Framework and Law

1.1 Environmental Protection Policies, Principles and Laws

Environmental Protection: Key Laws

Environmental protection in the Dominican Republic is governed by a robust legal framework composed of several key laws that ensure the conservation and sustainable use of natural resources. The General Law on Environment and Natural Resources (Law No 64-00) provides the foundation for environmental management, focusing on the protection of biodiversity and promoting sustainable development. Similarly, Law No 202-04 on Protected Areas emphasises the creation and preservation of protected areas, such as national parks, to conserve sensitive ecosystems, while Decree No 571-09 regulates permissible activities within these zones to prevent degradation.

In addition, the Law on Integral Waste Management and Co-processing of Solid Waste (Law No 225-20) addresses solid waste management, encouraging recycling and establishing safety protocols for the disposal of hazardous waste. Water conservation is guided by Law No 5852, which ensures watershed management and pollution control. Other notable regulations

include Law No 146-71 on Mining, which mandates environmental standards in mining operations, and Law No 147-00 on Climate Change, which implements policies to mitigate climate change impacts and promote sustainability. The Municipal Law (Law No 176-07) empowers local authorities to regulate environmental matters such as land use and waste management at the municipal level.

2. Enforcement Authorities and Mechanisms

2.1 Regulatory Authorities

Regulatory Authorities on Environmental Matters

The Dominican Republic's environmental policy and enforcement are overseen by various regulatory authorities, each playing a distinct role in protecting natural resources and ensuring compliance with environmental laws. The Ministry of Environment and Natural Resources serves as the primary authority, and is responsible for implementing environmental policies, issuing permits and overseeing the sustainable management of resources. Additionally, the National Council for Climate Change and Clean Development Mechanism co-ordinates the country's

climate policies, working towards alignment with international agreements and reducing greenhouse gas emissions.

Other key bodies include the National Environmental Protection Service (SENPA), a specialised enforcement agency under the Ministry of Environment tasked with combating environmental crimes like deforestation and illegal resource exploitation. The National Institute of Water Resources (INDRHI) manages water resources, ensuring sustainable supply for urban, rural and agricultural use, while the General Directorate of Mining (DGM) ensures that mining activities adhere to environmental regulations.

At the local level, municipal environmental units are responsible for enforcing environmental regulations, particularly in areas like solid waste management, land use and pollution control. These units ensure that environmental policies are implemented effectively across municipalities, complementing the national regulatory framework.

2.2 Co-operation

In the Dominican Republic, there are several ways to foster collaboration with regulatory authorities on environmental matters. These mechanisms help ensure smooth communication, compliance and co-operation.

- **Environmental impact assessments (EIAs):** For projects that could impact the environment, businesses must work closely with the Ministry of Environment and Natural Resources by submitting an EIA. This ensures environmental concerns are addressed from the start, and authorities can provide guidance and approval.
- **Environmental permits and licences:** Companies need to apply for permits to operate,

which requires regular interaction with regulatory authorities to ensure they meet legal and environmental standards.

- **Public consultations:** For certain projects, the law requires public consultations. These allow the local community, environmental groups and authorities to have a say, ensuring transparency and addressing concerns early on.
- **Monitoring and reporting:** Businesses are usually required to provide regular updates and reports to the authorities. This keeps everyone informed about the ongoing environmental impact and ensures prompt responses if adjustments are needed.
- **Corporate social responsibility (CSR) and voluntary agreements:** Many companies choose to go beyond legal requirements by working with regulators on voluntary initiatives aimed at promoting sustainability. These agreements encourage co-operation and reflect the company's commitment to the environment.

3. Environmental Protections

3.1 Protection of Environmental Assets

The Dominican Republic works to protect its environmental heritage through various measures.

- **Air quality protection:** The General Law on Environment and Natural Resources (Law No 64-00) mandates air quality monitoring and management. The Air Quality Standards (Resolution No 01-2005) set limits for pollutants like particulate matter (PM), sulphur dioxide (SO₂) and nitric oxide (NO_x). The National Environmental Protection Strategy promotes clean energy and emission reduction. The country is also part of international agreements like the Convention on Long-Range Transboundary Air Pollution (CLRTAP).

- Water resources management: Law No 64-00 emphasises sustainable water use and conservation. The Regulation on the Use and Conservation of Water Resources (Decree No 193-01) sets guidelines for water use and quality. The National Water Quality Monitoring Program assesses water quality to protect public health and ecosystems. The country is a signatory to agreements like the United Nations Convention to Combat Desertification (UNCCD) and the Ramsar Convention.
- Soil conservation and land use: Law No 64-00 addresses soil erosion and promotes sustainable land use. The Land Use Planning Law (Law No 1-12) integrates EIAs in land use decisions. The Dominican Republic is part of international agreements like the UNCCD.
- Flora and fauna protection: Law No 64-00 protects wildlife and plant species, with Decree No 123-02 establishing protected areas. The country is committed to biodiversity conservation through conventions like the Convention on Biological Diversity (CBD), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Ramsar and the Convention on the Conservation of Migratory Species of Wild Animals (CMS).
- Safeguarding natural habitats and landscapes: Protected areas are regulated by the Protected Areas Law (Law No 202-04) and the Biodiversity Law (Law No 100-13). These laws ensure ecosystem preservation and sustainable use of biological resources.
- Marine ecosystem conservation: Law No 64-00 and the Marine Protected Areas Law (Law No 202-04) protect marine habitats. The Biodiversity Law (Law No 100-13) promotes sustainable marine resource use. The country is part of agreements like the CBD, the United Nations Convention on the Law of the Sea (UNCLOS) and Ramsar.

- Addressing climate change: The National Development Strategy (*Estrategia Nacional de Desarrollo* (END)) 2030 and the Climate Change Law (Law No 1-12) focus on climate resilience and reducing greenhouse gas emissions. Public participation and stakeholder engagement are emphasised in climate-related decision-making.

3.2 Breaching Protections

Breaching environmental protections can result in various legal and administrative consequences aimed at ensuring compliance and safeguarding natural resources. These consequences include substantial fines and penalties, which vary depending on the severity of the violation. Authorities may suspend or revoke permits and licences, halting operations until compliance is achieved. Offenders might be required to restore damaged ecosystems or rehabilitate polluted sites. In severe cases, criminal charges can be pursued, leading to imprisonment or other sanctions. Affected parties may seek compensation through civil lawsuits, and entities with past violations may face increased regulatory scrutiny. Additionally, breaching environmental protections can cause significant reputational damage, affecting relationships with stakeholders, customers and the community.

4. Environmental Incidents and Permits

4.1 Investigative and Access Powers

Environmental protection and enforcement are supported by several key institutions, including SENPA, the Línea Verde and the Specialized Prosecutor's Office for Environmental Matters.

- SENPA is responsible for monitoring compliance with environmental regulations,

conducting inspections and enforcing laws related to environmental protection. It has the authority to enter properties, gather evidence and take enforcement actions against violators, such as issuing fines and suspending permits.

- Línea Verde serves as a public reporting hotline that allows citizens to report environmental violations, such as pollution incidents and illegal activities. This initiative encourages public participation in environmental protection and facilitates timely responses from regulatory authorities, including SENPA.
- The Specialized Prosecutor's Office for Environmental Matters operates under the Attorney General's Office and focuses on prosecuting environmental crimes. It investigates alleged violations, collaborates with regulatory bodies to gather evidence and seeks penalties against offenders. This office plays a critical role in enforcing environmental laws, promoting compliance and raising public awareness about the importance of protecting natural resources.

4.2 Environmental Permits/Approvals

Article 40 of Law 64-00 (General Law on Environment and Natural Resources) mandates that any activity potentially affecting the environment, such as construction, industrial activities, natural resource extraction, waste management and tourism development, requires an environmental permit.

To obtain an environmental permit, applicants must submit a detailed application to the Ministry of Environment and Natural Resources, including information about the project, its potential environmental impacts and management plans. For projects with significant environmental impacts, an EIA is required to evaluate and mitigate potential negative effects.

The Ministry reviews the application and EIA, considering public and stakeholder feedback to ensure comprehensive evaluation. If the application meets all requirements, the Ministry issues an environmental permit with specific conditions and requirements for the project's implementation.

If an applicant disagrees with the Ministry's decision, they can appeal by submitting a written appeal within a specified timeframe. The Ministry will conduct an administrative review, considering any new evidence or arguments. If unresolved, the applicant can pursue judicial recourse by filing a lawsuit for further review.

Public participation is encouraged throughout the permitting process, allowing community members to voice concerns and engage in discussions about the project's environmental impacts.

4.3 Regulators' Approach to Policy and Enforcement

The regulators' approach to environmental policy and enforcement emphasises sustainability, compliance and public participation.

Regulators prioritise preventive measures to avert environmental harm before it occurs, conducting EIAs for projects that may significantly affect the environment. The regulatory framework is anchored in laws such as Law 64-00 (General Law on Environment and Natural Resources) and sector-specific regulations, establishing clear guidelines for environmental protection and pollution control.

Regulatory authorities, including the Ministry of Environment and SENPA, actively monitor compliance with environmental regulations through regular inspections. Violations can lead to fines,

suspension of permits or other enforcement actions.

Public involvement is encouraged in the decision-making process through community consultations and public comment periods, fostering transparency and accountability. There is also collaboration among various government agencies, local governments, non-governmental organisations (NGOs) and international bodies to address environmental challenges effectively.

Education and capacity-building initiatives are emphasised, providing training and resources to businesses, communities and the public to promote understanding of environmental laws and best practices. When violations occur, regulators impose penalties and corrective measures to deter future non-compliance, ranging from monetary fines to stricter oversight of operations.

4.4 Transferring Permits/Approvals

Environmental permits and approvals can be transferred in the Dominican Republic, subject to certain conditions and regulatory processes.

Environmental permits are generally transferable, but this depends on the regulations set by the Ministry of Environment and Natural Resources. This transferability applies to permits for activities like construction, industrial operations and natural resource extraction.

The permit holder must seek approval from the Ministry of Environment before transferring the permit to another party. This ensures the new holder meets all necessary qualifications and can comply with environmental regulations. The regulatory authority may also evaluate the compliance history of both the current and prospective permit holders. If the current holder has a history of violations, the transfer may be denied.

The transfer process involves submitting a formal application to the Ministry of Environment detailing the new permit holder and the reasons for the transfer. The Ministry will review the application, assessing the new holder's qualifications and capacity to manage environmental responsibilities. If approved, the Ministry will issue a formal transfer approval, making the new permit holder responsible for adhering to all conditions of the original permit.

Transfers can be made to individuals, companies or entities capable of complying with the environmental regulations and conditions stipulated in the permit. This includes new owners, partners or operators responsible for the activities covered by the permit.

4.5 Consequences of Breaching Permits/Approvals

Breaching an environmental approval or permit can lead to legal and practical consequences. Legally, violators may face fines, suspension or revocation of permits, civil liability for damages and even criminal penalties. Practically, violations can disrupt operations, cause financial losses, increase scrutiny, damage reputations and lead to public opposition.

Key types of liability include administrative sanctions, civil compensation, criminal penalties, strict liability for hazardous activities, joint and several liability for multiple parties and obligations to restore damaged environments. Compliance with regulations is crucial to avoid these consequences and protect the environment.

5. Environmental Liability

5.1 Key Types of Liability

In the Dominican Republic, key types of liability for environmental damage or law breaches include:

- civil liability – compensation for damage and court-ordered environmental remediation;
- criminal liability – fines, imprisonment and criminal prosecution for serious violations;
- administrative sanctions – fines, permit suspension or revocation, and business closures by regulatory authorities; and
- joint and several liability – multiple parties can be held responsible for the full extent of the environmental harm.

5.2 Disclosure

In the Dominican Republic, environmental issues must be disclosed during the permitting process and whenever significant environmental impacts are identified. This disclosure is typically required when applying for environmental permits and conducting EIAs, and during regular reporting to regulatory authorities.

Environmental issues must be disclosed in a detailed and transparent manner, including information about potential impacts, mitigation measures and compliance with environmental regulations. This ensures that all stakeholders, including regulatory authorities and the public, are informed about the environmental aspects of a project or activity.

The consequences for non-disclosure or incomplete disclosure of environmental issues can be severe. These may include fines and penalties for failing to provide accurate and complete information. Authorities may also suspend or revoke permits and licences, halting operations

until full disclosure is made. In cases of significant non-disclosure, criminal charges may be pursued, leading to further legal consequences. Additionally, non-disclosure can result in reputational damage and loss of trust from stakeholders and the community.

6. Environmental Incidents and Damage

6.1 Liability for Historical Environmental Incidents or Damage

In the Dominican Republic, current or purchasing operators and landowners can be held liable for historical environmental damage. This liability includes the responsibility for remediation and restoration of contaminated sites, even if they were not responsible for the original damage. Conducting thorough environmental due diligence (EDD) before acquiring property or businesses is crucial to identify and manage potential liabilities.

6.2 Reporting Requirements

In the Dominican Republic, environmental reporting requirements include:

- EIAs – required for projects with significant environmental impacts;
- regular monitoring reports – businesses must report on emissions, waste management and compliance;
- incident reporting – prompt reporting of environmental incidents like spills; and
- annual environmental reports – required for certain sectors to summarise environmental management and compliance.

These reports ensure transparency and regulatory compliance.

6.3 Types of Liability and Key Defences

In the Dominican Republic, liability for environmental incidents or damage can be civil or administrative/regulatory. Civil liability includes compensation claims for damages to the environment or third parties, strict liability for hazardous activities, and joint and several liability where any responsible party can be held liable for the full amount of damages. Administrative/regulatory liability involves sanctions such as fines, permit suspension or revocation, criminal charges for severe violations and restoration obligations to repair damaged environments.

Defences and limits to liability include demonstrating due diligence, citing natural disasters or unforeseen events (acts of God) and attributing damage to unrelated third parties. Statutory limits may cap compensation amounts and set timeframes for claims. Compliance with regulations and having environmental liability insurance can also help limit liability.

7. Corporate Liability

7.1 Liability for Environmental Damage or Breaches of Environmental Law

Corporate entities can be held liable for environmental damage or breaches of environmental law under several rules. The General Law on Environment and Natural Resources (Law No 64-00) allows for administrative sanctions, including fines and permit revocations. Companies can also face criminal charges for severe violations, leading to fines and imprisonment for responsible individuals. Civil liability enables affected parties to seek compensation for damages. Under strict liability, companies are responsible for environmental harm regardless of fault, especially with hazardous activities. Joint and several liability ensures that a company can

be held fully accountable if multiple parties are involved in causing damage. These rules ensure corporate accountability and encourage compliance with environmental regulations.

7.2 Environmental Taxes

In the Dominican Republic, key environmental taxes include:

- environmental fees for permits and licences under Law No 64-00, required for projects impacting the environment;
- tax on hazardous waste, applied to companies generating such waste to ensure proper management;
- selective consumption tax (*impuesto selectivo al consumo* (ISC)) on fuels, with higher taxes on polluting fuels to reduce emissions;
- higher import taxes on vehicles with larger engines, while electric and hybrid vehicles enjoy tax reductions;
- solid waste management tax imposed by municipalities for waste collection and treatment; and
- tax incentives for renewable energy projects under Law No 57-07, encouraging sustainable practices.

7.3 Incentives, Exemptions and Penalties

Incentives and exemptions for “good” environmental citizenship include benefits such as tax exemptions for renewable energy projects under Law No 57-07, which reduce income tax, import duties and VAT. Additionally, the CONFO-TUR (*Consejo de Fomento Turístico*) programme grants tax exemptions to tourism projects that meet environmental standards, encouraging sustainable practices. Companies demonstrating good environmental practices can also receive certifications and awards, enhancing their reputation. Moreover, reduced taxes are applied to electric vehicles and clean technologies.

On the other hand, there are penalties for “bad” environmental citizenship. Law No 64-00 establishes fines and sanctions for those who violate environmental laws, encompassing illegal deforestation, pollution and non-compliance with regulations. Violators may face financial penalties, permit revocations or even criminal charges in severe cases.

7.4 Shareholder or Parent Company Liability

Shareholders or a parent company can be liable for environmental damage or breaches of environmental law in the Dominican Republic under certain circumstances.

Direct liability applies when they are directly involved in activities leading to environmental harm, such as overseeing operations that violate regulations. Corporate veil piercing allows courts to hold parent companies accountable if they misuse the corporation to commit fraud or evade obligations.

Law No 64-00 extends environmental responsibilities to shareholders and parent companies in positions of authority. Joint and several liability means that multiple parties, including parent companies and subsidiaries, can be collectively held responsible for damages.

Regulatory agencies can take action against shareholders or parent companies for non-compliance or complicity in violations. Additionally, parent companies may face liability through contractual obligations if they provide guarantees related to environmental compliance.

In summary, while direct liability usually falls on the responsible entity, shareholders and parent companies can also be held accountable,

particularly if they are directly involved or have control.

7.5 ESG Requirements

Environmental, social and governance (ESG) requirements are established primarily through Law No 64-00, which governs the management and protection of natural resources. This law mandates EIAs for projects that may significantly affect the environment, alongside various regulations addressing waste management, air and water quality, and biodiversity conservation. Companies must engage with local communities and conduct social impact assessments to evaluate the potential social consequences of their activities, ensuring that community needs are considered.

Monitoring and enforcement of these ESG requirements involves government agencies conducting inspections, reviewing compliance reports and evaluating environmental performance. Companies are required to submit reports on their environmental impact, and violations can result in fines, penalties or legal action. The Ministry of Environment oversees enforcement and can revoke permits for non-compliance. Public participation is encouraged through consultations during the EIA process, enhancing transparency and accountability in environmental decision-making.

7.6 Environmental Audits

Yes, companies in the Dominican Republic are subject to environmental audit requirements, particularly for those in sectors with significant environmental impacts. The primary legislation, Law No 64-00, mandates EIAs for projects that may affect natural resources. Additionally, companies may be required to conduct periodic environmental audits to ensure compliance with environmental regulations and standards. These

audits help assess the effectiveness of environmental management systems and identify areas for improvement.

8. Personal Liability

8.1 Directors and Other Officers

Directors and officers can be held personally liable for environmental damage or breaches of environmental law committed by their companies under certain circumstances. This is particularly relevant when it can be demonstrated that these individuals acted with negligence, malice or gross misconduct. Law No 64-00 on the Environment and Natural Resources specifies that those responsible for management or control of a legal entity can be held accountable if their actions directly contribute to environmental harm.

The penalties for such liabilities can vary significantly based on the severity of the breach. Possible sanctions include administrative fines, the obligation to pay remediation costs and even criminal charges in cases of egregious misconduct. In addition, the court may impose civil penalties, including damages to compensate affected parties. This framework aims to ensure accountability at all levels of corporate management and encourages compliance with environmental laws to protect public health and the environment.

8.2 Insuring Against Liability

In the Dominican Republic, directors and officers can potentially obtain insurance to cover liabilities arising from environmental damage or breaches of environmental law. This type of insurance is often included under directors' and officers' (D&O) liability insurance, which protects corporate executives from personal losses if they

are sued for alleged wrongful acts while managing a company. Such policies typically cover legal fees, settlements and other related costs, although they may have limitations regarding environmental claims, especially if negligence or intentional misconduct is involved.

However, it is important to note that many insurance policies may exclude coverage for certain types of environmental liabilities, particularly those related to pollution or regulatory violations. Companies often need to seek specialised environmental liability insurance to adequately cover these risks. Additionally, the legal framework surrounding corporate liability and insurance in the Dominican Republic emphasises compliance with environmental laws, which may influence the availability and terms of such insurance.

9. Insurance

9.1 Environmental Insurance

There is no compulsory element to environmental insurance in the Dominican Republic, meaning businesses are not required by law to obtain insurance for contamination or nuisance. However, in some specific sectors or under certain contractual agreements, obtaining environmental insurance might be strongly recommended or even required by private stakeholders or financial institutions to mitigate risks.

Certain environmental risks may be uninsurable, especially those resulting from wilful misconduct, gross negligence or non-compliance with existing environmental regulations. Additionally, long-term, gradual pollution may not always be covered, depending on the terms of the policy.

10. Lender Liability

10.1 Financial Institutions/Lender Liability

Financial institutions can incur environmental liability in various situations that reflects their direct or indirect involvement in activities generating environmental impacts. A clear example is the financing of polluting projects. If an institution grants a loan for a project that does not comply with environmental regulations, such as the construction of an industrial plant without the required EIA, it may be held liable if the project causes pollution or environmental damage. The liability arises from the failure to implement contractual clauses conditioning the loan on compliance with environmental standards, demonstrating a lack of diligence in the preliminary evaluation of the project.

Another way in which financial institutions may be liable is when they lease assets that are subsequently used in activities causing environmental harm. For instance, if an institution leases a vehicle or machinery that is then employed in activities resulting in pollution or environmental degradation, the institution could be held jointly liable. This particularly applies if the institution did not take the necessary precautions to ensure that the use of such assets complied with applicable environmental regulations, indicating a failure in their duty of care.

Additionally, during the term of a loan, if the financial institution does not adequately and systematically monitor the project it finances, it may incur liability if environmental damage occurs. A lack of inspections, failure to verify regulatory compliance or omission of periodic environmental reporting requirements could be considered a breach of its duty of oversight and

control, especially if such actions could have prevented the damage.

Finally, when financial institutions act as trustees, they have an obligation to manage trust assets in a way that minimises any potential environmental impact. If the institution fails to exercise due diligence and environmental damage arises from activities related to the assets under its administration, it may be held liable. Environmental regulations require these entities not only to supervise but also to take preventive actions to ensure that the assets under their control do not contribute to environmental degradation, as any omission in this regard exposes them to joint liability.

10.2 Lender Protection

In the Dominican Republic, lenders protect themselves from environmental liability through EDD, ensuring compliance with laws; environmental warranties and indemnity clauses in loan agreements, holding borrowers responsible for any environmental damages; requiring environmental liability insurance; securing collateral or mortgages on property; and sometimes using *fideicomiso* (trust) structures to isolate assets from potential environmental risks. These measures help lenders mitigate financial and legal exposure to environmental issues.

11. Civil Liability

11.1 Civil Claims

According to the General Law on Environment and Natural Resources (Law No 64-00, dated 18 August 2000), civil claims for damages arising from harm to the environment or natural resources may be brought whenever an individual or legal entity causes damage. Such entities will be held objectively liable in civil matters for the con-

sequences of their actions. In these cases, the party responsible for the damage will be legally obligated to repair it materially, bearing the corresponding costs whenever possible. Additionally, they must provide compensation in accordance with the law, thus ensuring adequate reparation for the affected parties.

11.2 Exemplary or Punitive Damages

In the Dominican Republic, courts do not award punitive or exemplary damages, as the legal system focuses on compensatory damages to cover harm suffered. In environmental matters, under Law No 64-00, individuals or entities can be held liable for environmental damage and required to pay compensatory damages. Severe cases involving gross negligence or intentional harm may result in higher compensation, but not punitive damages. Additionally, criminal penalties, such as fines or imprisonment, can be imposed for serious environmental violations.

11.3 Class or Group Actions

Class or group actions are possible for environmental-related civil claims in the Dominican Republic. Under the Civil Code and relevant laws, individuals or groups affected by environmental damage can collectively file lawsuits. This is particularly relevant for cases involving widespread environmental harm, such as pollution or degradation of natural resources.

11.4 Landmark Cases

There have been several landmark cases in the Dominican Republic related to environmental issues. Here are a few notable examples.

- **Carmen A de la Cruz v The State:** This case involved a group of residents from the community of Haina who sued the government, and a private company, for environmental damage caused by industrial activities. The

Supreme Court of the Dominican Republic ruled in favour of the plaintiffs, recognising the right to a healthy environment and ordering measures to mitigate the pollution affecting the community. *Sentencia núm SCJ-SS-23-0347*, Exp 001-022-2022-RECA-01675 (Supreme Court of the Dominican Republic, 31 March 2023).

- **Grupo Estrella v Ministry of Environment:** In this case, a construction company challenged the Ministry of Environment's decision to revoke its environmental permit due to non-compliance with regulations. The court upheld the Ministry's decision, emphasising the importance of strict adherence to environmental laws and the government's role in protecting natural resources.
- **The Haina River Pollution Case:** This case involved severe pollution of the Haina River, attributed to industrial discharges. The court ruled that the responsible companies must take remedial actions and compensate affected communities, setting a precedent for holding polluters accountable for environmental damage.
- **EIAs:** Various cases have also established the importance of conducting thorough EIAs before project approvals. Courts have annulled permits when EIAs were found to be inadequate, reinforcing the legal requirement for comprehensive assessments to protect the environment.

12. Contractual Agreements

12.1 Transferring or Apportioning Liability

In the Dominican Republic, indemnities and contractual agreements can be used to transfer or apportion liability for incidental damage or breaches of law between private parties, such as

buyers and sellers. These contracts may include indemnity clauses that specify liability allocation and can limit or exclude certain types of damages. However, legal restrictions apply, preventing the transfer of liability for gross negligence, willful misconduct or violations of mandatory laws, particularly in cases involving environmental damage.

While private agreements can guide liability between parties, they do not have a binding effect on regulators. Regulatory authorities retain the power to enforce environmental laws and impose penalties regardless of any contractual arrangements. Thus, while such agreements are useful for managing liability among private entities, they do not influence the regulator's obligations to ensure compliance with environmental standards and protect public interests.

12.2 Environmental Insurance

The most common forms of coverage include pollution liability insurance, which addresses third-party claims for bodily injury and property damage resulting from pollution incidents, and environmental impairment liability (EIL), which offers broader protection for various environmental risks. Site-specific coverage is also tailored for particular properties or projects, reflecting their unique environmental challenges.

This type of insurance typically covers risks such as clean-up costs for environmental contamination, legal liabilities from third-party claims and potential business interruption losses due to environmental incidents. While the uptake of environmental insurance may be limited by factors such as cost and complexity, it provides essential protection for businesses engaged in high-risk activities, helping them mitigate the financial repercussions associated with environmental incidents.

13. Contaminated Land

13.1 Key Laws Governing Contaminated Land

The key laws governing contaminated land primarily include Law No 64-00 on the Environment and Natural Resources and Decree No 2-2003, which establishes the framework for environmental management and protection. These laws outline the responsibilities of landowners and operators in preventing and addressing land contamination. They require entities to conduct environmental assessments and implement remediation plans when contamination is identified, ensuring that any hazardous substances are managed appropriately to protect public health and the environment.

Regulatory authorities, such as the Ministry of Environment and Natural Resources, take a proactive approach to remediation requirements by enforcing compliance with environmental standards and monitoring contaminated sites. When contamination is detected, authorities may mandate specific remedial actions, including site assessments, clean-up procedures and ongoing monitoring, to ensure that contaminated land is restored to safe and usable conditions. The government emphasises collaboration with affected communities and stakeholders throughout the remediation process, aiming for transparency and effective communication to address environmental concerns.

13.2 Clearing Contaminated Land

In the Dominican Republic, Law No 64-00 clearly establishes responsibilities regarding environmental contamination. According to Article 76, the consequences of environmental disasters caused by negligence are the exclusive responsibility of the individuals or entities that caused them. These individuals or entities are obligat-

ed to restore or repair the damaged areas or resources, whenever possible, and must also face criminal and civil liability for the damages caused.

Environmental responsibility in this context is non-delegable, meaning it cannot be transferred to another person or entity; in legal terms, this is known as environmental liabilities. The law ensures that the party responsible for the damage is the one who directly caused it, regardless of any attempt to transfer this responsibility to a third party. This provision aims to ensure that those engaged in activities with potential environmental impact are fully aware of the consequences of their actions and take on the legal obligations that arise from them.

Additionally, this approach is part of Dominican public law to ensure that environmental protection remains a top priority, holding companies or individuals accountable for any negligent or harmful actions towards the environment. The goal is not only to sanction but also to promote effective prevention and restoration of environmental damages.

13.3 Determining Liability

Dominican legislation recognises civil, criminal and administrative liability for those whose actions or omissions cause damage to the environment. In accordance with environmental laws and the polluter pays principle, anyone who causes damage (loss, reduction or deterioration) to the environment, natural resources or any of its components is held liable.

When a licence or authorisation holder inflicts damage on the environment, the process to determine the liability for the damage caused would depend on the terms' limits or compliance framework set by the authorisation; therefore,

if the authorities determine non-compliance to such terms, they could penalise the holder. On the other hand, if the polluter does not hold an environmental licence or authorisation, any interested or affected party has the right to sue the polluters for the damage caused. In this case, the judge could request input from an expert witness to assess the amount of damage involved in the infringement.

13.4 Proceedings Against Polluters

In the Dominican Republic, the locus standi requirements for bringing proceedings against polluters, landowners or occupiers affected by contamination are outlined in the legal framework that regulates environmental protection, specifically Law No 64-00, the General Law on Environment and Natural Resources. According to this law, both individuals and communities directly affected by environmental contamination have the right to initiate legal action. Affected parties must demonstrate that they have suffered, or are at risk of suffering, harm due to pollution or environmental damage caused by the defendants.

Additionally, environmental NGOs legally registered in the country also have standing to bring proceedings in the public interest. These organisations do not need to prove direct harm but must establish that their purpose aligns with environmental protection and that the issue at hand falls within their scope of interest.

Public authorities, such as the Ministry of Environment and Natural Resources (*Ministerio de Medio Ambiente y Recursos Naturales*), have the authority to take legal action against those responsible for environmental damage, regardless of whether direct harm to a specific individual is proven. The law further permits class actions or collective claims when a group of indi-

viduals is affected by the same environmental issue. In such cases, a representative or an NGO may bring the lawsuit on behalf of the affected group.

In all cases, the claimant must present sufficient evidence linking the pollution or environmental damage to the activities of the polluter, landowner, or occupier. This evidence is crucial in demonstrating the legal basis for seeking redress or remediation.

13.5 Investigating Environmental Accidents

In the Dominican Republic, the process of investigating environmental accidents begins when either the affected party or community reports the incident to the environmental authorities, or when a team of technicians from the Ministry of Environment and Natural Resources identifies and alerts the authorities of the contamination. Regardless of the source of the report, the primary responsibility falls on the party responsible for the damage. They must officially inform the authorities of the incident and submit a compensation plan aimed at remediating the environmental harm caused.

Once a report is made, the Ministry conducts an investigation to assess the extent and nature of the damage. This process involves collecting evidence, such as samples of soil, water or air, and determining whether the contamination violates environmental regulations under Law No 64-00, the General Law on Environment and Natural Resources. If a violation is confirmed, the Ministry may impose fines and require the responsible party to implement corrective measures.

In response to a report, an administrative sanctioning process may also be initiated. This pro-

cess is independent and not limited to civil or criminal proceedings. The administrative process allows authorities to impose penalties, such as fines or suspension of activities, directly within the administrative framework, ensuring that immediate and appropriate actions are taken to mitigate environmental harm. The responsible party is also expected to propose and execute a remediation plan approved by the Ministry, outlining specific steps to restore the environment to its original condition or minimise the damage as much as possible. Non-compliance or failure to properly inform the authorities may result in additional penalties or legal action against the polluter.

14. Climate Change and Emissions Trading

14.1 Key Policies, Principles and Laws

Key policies include the National Climate Change Policy (2015), the National Development Strategy 2030 and the Plan for an Economic Development Compatible with Climate Change (Plan DECCC). These policies integrate climate adaptation and mitigation strategies across various sectors, promoting resilience and sustainable development.

The main laws are the General Law on Environment and Natural Resources (Law No 64-00), which provides the legal framework for environmental protection, including climate change measures; Law No 225-20 on Integral Management and Co-processing of Solid Waste, which includes provisions to reduce greenhouse gas emissions; and the National Plan for Climate Change Adaptation 2015-2030, which outlines specific actions to adapt to climate change impacts in sectors like agriculture, energy, waste and health.

14.2 Targets to Reduce Greenhouse Gas Emissions

The Dominican Republic has set several policy and legal targets to reduce greenhouse gas emissions. The country aims to reduce its greenhouse gas emissions by 27% below business-as-usual (BAU) levels by 2030. This target includes a 20% reduction conditional on external financial support and an additional 7% reduction unconditionally financed through national efforts.

Additionally, the Dominican Republic has signed agreements, including one with the World Bank's Forest Carbon Partnership Facility (FCPF), to curb carbon emissions and reduce deforestation. This agreement aims to reduce forest-related carbon emissions by 5 million tons by 2025. The country has also integrated climate adaptation and mitigation strategies into its National Development Strategy 2030 and other national policies.

15. Asbestos and Polychlorinated Biphenyls (PCBs)

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs

For asbestos, the General Law on Environment and Natural Resources (Law No 64-00) and specific regulations mandate safe handling, removal and disposal. Occupational safety standards ensure worker protection. For polychlorinated biphenyls (PCBs), Law No 225-20 on Integral Management and Co-processing of Solid Waste and specific guidelines outline procedures for safe identification, handling, storage and disposal. These measures aim to mitigate the harmful effects of these hazardous substances.

16. Waste

16.1 Key Laws and Regulatory Controls

The key law governing waste management is the General Law on Integral Management and Co-processing of Solid Waste (Law No 225-20). This law establishes the legal framework for preventing waste generation and ensuring its proper management. It includes provisions for waste classification, responsibilities of waste generators and the principles of extended producer responsibility (EPR) for certain products like batteries, electronics and packaging.

Additionally, the Policy for the Integral Management of Municipal Solid Waste, issued by the Ministry of Environment in 2014, provides guidelines for managing municipal solid waste. This policy emphasises waste reduction, separation at the source, and the promotion of recycling and recovery of materials.

16.2 Retention of Environmental Liability

A producer or consignor of waste can retain liability after disposal by a third party if they fail to comply with regulations or have specific contractual obligations, or if the waste is hazardous. Liability can also arise from negligence or misconduct by the third party, or if the producer fails to verify proper disposal. These measures ensure accountability and promote responsible waste management practices.

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

Producers of goods can be required to design, take back, recover, recycle or dispose of their products once they become waste under various circumstances, often governed by EPR policies. These policies shift the responsibility for the entire life cycle of a product to the produc-

ers. Key circumstances include legislation and regulations, such as the Waste Electrical and Electronic Equipment (WEEE) Directive in the EU, which mandates the recycling of electronic waste. Products with significant environmental impacts, like batteries and electronics, are also subject to EPR to ensure proper management and recycling.

Additionally, market and consumer demand for sustainable products can drive producers to adopt EPR practices voluntarily. Companies may implement take-back programmes to enhance their brand image and meet customer expectations. CSR initiatives also play a role, as many companies adopt EPR to demonstrate their commitment to sustainability and environmental stewardship. By implementing EPR, producers are incentivised to design products that are easier to recycle, use fewer hazardous materials and have a longer lifespan, ultimately reducing the environmental impact of their products.

16.4 Rights and Obligations Applicable to Waste Operators

Waste operators are governed by Law No 225-20 on Integral Management and Co-processing of Solid Waste. They have the right to access information on waste management policies and receive technical and logistical support from authorities. Their obligations include reducing waste generation, separating waste at the source, and ensuring proper handling and disposal. Compliance with environmental standards and financing waste management operations are also required.

Breaching these obligations can lead to severe consequences, such as substantial fines, suspension of permits and mandatory restoration of damaged ecosystems. Severe violations may result in criminal charges, including imprison-

ment. Affected parties can seek compensation through civil lawsuits, and entities with past violations may face increased regulatory scrutiny. Additionally, non-compliance can cause significant reputational damage, affecting relationships with stakeholders and the community.

17. Environmental Disclosure and Information

17.1 Self-Reporting Requirements

Companies and individuals must promptly notify the Ministry of Environment and Natural Resources of any environmental incidents, such as spills, leaks or other forms of contamination. This requirement ensures that appropriate measures can be taken to mitigate environmental harm and address any potential risks to public health and safety. Failure to report such incidents can result in fines, sanctions and increased scrutiny from regulatory bodies.

17.2 Public Environmental Information

In the Dominican Republic, the public can obtain environmental information from public authorities through formal requests and public participation processes. The General Law on Environment and Natural Resources (Law No 64-00) requires authorities like the Ministry of Environment to disclose information on hazardous materials, EIAs and regulatory compliance. Public consultations during the permitting process also provide access to relevant information.

Public authorities include government entities responsible for environmental management, such as national ministries and local government units. Additionally, the government transparency portal and the Office of Access to Public Information (OAI) facilitate public access to information, promoting transparency and accountability.

17.3 Corporate Disclosure Requirement

In the Dominican Republic, corporations are not generally required to disclose environmental information in their annual reports. However, under the country's securities market law and regulations, corporate entities issuing debt or equity instruments may be required to disclose environmental information. This ensures transparency and informs investors about potential environmental risks and liabilities associated with the company.

17.4 Green Finance

Green Bonds in the Dominican Republic: Caribbean Green Financing Frameworks

In the Dominican Republic, green finance arrangements include initiatives like green bonds and the development of a national green taxonomy. The country has issued sovereign green bonds to finance projects aimed at reducing greenhouse gas emissions and promoting sustainable development. The International Finance Corporation (IFC) has also supported the creation of the Caribbean Green Financing Frameworks to engage the financial sector and other stakeholders in green financing.

The primary authorities responsible for monitoring and enforcing these arrangements are the Ministry of Environment and Natural Resources and the Superintendency of the Securities Market (*Superintendencia del Mercado de Valores de la República Dominicana* (SIMV)). These bodies ensure compliance with environmental standards and oversee the implementation of green finance initiatives.

18. Transactions

18.1 Environmental Due Diligence

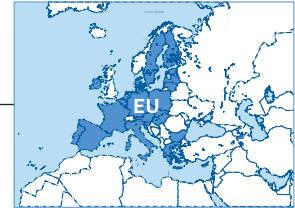
EDD is typically conducted on mergers and acquisitions (M&A), finance and property transactions in the Dominican Republic. This process helps identify any environmental liabilities and ensures compliance with environmental regulations. For a purchaser of shares or assets, typical EDD might include evaluating the property for contamination or other environmental issues through environmental site assessments (ESAs), reviewing environmental permits and compliance to ensure all necessary permits are in place, investigating historical environmental liabilities to identify past contamination, ensuring required EIAs are completed and approved, examining regulatory records for past violations or ongoing enforcement actions, and conducting interviews and inspections to identify potential environmental risks. This thorough due diligence helps purchasers make informed decisions and manage potential environmental risks associated with the transaction.

18.2 Disclosure of Environmental Information

In the Dominican Republic, a seller is generally required to disclose any known environmental information to a purchaser. This includes details about any existing environmental liabilities, such as contamination, compliance with environmental regulations and any ongoing or past environmental assessments or permits. Full disclosure helps ensure that the purchaser is aware of any potential environmental risks or obligations associated with the property or business, facilitating informed decision-making and compliance with legal requirements. This practice is crucial for avoiding future disputes and ensuring transparency in the transaction process.

18.3 Key Issues in Environmental Due Diligence

In the Dominican Republic, common environmental legal issues in transactions often include ensuring thorough EDD to identify existing liabilities such as contamination or regulatory non-compliance. Navigating the transfer of environmental permits and approvals to new owners or operators is also crucial. Verifying compliance with all relevant environmental laws and regulations is essential to avoid future legal complications. Addressing potential liabilities for historical contamination that may affect new owners or operators is another key concern. Additionally, ensuring that any required EIAs are completed and approved for ongoing or planned projects is critical to maintaining regulatory compliance and avoiding delays. These issues are vital to manage and mitigate legal and financial risks in property and business transactions.



Law and Practice

Contributed by:

Peter Sellar, Gerard McElwee, Aodhan McGourty and Maria-Magdalena Markova,
Fieldfisher (Belgium)

Contents

1. Regulatory Framework and Law p.124

1.1 Environmental Protection Policies, Principles and Laws p.124

2. Enforcement Authorities and Mechanisms p.125

2.1 Regulatory Authorities p.125

2.2 Co-operation p.125

3. Environmental Protections p.126

3.1 Protection of Environmental Assets p.126

3.2 Breaching Protections p.127

4. Environmental Incidents and Permits p.127

4.1 Investigative and Access Powers p.127

4.2 Environmental Permits/Approvals p.128

4.3 Regulators' Approach to Policy and Enforcement p.128

4.4 Transferring Permits/Approvals p.129

4.5 Consequences of Breaching Permits/Approvals p.129

5. Environmental Liability p.129

5.1 Key Types of Liability p.129

5.2 Disclosure p.130

6. Environmental Incidents and Damage p.131

6.1 Liability for Historical Environmental Incidents or Damage p.131

6.2 Reporting Requirements p.131

6.3 Types of Liability and Key Defences p.131

7. Corporate Liability p.132

7.1 Liability for Environmental Damage or Breaches of Environmental Law p.132

7.2 Environmental Taxes p.133

7.3 Incentives, Exemptions and Penalties p.133

7.4 Shareholder or Parent Company Liability p.133

7.5 ESG Requirements p.134

7.6 Environmental Audits p.134

8. Personal Liability p.134

8.1 Directors and Other Officers p.134

8.2 Insuring Against Liability p.135

9. Insurance p.135

9.1 Environmental Insurance p.135

10. Lender Liability p.135

10.1 Financial Institutions/Lender Liability p.135

10.2 Lender Protection p.135

11. Civil Liability p.135

11.1 Civil Claims p.135

11.2 Exemplary or Punitive Damages p.136

11.3 Class or Group Actions p.136

11.4 Landmark Cases p.136

12. Contractual Agreements p.136

12.1 Transferring or Apportioning Liability p.136

12.2 Environmental Insurance p.136

13. Contaminated Land p.136

13.1 Key Laws Governing Contaminated Land p.136

13.2 Clearing Contaminated Land p.136

13.3 Determining Liability p.137

13.4 Proceedings Against Polluters p.137

13.5 Investigating Environmental Accidents p.137

14. Climate Change and Emissions Trading p.137

14.1 Key Policies, Principles and Laws p.137

14.2 Targets to Reduce Greenhouse Gas Emissions p.138

15. Asbestos and Polychlorinated Biphenyls (PCBs) p.138

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs p.138

16. Waste p.138

16.1 Key Laws and Regulatory Controls p.138

16.2 Retention of Environmental Liability p.139

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods p.140

16.4 Rights and Obligations Applicable to Waste Operators p.140

17. Environmental Disclosure and Information p.140

17.1 Self-Reporting Requirements p.140

17.2 Public Environmental Information p.141

17.3 Corporate Disclosure Requirement p.141

17.4 Green Finance p.142

18. Transactions p.142

18.1 Environmental Due Diligence p.142

18.2 Disclosure of Environmental Information p.142

18.3 Key Issues in Environmental Due Diligence p.142

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Fieldfisher (Belgium) has more than 70 lawyers, including 20 partners, practising in various areas of law, spread across several departments. The Belgium office is integrated with that of other Fieldfisher firms: know-how and experience are shared in regular collaboration on cases, providing a true European legal platform. The firm's internal organisation allows it to develop a global and integrated approach to projects and disputes in multiple areas, with optimal co-ordination and collaboration between departments, enabling the team to deliver quality services

to clients, using a comprehensive and holistic approach. Fieldfisher's integrated international offices and relationships with other law firms enables the firm to offer a multi-jurisdictional business capability in all major European business centres. The firm works closely with foreign counterparts and has long-standing relationships with other highly reputable law firms. Thanks to this professional network, Fieldfisher is able to offer a fully integrated service in most EU member states.

Authors



Peter Sellar is a partner in the EU regulatory group at Fieldfisher's Brussels office. With more than 25 years' experience, Peter focuses on the circular economy and

sustainability, with particular experience in in EU product law, general chemicals, biocides and pesticides, ecodesign, electronic and electrical equipment, and cosmetics, as well as medical devices and medical products law. His work also covers ESG legislation and green claims. Peter assists clients on EU-wide advocacy campaigns to avoid adverse regulation, failing which litigation before the ECJ in Luxembourg. In environmental law, he led on the most recent success before the ECJ and the EU's General Court regarding the unlawful classification of a chemical.



Gerard McElwee is a partner in the EU regulatory group at Fieldfisher's Brussels office. His practice focuses on EU product regulatory matters involving everything from chemicals

(REACH, biocides, pesticides, and classification, labelling and packaging) through to consumer products such as detergents, cosmetics and toys, and more circular economy areas such as packaging, single-use plastics, RoHS/WEEE, waste, water management, green claims, and ecocide. This includes general compliance advice, strategic advice on anticipated legislative changes, and advice on product liability and product recall issues. Gerard also advises on contentious matters and has represented many clients before the European courts, European agencies, and national courts.

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Fieldfisher (Belgium)



Aodhan McGourty is a senior associate in the EU regulatory group at Fieldfisher's Brussels office. His practice relates to EU product regulation and environmental law matters,

including green claims, packaging, ecodesign, general chemicals, biocides and the EU Water Framework Directive. Aodhan regularly advises on product compliance issues and is involved in task force management, contentious work before the European courts, strategic advocacy, and complex data-sharing arrangements.



Maria-Magdalena Markova is an associate in the EU regulatory group at Fieldfisher's Brussels office. Her areas of expertise involve EU product regulatory matters, including

general chemicals, biocides, packaging, medical devices, and veterinary medicinal products. Prior to joining Fieldfisher, Maria-Magdalena practised law for several years at a Bulgarian law firm, advising local and international investors on corporate and regulatory matters. She also acted as a national legal expert for Bulgaria on a range of EU projects for a Brussels-based legal and policy consulting company.

Fieldfisher (Belgium)

L'Arsenal
Boulevard Louis Schmidtlaan 29
Box 15
1040 Brussels
Belgium

Tel: +32 2 742 70 00
Email: BrusselsInfo@fieldfisher.com
Web: www.fieldfisher.com/en/locations/belgium

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1. Regulatory Framework and Law

1.1 Environmental Protection Policies, Principles and Laws

EU environmental policy is based on the precautionary principle, the “polluter pays” principle, and the principles that preventative action should be taken and that environmental damage should as a priority be rectified at source.

- The precautionary principle is a risk management tool that enables restrictive actions to be taken when, following a thorough scientific assessment, uncertainty about a suspected risk to human health or to the environment remains.
- The “polluter pays” principle provides that those who are responsible for pollution should bear the costs of managing to prevent, control and remedy its damage to human health or the environment. It is implemented by the Environmental Liability Directive (ELD) (Directive 2004/35/CE). It is also increasingly provided for in EU secondary legislation via the establishment of extended producer responsibility (EPR) schemes.

Policies

Environmental policy has become increasingly important in EU policy-making. In December 2019, the EC launched the European Green Deal. This sets out the EU’s strategy to achieve climate neutrality by 2050 and to place environmental protection and sustainability at the heart of the EU’s economic growth strategy.

As part of the Green Deal, the EC proposed a zero pollution action plan, which envisions that by 2050 air, water and soil pollution will be reduced to levels no longer considered harmful to health and natural ecosystems. This is

accompanied by a number of 2030 targets to speed up reducing pollution at source, including:

- improving air quality to reduce the number of premature deaths caused by air pollution by 55%;
- improving water quality by reducing plastic litter at sea (by 50%) and microplastics released into the environment (by 30%); and
- improving soil quality by reducing nutrient losses and chemical pesticides’ use by 50%.

The other 2030 targets include reducing:

- the EU ecosystems where air pollution threatens biodiversity by 25%;
- the share of people chronically disturbed by transport noise by 30%; and
- waste generation (including residual municipal waste) by 50%.

The Green Deal includes the Chemicals Strategy for Sustainability (CSS), which aims to protect the environment against hazardous chemicals. This involves a number of actions, including:

- banning the most harmful chemicals in consumer products except for essential use;
- phasing out non-essential uses of per- and polyfluoroalkyl substances (PFAS); and
- measures aimed at improving the assessment of chemical risks and hazards.

The European Green Deal has been a cornerstone of the 2019–24 von der Leyen Commission. The new Commission (2024–29) is expected to continue its implementation while also shifting attention to the New Clean Industrial Deal, which places greater emphasis on the EU’s competitiveness.

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Laws

There are a multitude of EU laws relating to the environment. Some of the main horizontal pieces of environmental legislation include:

- the Water Framework Directive (2000/60/EC);
- the Marine Strategy Framework Directive (2008/56/EC);
- the Birds Directive (2009/147/EC);
- the Habitats Directive (92/43/EEC);
- the ELD;
- the Environmental Impact Assessment Directive (2011/92/EU); and
- the Industrial Emissions Directive (IED) (2010/75/EU).

There are also a number of product- or sector-specific pieces of legislation, including:

- the Waste Framework Directive (WFD) (2008/98/EC);
- the Waste Electrical and Electronic Equipment (WEEE) Directive (2012/19/EU);
- Restriction of Certain Hazardous Substances in Electrical and Electronic Equipment Directive (“RoHS 2”) (2011/65/EU);
- Regulation (EC) No 1907/2006 on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH); and
- Regulation (EC) No 1272/2008 on the Classification, Labelling and Packaging of Substances and Mixtures (CLP).

The EC is responsible for ensuring that EU law is implemented properly by EU member states and can launch infringement proceedings against member states when this is not the case. Such proceedings may end before the ECJ. The EC often focuses on whether EU member states have properly transposed measures into their national laws. However, it may also be notified of EU member states’ failures to implement or comply with EU environmental law via complaints submitted by EU citizens, businesses and organisations, as well as via petitions and questions from the European Parliament and its members.

The EC may also exercise certain “regulatory” functions, including the adoption of technical delegated or implementing Acts related to requirements in EU secondary law and the issuing of guidance.

There are three main EU agencies relevant to EU environmental law:

- the European Environment Agency, which collects data and produces assessments on a range of environmental topics;
- the European Chemicals Agency (ECHA), which manages the implementation of the EU’s chemicals legislation; and
- the Joint Research Centre, which provides independent, evidence-based science and knowledge to support EU policies.

2. Enforcement Authorities and Mechanisms

2.1 Regulatory Authorities

The EU has no inspection or enforcement authority. It relies on member states to implement and enforce those laws at the national, regional, and local levels.

2.2 Co-operation

The EU Network for the Implementation and Enforcement of Environmental Law (IMPEL) brings together the environmental authorities of the EU, European Economic Area (EEA) and European Free Trade Association (EFTA) member states, as well as those of acceding and candidate countries. It aims to promote profes-

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sional collaboration as well as information and best-practice exchange between environmental regulators.

ECHA hosts the Forum for Exchange of Information on Enforcement. This is a body made up of representatives of national enforcement authorities. It works towards co-ordinating the enforcement of REACH, CLP, and other key EU chemical regulations.

3. Environmental Protections

3.1 Protection of Environmental Assets Air Quality

The Ambient Air Quality Directives (Directive 2004/107/EC and Directive 2008/50/EC) set quality standards for 12 air pollutants, which must be attained by all EU member states against specified timelines. They lay down common methods and criteria to assess air quality and require EU member states to set up a network of monitoring stations and sampling points. EU member states must report to the EC and provide information to the public on the results of their air quality assessments. Where the standards are not met in a particular zone or agglomeration, EU member states must prepare and implement air quality plans to address the sources responsible.

On 26 October 2022, the EC presented a proposal to revise the Ambient Air Quality Directives and consolidate them into one legal Act. The final Act (Directive (EU) 2024/2881) was published in the Official Journal on 20 November 2024 and will enter into force on 10 December 2024.

The National Emissions Ceilings Directive (2016/2284/EU) also sets national commitments to reduce emissions for five transboundary air

pollutants and requires EU member states to establish action plans. There are other EU Directives setting emissions standards or other requirements for sources of air pollution in different sectors – for example, the IED, Regulation (EU) 2019/631 on Passenger Cars and Light Commercial Vehicles, Regulation (EU) 2024/1610 on New Heavy-Duty Vehicles, and the Non-Road Mobile Machinery Regulation (2016/1628/EU).

Water

The Water Framework Directive and the Marine Strategy Framework Directive provide the legal frameworks for the protection of fresh and marine waters.

The Water Framework Directive concerns the protection of inland surface waters, coastal waters, transitional waters, and groundwater. It requires member states to protect and restore water bodies to reach good chemical and ecological status, and to prevent deterioration. EU member states are required to prepare plans to achieve their targets for each river basin district within their territory. The WFD also includes requirements to monitor and report on water status within each district.

The Water Framework Directive is supported by the Environmental Quality Standards (EQS) Directive (2008/105/EC), which lays down maximum concentration limits for certain substances. EU member states must monitor the presence of these substances and take measures to achieve these standards. The Groundwater Directive (2006/118/EC) similarly identifies a list of substances and standards to be achieved for groundwater.

In October 2022, the EC presented a proposal to amend the Water Framework Directive, the EQS Directive and the Groundwater Directive. As of

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October 2024, the proposal remains subject to inter-institutional negotiations, with the final text yet to be published. The proposal would, among other aspects, set EQS for 23 new substances (eg, glyphosate) and certain PFAS and pharmaceuticals.

The Marine Strategy Framework Directive established a framework for EU member states to take necessary measures to achieve or maintain good environmental status in the marine environment by 2020. It required EU member states to develop a strategy for the protection, preservation and restoration of its marine waters and to prevent and reduce inputs in the marine environment, with a view to phasing out pollution.

In addition to those two EU Directives, the Urban Waste Water Treatment Directive (UWWTD) (91/271/EEC) plays an important role in ensuring water quality by laying down requirements on the collection, treatment and discharge of urban waste water, as well as discharges from certain industrial sectors.

A “recast” updated version of the UWWTD was published on 12 December 2024. Member states have until 31 July 2027 to transpose its requirements into national law. Certain provisions, not requiring transposition, apply from 1 August 2027.

Natural Habitats, Flora and Fauna

The Habitats Directive and the Birds Directive aim to ensure that species and habitats within their scope are maintained or restored to good conservation status. They focus on the protection of endangered species and on the designation and protection of core sites.

- Endangered species – the legislation contains protections for endangered species listed in

Annex IV of the Habitats Directive, as well as for all naturally occurring wild bird species in the EU.

- Core sites – the legislation lays down rules on the designation and protection of core sites for the protection of species and habitat types listed in Annex I and II of the Habitats Directive and Annex I of the Birds Directive, as well as for migratory birds. These sites are collectively referred to as the Natura 2000 Network.

Under these EU Directives, EU member states must monitor progress and report to the EC every six years on the conservation status of species and habitat types. The results are published in a “State of Nature in the European Union” report.

The Nature Restoration Law (Regulation (EU) 2024/1991), which entered into force in August 2024, sets EU-wide targets to introduce restoration measures for at least 20% of the EU’s land and sea areas by 2030 and for all ecosystems in need by 2050. It also sets restoration targets for specific habitats and species. The framework for achieving such targets is contained in the Nature Restoration Law. EU member states must submit National Restoration Plans to the EC by mid-2026 and report on progress.

3.2 Breaching Protections

The consequences for infringement of these laws by private persons are regulated at member-state level.

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4. Environmental Incidents and Permits

4.1 Investigative and Access Powers

Under Article 5 of the ELD, competent authorities – as designated by EU member states – may at any time (inter alia):

- require the operator to provide information on any imminent threat of environmental damage (or in suspected cases of such an imminent threat) or on damage that has occurred;
- require the operator to take necessary preventative or remedial measures;
- give instructions to the operator on the necessary preventative or remedial measures to be taken; or
- themselves take necessary preventative or remedial measures.

4.2 Environmental Permits/Approvals

According to Article 4(1) of the IED, no installation or combustion plant, waste incineration plant or waste co-incineration plant is to be operated without a permit. “Installation” in this context means a stationary technical unit within certain industries, including:

- the energy industry (including combustion of fuels in installations with a total rated thermal input of 50 MW or more, refining of mineral oil and gas, and gasification or liquefaction of coal or other fuels in installations with a total rated thermal input of 20 MW or more);
- production and processing of metals (including metal ore, production of pig iron or steel, and processing of ferrous and non-ferrous metals);
- the mineral industry (eg, production of cement, lime, magnesium oxide, and asbestos, as well as the manufacture of glass including glass fibre with a melting capacity

exceeding 20 tonnes per day, melting mineral substances including the production of mineral fibres with a melting capacity exceeding 20 tonnes per day, and melting mineral substances including the production of mineral fibres with a melting capacity exceeding 20 tonnes per day);

- the chemical industry (including production of organic and inorganic chemicals);
- waste management (including disposal or recovery of hazardous waste with a capacity exceeding 10 tonnes per day, as well as the disposal or recovery of waste in waste incineration plants or in waste co-incineration plants).

In April 2024, the IED was amended and certain industries/activities were added, including:

- manufacture of batteries, other than exclusively assembling, with a production capacity of 15,000 tonnes of battery cells (cathode, anode, electrolyte, separator, capsule) or more per year; and
- extraction (including on-site treatment operations such as comminution, size control, beneficiation and upgrading) of the following ores on an industrial scale: bauxite, chromium, cobalt, copper, gold, iron, lead, lithium, manganese, nickel, palladium, platinum, tin, tungsten and zinc.

A detailed list of all activities is available in Annex I, Annex Ia and Part 1 of Annex VII to the IED. Under Article 5 of the IED, the competent authorities designated by EU member states are responsible for issuing the permits.

4.3 Regulators’ Approach to Policy and Enforcement

At the national level, EU member states are responsible for upholding EU regulations, with

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enforcement procedures and sanctions following national law. In 2016, the EC clarified that its enforcement policy involved monitoring how EU law is applied and implemented, as well as solving problems with EU member states to remedy possible breaches of the law and taking infringement action when appropriate.

The European Green Deal also adds that the EC will “work with the member states to step up the EU’s efforts to ensure that current legislation and policies relevant to the Green Deal are enforced and effectively implemented”. The EC’s Directorate-General for Environment focuses enforcement action on:

- cases where EU member states have failed to communicate national transposition measures;
- cases where national transposition measures have incorrectly transposed EU Directives;
- cases where EU member states have failed to comply with an ECJ judgment; and
- cases involving possible serious damage to EU financial interests.

4.4 Transferring Permits/Approvals

The IED does not contain explicit provisions regarding the transfer of permits. It is up to EU member states to establish transfer provisions.

4.5 Consequences of Breaching Permits/Approvals

According to Article 8(2) of the IED, in the event of a breach of the permit conditions, EU member states must ensure that:

- the operator immediately informs the competent authority;
- the operator immediately takes the measures necessary to ensure that compliance is

restored within the shortest possible time; and

- the competent authority requires the operator to take any appropriate complementary measures that the competent authority considers necessary to restore compliance.

Article 79 of the IED states that EU member states must establish effective, proportionate and dissuasive penalties applicable to infringements of the national provisions adopted pursuant to the IED.

Additionally, Article 79a was introduced in 2024 – pursuant to which, EU member states must ensure that where damage to human health has occurred as a result of an infringement of national measures that were adopted pursuant to this IED, the individuals affected have the right to claim and obtain compensation for that damage from the relevant natural or legal persons.

5. Environmental Liability

5.1 Key Types of Liability

The ELD establishes a framework of environmental liability based on the “polluter pays” principle. Under Article 2(1) of the ELD, “environmental damage” is:

- damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species;
- damage that significantly adversely affects the ecological, chemical or quantitative status or the ecological potential of the waters concerned or significantly adversely affects the environmental status of the marine waters concerned; or

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- land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction - in, on or under land – of substances, preparations, organisms or micro-organisms.

In 2021, the EC issued guidelines clarifying the scope of the term “environmental damage”:

- environmental damage caused by any of the occupational activities listed in Annex III to the ELD (such as energy industries, mineral industries, chemical industries, and production and processing of metals), as well as any imminent threat of such damage occurring by reason of any of those activities; or
- damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III to the ELD, as well as any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent.

The Environmental Crime Directive (2008/99/EC) (the “2008 ECD”) established measures relating to criminal law to protect the environment more effectively but will soon be replaced by the new Environmental Crime Directive (2024/1203/EU) (the “new ECD”), which entered into force in May 2024. Like the 2008 ECD, Article 3 of the new ECD contains a list of environmental offences that EU member states must criminalise if such actions are unlawful and committed intentionally or with serious negligence. The specific powers, procedures, and enforcement mechanisms employed by the competent national authorities are governed by national member state law.

In addition, the new ECD introduces several significant changes aimed at enhancing the protection of the environment through criminal

law. There are new categories of environmental offences such as:

- unlawful ship recycling;
- unlawful water abstraction;
- serious breaches of EU chemicals and mercury legislation;
- serious breaches related to fluorinated greenhouse gases; and
- serious breaches of legislation on invasive alien species.

EU member states will be required to establish “qualified criminal offences” for cases where environmental crimes cause serious, widespread and substantial damage with more severe penalties.

In addition, the new ECD sets out specific types and levels of penalties for natural and legal persons. By way of example, in the case of criminal offences, such penalties can be based on fixed amounts or a percentage of the total annual worldwide turnover of the legal entity involved.

EU member states have until 21 May 2026 to align their national legislation with the requirements of the new ECD.

5.2 Disclosure

Under Article 6 of the ELD, the competent authorities - designated by EU member states – may:

- require the operator to provide information on any imminent threat of environmental damage or in suspected cases of such an imminent threat; and
- require the operator to provide supplementary information on any damage that has occurred.

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The Corporate Sustainability Reporting Directive (CSRD) (2022/2464/EU) establishes an obligation for certain companies to report on sustainability matters (including environmental, social and human rights, as well as governance factors as per Article 1(2)(b) of the CSRD) (see **7.5 ESG Requirements**).

6. Environmental Incidents and Damage

6.1 Liability for Historical Environmental Incidents or Damage

The ELD does not address this question. It is up to EU member states to adopt their own rules.

6.2 Reporting Requirements

Reporting obligations are foreseen for operators in case of environmental damage under the ELD.

For the reporting of illegal activities, the role of civil society under the ECD should be highlighted.

Under the CSRD and the European Sustainability Reporting Standards (ESRS) (Commission Delegated Regulation (EU) 2023/2772), in-scope companies are required to report on impacts, risks and opportunities (IROs) related to environmental aspects material to their operations as part of their broader environmental impact and sustainability reporting obligations.

Significant environmental damage that is widespread or challenging to remedy may be considered material for disclosure. Accordingly, companies should estimate and disclose the anticipated financial impacts of material risks linked to pollution and other environmental incidents, including details on costs, assumptions, and critical thresholds (Application Requirement

(AR) 33 and AR 34 of the ESRS). The ESRS specifically mandate disclosure of significant pollution-related risks, incidents, and financial impacts, encompassing costs associated with pollution remediation, fines, and penalties (AR 31 and AR 32 of the ESRS).

6.3 Types of Liability and Key Defences

For types of liability, see **5.1 Key Types of Liability**.

For defences, Article 4 of the ELD provides the following:

- an act of armed conflict, hostilities, civil war or insurrection;
- a natural phenomenon of exceptional, inevitable and irresistible character;
- an incident in respect of which liability or compensation falls within the scope of any of the International Conventions listed in Annex IV of the ELD (including any future amendments thereof) that is in force in the EU member state concerned; and
- pollution of a diffuse character, where it is not possible to establish a causal link between the damage and the activities of individual operators.

The ELD does not apply to:

- such nuclear risks or environmental damage (or imminent threat of such damage) as may be caused by the activities covered by the Treaty establishing the European Atomic Energy Community or caused by an incident or activity in respect of which liability or compensation falls within the scope of any of the international instruments listed in Annex V of the ELD (as amended);

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- activities of which the main purpose is to serve national defence or international security; or
- activities of which the sole purpose is to protect from natural disasters.

The operator can also limit its liability in accordance with national legislation implementing the Convention on Limitation of Liability for Maritime Claims (LLMC) 1976 (as amended) or the Strasbourg Convention on Limitation of Liability in Inland Navigation (*Convention sur la Limitation de la responsabilité en Navigation Intérieure*, or CLNI) 1988 (as amended).

7. Corporate Liability

7.1 Liability for Environmental Damage or Breaches of Environmental Law

ELD

The main legal instrument concerning liability of a corporate entity for environmental damages or breaches of environmental law is the ELD. The ELD establishes a framework of environmental liability based on the “polluter pays” and preventative principles.

Although the ELD does not refer to “companies”, it does refer to operators upon whom particular duties can be imposed by public authorities. In practice, those operators are companies. If an operator enters insolvency, this may hamper the application of the ELD. Article 14(1) of the ELD thus encourages EU member states to develop financial security instruments to enable financial guarantees for operators to comply with the ELD. There is no formal duty to provide financial guarantees under the ELD.

ECD

Article 6 of the ECD states that “legal persons” can be held liable for environmental crimes if committed for their benefit or by any person with a “leading position within the legal person” acting individually or as part of an organ of the legal person (based on their power to represent the legal person, to take decisions on behalf of the legal person, and to exercise control over the legal person). Under Article 2(d) of the 2008 ECD/Article 2(2)(a) of the new ECD, a “legal person” is “any legal entity having such status under the applicable national law, except for [s]tates or public bodies exercising [s]tate authority and for public international organisations”.

Similarly, the new ECD also provides that legal persons should be held liable (Article 6). However, the main change revolves around the long list of potential penalties foreseen for legal persons (Article 7).

Corporate Sustainability Due Diligence Directive

The EU Corporate Sustainability Due Diligence Directive (CSDDD) (2024/1760/EU) mandates in-scope companies to carry out due diligence with regard to adverse impacts of their operations, subsidiaries, and supply chains on human rights and the environment.

Under Article 29 of the CSDDD, EU member states must ensure that companies can be held liable for damages caused to natural or legal persons by companies’ failure to fulfil due diligence obligations. This liability arises when companies intentionally or negligently fail to prevent or address adverse impacts. Such liability is activated if the breach results in harm to individuals or entities whose rights are protected under national law. First, damage must be shown to have occurred to a natural or legal per-

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son, impacting a legal interest protected under national law and related to a right listed in the Annex, Part I of the CSDDD. Second, there must be evidence of a breach of the due diligence obligations outlined in Articles 10 and 11 of the CSDDD, indicating a negligent or intentional failure to prevent potential adverse human rights or environmental impacts or to address actual impacts. Finally, causation must be established, demonstrating that this failure directly resulted in damage to the affected legal interests. The CSDDD further stipulates that - where multiple parties are involved – joint and several liability may apply, except in cases where only business partners are responsible.

EU member states may define the concept of “(protecting) legal interest” for natural or legal persons in various ways, leading to differences in the types of damages that can be claimed between member states.

7.2 Environmental Taxes

The principal EU environmental taxation initiatives in the EU include:

- the Energy Taxation Directive (ETD) (2003/96/EC);
- the Emissions Trading Scheme (ETS) Directive (2003/87/EC);
- the Carbon Border Adjustment Mechanism (CBAM) (Regulation (EU) 2023/956); and
- the Levy on Non-recycled Plastic Packaging Waste (Regulation (EU, Euratom) 2021/770 on the calculation of the own resource based on plastic packaging waste that is not recycled, on the methods and procedure for making available that own resource, on the measures to meet cash requirements, and on certain aspects of the own resource based on gross national income) (“the Levy”).

7.3 Incentives, Exemptions and Penalties

“Good” environmental citizenship can lead to better conditions under the various taxation initiatives by the EC, such as under the ETD, the ETS, the CBAM and the Levy. Exemptions do exist under these schemes – for example, under the ETD, certain energy-intensive undertakings receive a higher share of free allowances if they are at risk of carbon leakage.

Other incentives have been created by the EU, including the EU Innovation Fund, which will provide EUR10 billion support between 2020 and 2030 for European companies that invest over EUR7.5 million in sustainable technology. The EU renewable energy financing mechanism will make it easier for regions to launch projects at a time when their economy is under pressure.

As regards penalties, failure to comply with the EU incentives can lead to fines. “Bad” environmental citizenship (eg, breaching environmental law) could also lead to legal action under the ELD and the 2008 ECD /new ECD. Other penalties can be imposed by national law.

7.4 Shareholder or Parent Company Liability

See 7.1 Liability for Environmental Damage or Breaches of Environmental Law.

ELD

Arguably, the ELD can enable claims against the parent company, as the parent company controls the occupational activities that caused the damage. It is arguable that this is only possible if legislation is enacted holding the parent to be an operator of the activities of its subsidiary. Joint liability of a company and its parent company and/or shareholders would arguably require modifying the ELD.

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Currently, no harmonised rule exists on enterprise (group) liability within the EU. There are significant divergences in how the “corporate veil” is lifted in different EU member states. In Germany, for example, a parent company can be held liable for breaches by an affiliate. In other EU member states, this is less common. There have not yet been any ECJ cases regarding parental liability for environmental damage or breaches of environmental law in the context of corporate groups. In *Akzo Nobel* (Case C-97/08), the ECJ held that the parent company could be attributed liability for the conduct of its subsidiary, given that they were viewed as belonging to the same “single economic unit”.

ECD

A parent company and/or shareholder could fall within the definition of “legal persons” that can be liable under the 2008 ECD/new ECD (Article 6). Therefore, arguments similar to those made regarding the ELD could be made regarding the ECD’s applicability to parent companies. However, criminal law remains largely a national prerogative.

7.5 ESG Requirements

See 17.3 Corporate Disclosure Requirement.

7.6 Environmental Audits

Companies are not subject to mandatory environmental audits directly at the EU level, but as an example, the Eco-Management and Audit Scheme (EMAS) (Regulation (EC) No 1221/2009) establishes a voluntary premium management tool for different types of organisations willing to evaluate, report on and improve their environmental performance.

8. Personal Liability

8.1 Directors and Other Officers

See 7.1 Liability for Environmental Damage or Breaches of Environmental Law.

ELD

Per Article 3(1) of the ELD, a director could fall within the definition of “operator”, as they could qualify as a “natural” person who controls the occupational activity or as the person to which the decisive economic power of the undertaking has been delegated.

Regarding the question of other officers being held liable, the *Fipa* case (C-534/13) before the ECJ is relevant. The question asked was whether parties other than the polluter could be held liable for pollution costs, even though the contamination was not caused by them. The ECJ held that, on the basis of the “polluter pays” principle, only the responsible operator could be held liable. The ELD can therefore not be extended to impose liability on the innocent owner. However, Article 16 of the ELD provides EU member states with the possibility to adopt more stringent provisions in relation to the remediation of environmental damage.

Regarding penalties, Article 8 of the ELD states that the operator must bear the costs for the preventative and remedial actions taken under the ELD. Annex II of the ELD sets out the common framework to be followed when choosing the most appropriate measures to remedy the environmental damage. As mentioned earlier, Article 16 of the ELD states that EU member states are free to adopt more stringent provisions concerning the remedying of environmental damage.

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ECD

As mentioned in **7.1 Liability for Environmental Damage or Breaches of Environmental Law**, Article 6 of the 2008 ECD/new ECD states that “legal persons” can be held liable for environmental crimes if committed for their benefit or by any person with a “leading position within the legal person” acting individually or as part of an organ of the legal person (based on their power to represent the legal person, to take decisions on behalf of the legal person, and to exercise control over the legal person). Based on the definition of “legal person”, directors could be considered as falling within such definition but national law will need to be checked. In addition, the new ECD explicitly provides that natural persons who commit, incite or are accessories to a criminal offence could also be held liable as natural persons. This includes corporate board members (see recital 38).

Regarding penalties, Article 7 of the ECD states that EU member states “shall take the necessary measures to ensure that legal persons held liable pursuant to Article 6 are punishable by effective, proportionate and dissuasive penalties”. In addition, natural persons can also be held liable and, in that respect, Article 5 of the new ECD provides that penalties or measures against natural persons may include “disqualification from holding, within a legal person, a leading position of the same type used for committing the offence”.

8.2 Insuring Against Liability

Per Article 14 of the ELD, EU member states should encourage the development of financial security instruments (including financial mechanisms in case of insolvency), with the aim of enabling operators to use financial guarantees to cover their responsibilities under the ELD. If directors qualify as “operators” pursuant to Article 2(6) of the ELD, then they could have the

option of insuring against remedies imposed by the ELD. As stated in **9.1 Environmental Insurance**, environmental insurance is regulated at member-state level.

9. Insurance

9.1 Environmental Insurance

The rules for (environmental) insurance are regulated at member-state level. The ELD does require EU member states to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including in case of insolvencies, so that economic operators can use financial guarantees to cover their responsibilities under the ELD.

10. Lender Liability

10.1 Financial Institutions/Lender Liability

EU legislation does not provide rules on direct liability of financial institutions for environmental damage (nor does it require EU member states to do so). Rules on lender liability will vary per member state.

10.2 Lender Protection

Financial institutions can, in any event, ex ante reduce exposure to any claim by doing their due diligence.

11. Civil Liability

11.1 Civil Claims

Civil claims principally fall under national law. The EU introduced Directive (EU) 2020/1828 on Representative Actions for the Protection of

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the Collective Interests of Consumers. It aims to ensure that consumers can protect their collective interests in the EU via representative actions brought by representative entities (so-called qualified entities). Such “class” actions apply to a set number of EU secondary legislations in Annex I of the Directive, including CLP and Regulation (EU) 2024/1781 on Ecodesign Requirements for Sustainable Products (ESPR). The question of civil remedies will generally be a question of member-state national law.

11.2 Exemplary or Punitive Damages

The awarding of exemplary or punitive damages is a matter for the national courts of EU member states.

11.3 Class or Group Actions

See 11.1 Civil Claims.

11.4 Landmark Cases

Cases concerning civil claims are dealt with by the national courts of EU member states.

12. Contractual Agreements

12.1 Transferring or Apportioning Liability

Private contracts can be used to impose obligations on certain parties to comply with applicable laws. Under civil claims, such contracts will be fully valid. However, clauses may be disputed in certain fields of law such as in criminal or competition law proceedings where responsibility for committing an infringement is, in principle, personal. In general, if the clauses comply with national law, they are fully binding.

That said, in administrative or criminal proceedings involving an EU member state enforcing an EU compliance obligation, it will not be possi-

ble for Party A to contract away responsibility (liability) for compliance with the relevant EU law to Party B. Even though a private agreement may be in place that Party B pays the penalty, for instance, it will be Party A that the member states will enforce against.

12.2 Environmental Insurance

This varies per EU member state.

13. Contaminated Land

13.1 Key Laws Governing Contaminated Land

At EU level, unlike for water and air, there are no overarching rules applicable to soil pollution and contaminated land. These rules are defined at member-state level.

In July 2023, the EC proposed a Directive on Soil Monitoring and Resilience to protect and restore soils and ensure that they are used sustainably. The proposal requests that EU member states identify and investigate all potentially contaminated sites and map them in a public register. Based on the outcome of their investigation, EU member states must take risk-reduction measures to address unacceptable risks for human health and the environment. The remediation costs must be borne by the parties responsible for the contamination.

Other EU legislation contains key principles to apply both for the reduction of soil contamination in sites (ie, the IED) and to determine liability in the case of environmental damage (ie, the ELD).

13.2 Clearing Contaminated Land

This is mainly regulated at member-state level.

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The ELD establishes framework rules on how operators must bear the costs for preventative and remedial actions (including clean-up of contaminated land). The ELD is without prejudice to any provisions at a member-state level concerning cost allocation in cases of multiple-party causation - in particular, concerning the apportionment of liability between the producer and the user of a product.

13.3 Determining Liability

EU member state authorities determine and assess the extent of environmental damage and agree the preventative or remediation measures to be taken by those responsible for the damage. Operators carrying out dangerous activities listed in Annex III of the ELD (eg, waste management operations) are subject to strict liability so there is no need to prove fault in order to determine liability. For operators carrying out other activities, it is necessary to establish a causal link between their activity and the damage to determine liability. On the basis of that determination, EU member states will attribute liability.

Liability for traditional civil law damage (property damage and/or personal injury) falls under each EU member state's law.

13.4 Proceedings Against Polluters

The rules on admissibility of legal actions seeking redress for damage before EU member state courts depends on the law of each EU member state. At EU level, the ELD only provides that affected individuals and NGOs are entitled to notify public bodies of environmental damage or imminent threat of such. They can challenge the action or inaction of a public body to prevent and remedy environmental damage.

13.5 Investigating Environmental Accidents

As per 4.1 Investigative and Access Powers, each EU member state's competent authority has investigation powers under the ELD.

14. Climate Change and Emissions Trading

14.1 Key Policies, Principles and Laws

There are two key policies that set out the EU's direction on climate change policy:

- the overarching European Green Deal, via which the EC sets its policies and framework to ensure that the EU is transformed into a modern, resources-efficient and competitive economy; and
- the EC's Fit-for-55 plan, which aims to deliver on one of the key goals of the Green Deal to become a climate-neutral economy by 2050.

There are various pieces of legislation relating to climate change in the EU. The key ones are:

- the European Climate Law (Regulation (EU) 2021/1119), whereby the EU imposed on itself the obligation to reach climate neutrality by 2050;
- reducing emissions from power stations, industrial plants and recently also aviation via the ETS Directive's cap-and-trade system;
- reducing the emissions from sectors not included in the ETS (such as agriculture, business and transport – for now) via the Effort Sharing Regulation (2023/857/EU), which sets national targets for EU member states;
- the CBAM;
- the F-Gas Regulation (2024/573/EU), which phases out – up to complete elimination – (certain) fluorinated gases used in products

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such as refrigerators or air conditioners and establishes a market system with quota allocation.

- The Regulation on Land, Land Use Change, and Forestry (2018/841/EU), which aims to regulate how the land use sector contributes to the EU's climate goals;
- The EU Ozone Regulation (2024/590/EU), which aims to have the EU fulfil its obligations to protect the ozone layer and minimise the use of ozone-depleting substances;
- rules to regulate emissions from transport, including road transport, shipping and aviation (eg, the Fuel Quality Directive (2009/30/EC)).
- reducing land-based greenhouse gas emissions and urban temperatures via the Nature Restoration Law, which sets binding targets for EU member states for the restoration of critical EU habitats and species; and
- various funding programmes to enable the EU to reach those ambitions and rules to boost private funding.

14.2 Targets to Reduce Greenhouse Gas Emissions

There are three key targets for reducing greenhouse gas emissions in the EU (leaving aside energy-related targets):

- at least a 55% reduction in greenhouse gas emissions by 2030 (compared with 1990 levels);
- a 90% reduction in greenhouse gas emissions by 2040 (compared with 1990 levels); and
- a climate-neutral society by 2050.

15. Asbestos and Polychlorinated Biphenyls (PCBs)

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs

Since 2005, all use of asbestos is banned in the EU – both for goods produced and imported into the EU. Asbestos is mainly regulated by the Asbestos at Work Directive (2009/148/EC). The definition of asbestos in the Asbestos at Work Directive covers six fibrous silicates. Under it, it is necessary to determine whether any activity at work is likely to involve risk of exposure. If that is the case, a risk assessment must be carried out (including a consultation with the workers). Employers must notify the EU member state authorities of any activities with exposure to asbestos. Exposure must be reduced to the minimum in the permitted activities. The Asbestos at Work Directive provides other rules (eg, on training, clothing and equipment of workers).

The Asbestos at Work Directive was amended by Directive (EU) 2023/2668 to, inter alia, reduce occupational exposure limit value to 0.01 fibres per cubic centimetre.

Additional safeguards to protect workers from the risks of asbestos exposure are:

- the Occupational Safety and Health Framework Directive (89/391/EEC), which sets out the main principles of workers' safety and health at work; and
- the Carcinogens, Mutagens and Reprotoxic Substances Directive (2004/37/EC), which deals with risks posed by carcinogens at work.

The management of asbestos-containing waste is regulated in the WFD. The EU Construction and Demolition Waste Management Protocol

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and Guidelines also control the disposal of asbestos waste in landfills.

16. Waste

16.1 Key Laws and Regulatory Controls

The WFD is the main legal instrument for treating and managing waste in the EU. It establishes the basic concepts and definitions related to waste management, such as the definition of waste or recycling. It introduces the waste hierarchy, the “polluter pays” principle and the EPR concept, as well as setting separate collection targets for municipal waste.

Waste is broadly defined as any substance or object that the holder discards or intends or is required to discard. Waste must be differentiated from by-products, which are a substance or object resulting from a production process - the primary aim of which is not the production of that item. These should not be regarded as waste if certain conditions are met. Additionally, certain specified waste may cease to be waste when it has undergone a recovery operation and complies with specific criteria to be developed either at EU or member-state level.

The WFD establishes a waste hierarchy that EU member states should follow. The hierarchy indicates a priority order of the options in treating waste based on how they deliver the best environmental outcome, as follows:

- waste prevention;
- preparing for reuse;
- recycling;
- other recovery (eg, energy recovery); and
- disposal in landfills.

Waste operators are required to obtain a permit from the relevant competent authority. See **16.4 Rights and Obligations Applicable to Waste Operators** for more details.

The WFD recognises the general “polluter pays” principle, which requires polluters to bear the environmental and social costs of their actions. In particular, this is applied by the EPR concept, which requires EU member states to ensure that a producer bears the financial and/or operational responsibility for the management of the product at its waste stage. This tool intends to help meet national or EU recycling and recovery targets.

There are other pieces of legislation for specific waste treatment operations, such as the Landfill Directive (1999/31/EC) and the Waste Shipment Regulation (2024/1157/EU). The EU has also regulated various types of waste stream:

- end-of-life vehicles (Directive 2000/53/EC);
- extractive mining waste (Directive 2006/21/EC);
- packaging waste (Council Directive 94/62/EC); (to be repealed by a new regulation)
- disposal of polychlorinated biphenyls and polychlorinated terphenyls (PCBs/PBTs) (Council Directive 96/59/EC);
- RoHS 2;
- sewage sludge (Council Directive 86/278/EEC);
- ship recycling (Regulation (EU) 1257/2013);
- persistent organic pollutants (Regulation (EU) 2019/1021);
- single-use plastics (Directive (EU) 2019/904); and
- the WEEE Directive.

The Batteries Regulation (2023/1542/EU) includes rules on product requirements (eg, labelling, material composition, and design for

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recycling) and on the product's end-of-life management.

16.2 Retention of Environmental Liability

This is regulated at member-state level. According to the WFD, EU member states may decide that the responsibility for arranging waste management is to be borne partly or wholly by the producer of the product from which the waste came and that distributors of such product may share this responsibility.

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

The WFD, through the EPR principle, mandates EU member states to encourage the design of products to reduce their environmental impacts and the generation of waste. As regards the treatment of waste, the WFD only establishes general rules applicable to EU member states. In this regard, EU member states must take measures to promote high-quality recycling and achieve overall recycling targets of municipal waste per material (paper, metal, plastic and glass). EU member states must also ensure that the disposal of waste is safe and does not endanger human health or the environment.

Each specific waste stream legislation specifies to a greater extent how products must be designed and how they must be treated once they become waste (take back, recovery, recycling or disposal).

The new ESPR sets a framework for ecodesign requirements to be introduced in the coming years via secondary legislation with regard to specific product groups, including rules on their durability, reusability, upgradability, reparability, remanufacturing, and recycling. The ESPR also introduces a direct ban on the destruction of

unsold textiles and footwear, which will apply to large companies from 19 July 2026.

Additionally and also with regard to textile waste, a targeted amendment to the WFD - currently in trilogue negotiations and expected to be adopted in 2025 - will introduce mandatory, harmonised EU-wide EPR schemes for textile and footwear producers.

16.4 Rights and Obligations Applicable to Waste Operators

According to the WFD, EU member states require waste operators to obtain a permit from the relevant competent authority. These permits specify factors such as the types and quantities of waste to be treated and other requirements for the site concerned. Waste operator permits are granted for a specified period and may be renewable; they may be combined under a single permit with other required permits. Certain waste operations (ie, disposal of non-hazardous waste at the place of production, as well as recovery of waste) may be exempted from the permit requirement. The Landfill Directive specifies the conditions to be granted a landfill permit.

EU member states must take the necessary rules to prohibit the abandonment, dumping or uncontrolled management of waste. Enforcement rules and penalties are regulated at a member-state level and thus will vary.

17. Environmental Disclosure and Information

17.1 Self-Reporting Requirements

Certain EU Directives require EU member states to establish incident reporting requirements at the national level concerning environmental damage, as follows.

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- Under the ELD, operators that are engaged in certain regulated activities are required to notify the competent member state authority if they cause environmental damage or pose an imminent threat of damage. Additionally, the ELD grants individuals and NGOs the right to report environmental damage or impending threats thereof to designated public authorities.
- Under the IED, industrial installations are required to promptly inform the national authority of any emissions, incidents or accidents related to air and water pollution.
- Under the Seveso III Directive (2012/18/EU), operators of installations containing specified quantities of hazardous substances - as outlined in Annex I of the Seveso III Directive - must report major accidents, including those with the potential to significantly impact the environment.

17.2 Public Environmental Information

The Aarhus Convention, implemented in the EU through the Aarhus Regulation (1367/2006/EC) and the Access to Environmental Information Directive (2003/4/EC), safeguards citizens' rights to access environmental information from public authorities and bodies. This framework imposes an obligation on EU institutions and member states to provide public access to environmental information upon request, with some exceptions. "Community institution or body" is defined in the Aarhus Regulation as "any public institution, body, office or agency established by, or on the basis of, the Treaty...".

A public authority under the Access to Environmental Information Directive refers to:

- "government or other public administration, including public advisory bodies, at national, regional or local level";
- "any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment"; and
- "any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within [the foregoing]."

EU member states may provide that this definition does not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of the Access to Environmental Information Directive make no provision for a review procedure within the meaning of Article 6, EU member states may exclude those bodies or institutions from that definition.

EU citizens and legal entities also have the right to access documents - including those containing environmental information - that are held by EU institutions in any format (eg, paper, electronic, audio or video) via the conditions set in Regulation (EC) 1049/2001. Additionally, the public may obtain environmental information from EU centralised and public accessible registries - for example, the Industrial Emissions Portal containing specific information on emissions, pollutant releases and waste transfers, which was established by Regulation (EU) 2024/1244.

17.3 Corporate Disclosure Requirement

Under the CSRD, in-scope companies must report on their IROs in respect of ESG matters that are material to their operations. EU entities must report on their sustainability targets, strategies, and performance using the ESRS, with five standards (ESRS E) requiring disclosures of environmental information as material to the company on climate change, pollution (air, water,

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soil), water and marine resources, ecosystems, and resource use and circular economy.

Furthermore, the CSRD ties into Article 8 of the EU Taxonomy Regulation by requiring companies to disclose essential performance metrics for all six environmental objectives of the EU Taxonomy for Sustainable Activities (the “EU Taxonomy”).

The CSDDD also requires in-scope companies to annually report on their due diligence processes and outcomes, including information and measures related to adverse impacts of their operations on the environment.

17.4 Green Finance

Since 2018, the EU has been developing a comprehensive set of measures to promote sustainable finance. The foundations of the EU sustainable finance framework are:

- the EU Taxonomy - this common classification system identifies economic activities that significantly contribute to the EU’s climate and environmental objectives, featuring minimum social and human rights safeguards;
- a set of disclosure and reporting rules - namely, the Non-Financial Reporting Directive (NFRD) (2014/95/EU) and the CSRD, as well as the Sustainable Finance Disclosure Regulation (SFDR) (2019/2088/EU), which mandates that EU financial market participants (eg, financial advisers, investment firms and insurance providers) report on sustainability factors and their integration into decision-making processes; and
- a range of tools and standards – these include Climate Transition Benchmarks and the International Platform on Sustain-

able Finance, as well as Regulation (EU) 2023/2631 on European Green Bonds and Optional Disclosures for Bonds Marketed as Environmentally Sustainable and for Sustainability-Linked Bonds, which provides a voluntary framework for issuers to demonstrate their commitment to funding environmentally sound projects that align with the EU Taxonomy.

18. Transactions

18.1 Environmental Due Diligence

Environmental due diligence for M&A and other transactions is standard practice. However, its specifics depend on national environmental regulations and legislation on company law and financial markets at the member-state level.

18.2 Disclosure of Environmental Information

Disclosure of environmental information is regulated at member-state level.

18.3 Key Issues in Environmental Due Diligence

The most common environmental legal issues that will arise within the context of a transaction in EU member states will depend on environmental regulations and legislation on company law and financial markets at member-state level.

Trends and Developments

Contributed by:

Peter Sellar, Gerard McElwee, Manon Ombredane and Nayelly Landeros
Fieldfisher (Belgium)

Fieldfisher (Belgium) has more than 70 lawyers, including 20 partners, practising in various areas of law, spread across several departments. The Belgium office is integrated with that of other Fieldfisher firms: know-how and experience are shared in regular collaboration on cases, providing a true European legal platform. The firm's internal organisation allows it to develop a global and integrated approach to projects and disputes in multiple areas, with optimal co-ordination and collaboration between departments, enabling the team to deliver quality services

to clients, using a comprehensive and holistic approach. Fieldfisher's integrated international offices and relationships with other law firms enables the firm to offer a multi-jurisdictional business capability in all major European business centres. The firm works closely with foreign counterparts and has long-standing relationships with other highly reputable law firms. Thanks to this professional network, Fieldfisher is able to offer a fully integrated service in most EU member states.

Authors



Peter Sellar is a partner in the EU regulatory group at Fieldfisher's Brussels office. With more than 25 years' experience, Peter focuses on the circular economy and

sustainability, with particular experience in in EU product law, general chemicals, biocides and pesticides, ecodesign, electronic and electrical equipment, and cosmetics, as well as medical devices and medical products law. His work also covers ESG legislation and green claims. Peter assists clients on EU-wide advocacy campaigns to avoid adverse regulation, failing which litigation before the ECJ in Luxembourg. In environmental law, he led on the most recent success before the ECJ and the EU's General Court regarding the unlawful classification of a chemical.



Gerard McElwee is a partner in the EU regulatory group at Fieldfisher's Brussels office. His practice focuses on EU product regulatory matters involving everything from chemicals

(REACH, biocides, pesticides, and classification, labelling and packaging) through to consumer products such as detergents, cosmetics and toys, and more circular economy areas such as packaging, single-use plastics, RoHS/WEEE, waste, water management, green claims, and ecocide. This includes general compliance advice, strategic advice on anticipated legislative changes, and advice on product liability and product recall issues. Gerard also advises on contentious matters and has represented many clients before the European courts, European agencies, and national courts.

Contributed by: Peter Sellar, Gerard McElwee, Manon Ombredane and Nayelly Landeros, **Fieldfisher (Belgium)**



Manon Ombredane is a counsel in the EU regulatory group at Fieldfisher's Brussels office. Her practice focuses on EU regulatory and environmental law, including REACH, biocides

and pesticides, as well as on food law. Manon is involved with task force management, litigation, and product compliance work. She has a particular interest in all topics related to sustainability, from the sustainable food system to the Chemicals Strategy for Sustainability and all work related to sustainable products and ecodesign. Manon is an elected board member of the European Food Law Association.



Nayelly Landeros is an associate in the EU regulatory group at Fieldfisher's Brussels office. Her expertise lies in EU regulation with a focus on ESG legislation and product law.

Nayelly's practice involves advising on supply chain and sustainability reporting, including the Corporate Sustainability Reporting Directive, the Corporate Sustainability Due Diligence Directive, and the EU regulation on deforestation and environmental claims. She also advises clients on a wide range of EU regulatory frameworks, including biocides and product law frameworks, as well as REACH.

Fieldfisher (Belgium)

L'Arsenal
Boulevard Louis Schmidtlaan 29
Box 15
1040 Brussels
Belgium

Tel: +32 2 742 70 00
Email: BrusselsInfo@fieldfisher.com
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Introduction

2024 was always going to be a year of transition. The European elections in June heralded the slowing down of the EU's legislative process, with the arrival of a new European Parliament and European Commission (EC), the changing hands of certain files, and the possibility of a shift in general political direction and priorities.

For the raft of environmental legislation initiated under the EU Green Deal, concentrated activity and compromise by the legislators ensured that the final Acts were agreed prior to the elections. The coming years promise to be full of new developments, with the implementation and enforcement of more than 70 Acts adopted as part of the Green Deal.

This article takes a look at these newly minted and forthcoming pieces of environmental legislation and what to expect from them in the coming year.

Chemicals

REACH revision

Having inevitably stalled prior to the European elections, the future of the eagerly awaited and much-debated proposal for a revision of the Registration, Evaluation, Authorisation and Restriction of Chemicals Regulation (REACH) continues to preoccupy industry, NGOs, Parliamentarians and future Commissioners alike. A key element of 2020's Chemicals Strategy for Sustainability (CSS), the revision of REACH is intended to improve the environmental and economic sustainability of the EU chemicals industry and address critical issues for the sector, including:

- revision of registration requirements;
- revision of the provisions for dossier and substance evaluation;

- streamlining of the authorisation and restriction processes;
- introduction of a Mixtures Assessment Factor (MAF);
- simplification of supply chain communications; and
- revision of provisions for control and enforcement.

The publication of the essential use criteria as a standalone EC Communication might also shape the future revision of REACH.

At the time of writing (mid-October 2024), the incoming Commissioners are yet to be confirmed, but the two Commissioners-designate expected to be in charge of the file have committed to producing the REACH proposal in 2025 together as part of EC President Ursula von der Leyen's projected "Chemicals Industry Package" and to prioritising:

- innovative, sustainable and secure supply chains (supporting R&D and investment in the sector);
- simplified and streamlined legislation, including a "less burdensome" REACH aiming - among other things - for a system of "mainly broader restrictions" as a reform of the current authorisation and restriction regime;
- policy coherence (ie, alignment between REACH and other legislation); and
- clarity on per- and polyfluoroalkyl substances (PFAS) (and trying to accelerate the finalisation of the broad restriction).

Reference is also made to the expected proposal for a European Chemicals Agency (ECHA) basic regulation, but with no precise indication of timing.

Taking into account as well the package of legislative proposals to implement the One Substance One Assessment (OSOA) approach, it seems that the development of EU chemicals strategy is not set to depart wildly from its recent direction of travel under the Green Deal. Focus remains on increased protection of human health and the environment but the push for a shift towards safer and more sustainable alternatives may clash with the arrival of a European Parliament more focused on security and competitiveness and the need for harmonisation and simplification of the various processes.

It also remains to be seen to what extent the new Commission will align with the recent Draghi report on The Future of European Competitiveness and, in particular, its use of REACH to illustrate the shortcomings of the EU regulatory framework with regard to support for industrial policy and manufacturing investment.

CLP revision

The revision of the Regulation on Classification, Labelling and Packaging of Chemicals (CLP) was also announced under the CSS but fared better than REACH, with official publication on 20 November 2024 and entry into force on 10 December 2024. Admittedly less complex and with less room for controversy than the potential amendments to REACH, the CLP revision nevertheless incorporates significant changes, including:

- streamlining and accelerating processes for informing on the hazards of chemicals placed on the EU market;
- simplifying and clarifying labelling and advertising requirements, including the adaptation of the rules to the online market;
- introducing new powers for the EC to develop classification proposals;

- introducing rules for refillable chemical products to enable safe consumer bulk-buying and use;

It also aligns all relevant provisions with the new hazard classes introduced separately by Delegated Act in 2023, which are:

- endocrine disruptors (ED) for human health (HH) or the environment (ENV) (Category 1 and 2);
- persistent, bioaccumulative and toxic (PBT);
- very persistent and very bioaccumulative (vPvB);
- persistent, mobile and toxic (PMT); and
- very persistent and very mobile (vPvM).

The Delegated Act has been in force since April 2023. It is already possible for companies to comply voluntarily with the associated classification and labelling requirements for the new classes. Proposals for harmonised classification and labelling can already be submitted by the EU member states for these hazard classes. However, mandatory application has been phased to provide transition periods, with the following deadlines for industry to comply:

- substances placed on the market before 1 May 2025 - 1 November 2026;
- substances placed on the market after 1 May 2025 - 1 May 2025;
- mixtures placed on the market before 1 May 2026 - 1 May 2028; and
- mixtures placed on the market after 1 May 2026 - 1 May 2026.

Additionally, the ECHA has developed guidance to assist the supply chain with compliance. This is to be introduced in November 2024.

Ongoing PFAS restriction

Another key CSS initiative, the process for the introduction of a broad EU-wide restriction on PFAS rumbles on. The assessment of the 2023 proposal by ECHA's Risk Assessment Committee (RAC) and its Socio-Economic Analysis Committee (SEAC) is unsurprisingly taking longer than initially announced.

This is mainly due to the unprecedented number of substances (roughly 10,000) covered by the proposed restriction, as well as the correspondingly unprecedented volume of comments received during the mandatory public consultation on the proposal - many of which put forward additional data and arguments for derogations.

RAC and SEAC have adopted a "sector-by-sector" approach to their evaluations, which will be pursued during the course of the next year – discussion of the transport, energy and f-gas sectors are currently foreseen only in 2025 - and followed by another public consultation. The most recent estimates from the authorities acknowledge that the restriction is unlikely to be finalised in 2025 as initially announced.

For the authorities involved in the process, this turbo-charged deployment of the CSS-mandated grouping approach to restrictions may also provide some useful lessons for the management of further grouping proposals in the pipeline.

Circular Economy

Implementation of the Ecodesign for Sustainable Products Regulation

The Ecodesign for Sustainable Products Regulation (ESPR) (Regulation (EU) 2024/1781) escaped election hold-ups and was published in June 2024, entering into force on 18 July 2024. Building on the product sustainability requirements

initially established by the Ecodesign Directive (2009/125/EC), the ESPR broadens the scope of those requirements from energy-related product groups to nearly all physical products on the market, with the exception of:

- human and veterinary medicinal products;
- food and feed;
- living plants, animals and micro-organisms;
- products of human origin;
- products of plants and animals related directly to their future reproduction; and
- motor vehicles with their own ecodesign rules embedded in product-specific legislation.

Notable new measures introduced within this framework include:

- requirements for product durability, reusability, upgradability and reparability, as well as energy and resource efficiency, remanufacturing, and recycling;
- rules for product carbon and environmental footprints;
- information requirements, including notably the introduction of the Digital Product Passport;
- rules to address destruction of unsold consumer products;
- introduction of a definition of "substances of concern" (covering Substances of Very High Concern (SVHC) under REACH, substances with harmonised classification under CLP, persistent organic pollutants (POPs) under the POPs Regulation and product-specific substances to be defined in secondary legislation) and provisions to set requirements for tracking their presence in all products throughout their life cycle.

The next step in the ESPR's implementation will be the adoption by the EC of product-specific

ic legislation, with identified “priority product groups” first in line. These should include iron and steel, aluminium, textiles and footwear, furniture, tyres, detergents, paints, lubricants, chemicals, certain energy-related products and certain electronics, including IT products. This secondary legislation is expected to be adopted in 2026, with application in 2027 and 2028, but the first step to look out for will be the publication by April 2025 of a working plan that will shed more light on the timing and content. The procedure for each product-specific act will also include an impact assessment and stakeholder consultations.

With regard to textiles and footwear, note that the ESPR itself already includes a direct ban on their destruction in order to address as a point of urgency the significant impact of fast fashion and consequent textile waste. The ban will nevertheless have a phase-in period; it will not apply to small companies and medium-sized companies will have until mid-2030 to comply. Affected large companies, however, should already take note and make preparations in 2025, as the ban will hit them from mid-2026.

Publication and implementation of the Packaging and Packaging Waste Regulation

Proposed at the end of 2022, the switch for a regulation aims at harmonising the currently fragmented rules applicable to packaging and packaging waste governed by the three-decades old Directive 94/62/EC.

The original text proposed by the EC has been significantly revised during the legislative process, due in no small part to concerns from industry about the ability to meet the ambition of the proposed targets. The proposed Packaging and Packaging Waste Regulation (PPWR) in its agreed form remains complex, with many

secondary Acts needing to be adopted at a later stage to clarify and complete its measures. The latest version of the text includes notably the following elements.

- **Recyclability** - from 1 January 2030, all packaging placed in the EU market must be recyclable, according to design for recycling criteria and recycling performance grades (A-C) to be determined in secondary legislation. Packaging receiving less than a C grade will be prohibited from 2030 (or two years after the entry into force of such secondary legislation, whichever is later). Packaging receiving less than a B grade will be prohibited from 2038. Limited exemptions apply.
- **Recycled plastic content** - minimum percentages of recycled content are set for plastic packaging but many of the specifics remain to be determined in implementing legislation. The targets range from 10-35% by 2030 (or three years after the entry into force of such implementing legislation, whichever is later) and higher targets again in 2040.
- **Waste prevention** - introduction of packaging minimisation requirements to be met by 2030, empty space requirements, and new restrictions on certain types of single-use plastic packaging.
- **Labelling** - introduction of labelling requirements for packaging to facilitate consumer sorting.
- **Reuse** - different reuse targets are introduced for different types of packaging and apply from 2030. By way of example, a 40% target for transport packaging in forms including pallets, foldable plastic boxes, plastic crates, pails and trays.
- **Substances of concern** - introduction of new restrictions on PFAS in food contact packaging on top of existing restrictions for certain heavy metals. The EC will also adopt by

the end of 2026 a report on the presence of substance of concern in packaging, with a view to adopting additional restrictions under REACH and/or under design for recycling criteria.

The PPWR is now expected to be published in December or early 2025. Companies manufacturing or using in-scope products should already note the timelines for compliance with the requirements and targets applicable to them and make preparations to ensure compliance within their own operations and those of their supply chain.

Green Claims

An increased focus by the legislators on the prevalence of “greenwashing” and particularly misleading and unsubstantiated environmental claims by businesses has led to updates this year to the existing consumer protection legislation in order to address generic environmental claims and to the introduction of a new initiative aiming to regulate explicit environmental claims.

Directive on Empowering Consumers for the Green Transition

March 2024 saw the publication of Directive (EU) 2024/825 on Empowering Consumers for the Green Transition. Not to be confused with the forthcoming Green Claims Directive (discussed later in this article), this new legislation amends both the Unfair Commercial Practices Directive (UCPD) (2005/29/EC) and the Consumer Rights Directive (CRD) (2011/83/EU) to strengthen the protection of consumers against greenwashing and early obsolescence.

Principal measures include:

- a ban on generic environmental claims such as “eco-friendly”, “biodegradable” or “green”,

unless the trader can demonstrate “recognised excellent environmental performance” relevant to the claim;

- a ban on claims concerning a product’s environmental impact and based on carbon off-setting schemes, such as “carbon neutral”;
- obligation for environmental claims related to future environmental performance to be backed up with clear, objective, publicly available and verifiable commitments set out in a detailed and realistic implementation plan;
- limitation on the use of sustainability labels to only those based on official certification schemes or established by public authorities;
- introduction of easily recognisable harmonised notices on the legal guarantee of conformity, as well as harmonised labels on the durability of a product;
- obligation to inform the consumer of methods and objects of comparison when providing competitor product comparisons on environmental, social or circularity aspects; and
- a ban on certain practices associated with early obsolescence, including:
 - (a) false or exaggerated claims about the lifespan of a product;
 - (b) making software updates seem mandatory when they are not;
 - (c) making consumers replace consumables sooner than technically needed; and
 - (d) hiding or lying about the impact on a product’s performance of using consumables, spare parts or accessories not supplied by the original producer.

The deadline to transpose the EU Directive into national law is 27 March 2026, with entry into application on 27 September 2026. 2025 should therefore be the start of a period of adaptation for businesses to prepare themselves for compliance, including internal compliance checks and eliminating any prohibited claims or early

obsolescence practices from their manufacturing and marketing procedures. A recent increase in greenwashing litigation before EU member states' national courts highlights the importance of this due diligence as the rules become stricter.

Forthcoming Green Claims Directive

Complementing the Empowering Consumers for the Green Transition Directive, the proposal in March 2023 for a Green Claims Directive addresses “explicit environmental claims” (EECs) and their substantiation, communication and verification - again in the context of business-to-consumer relationships.

The main elements of the proposal include:

- scope - the Green Claims Directive will apply to EECs (defined as “an environmental claim that is in textual form or contained in an environmental label”) “made by traders about products or traders in business-to-consumer commercial practices”;
- substantiation - traders will have to substantiate their EECs with scientific evidence, accurate information, and compliance with relevant international standards;
- communication - EECs can only be communicated if they are substantiated and relate to a significant environmental impact, aspect or performance for the product or trader, and the substantiating information must be made available to the consumer;
- verification - EECs will be subject to ex ante independent and certified verification; and
- environmental labelling schemes - the above-mentioned rules will also apply to environmental labels and environmental labelling schemes will have to comply with minimum requirements.

The proposal is now set for trilogue negotiations. There is therefore still room for amendment and refinement of the provisions. However, the text should be finalised in 2025, with the deadlines for transposition and application in 2026-28.

Supply Chain Reporting and Due Diligence Corporate Sustainability Reporting Directive: transposition and implementation

2024 saw the beginning of implementation of the Corporate Sustainability Reporting Directive (CSRD) (Directive (EU) 2022/2464), which requires in-scope companies to disclose impacts, risks and opportunities related to ESG matters material to their operations across their value chain. The CSRD also requires specific formats and standards for the disclosures. In-scope companies must report according to the European Sustainability Reporting Standards (ESRS). Sector-specific ESRS and non-EU ESRS (for non-EU-headquartered groups) will be introduced as well, - although their implementation deadline has been delayed by two years to 2026.

Reporting companies must identify which disclosures and matters are relevant to them using the “double materiality” principle, which evaluates both “impact materiality” (ie, the impact of their activities on people and the environment) and “financial materiality” (ie, the main sustainability-related risks or opportunities that have financial implications for the business). The disclosed information must be verified by an independent third party – typically the company’s statutory auditor - and included in a designated section of its management report.

The CSRD has staggered application from 2024 to 2028, starting with EU companies already subject to the Non-Financial Reporting Directive (NFRD), which must report based on 2024 data by 2025. Large companies, including non-EU

firms with listed securities on EU regulated markets and large EU group parent companies, will need to comply in 2026 for financial years starting on or after 1 January 2025. Other SMEs listed on EU regulated markets will follow, reporting in 2027 for financial year 2026. Non-EU groups with significant EU operations will be required to report by 2029 for financial years starting on or after 1 January 2028.

The deadline for national transposition of the CSRD was 6 July 2024 but so far only ten EU member states have fully transposed it. The early stages of infringement action may therefore be initiated by the EC against the remaining countries in the coming months.

Corporate Sustainability Due Diligence Directive

Another piece of environmental legislation published in mid-2024 with a major impact on corporate operations, the Corporate Sustainability Due Diligence Directive (CSDDD) (Directive (EU) 2024/1760) requires large EU and non-EU companies operating in the EU market to fulfil due diligence obligations to identify, prevent and address adverse impacts on human rights and the environment across their operations, subsidiaries, and business partners in their value chain.

In addition, companies must adopt and implement a transition plan to align with EU climate goals, detailing how the company will contribute to limiting global warming to 1.5°C and achieving climate neutrality by 2050, including specific time-bound targets, defined emission categories, decarbonisation strategies, and governance oversight. This plan should outline emissions reduction targets for 2030 and every five years thereafter. Companies reporting under the CSRD (2013/34/EU) on sustainability disclosures may already fulfil some transition plan require-

ments through their existing reports, including those of their subsidiaries.

EU member states have until 26 July 2026 to transpose the CSDDD into national law, with compliance deadlines for in-scope companies varying from 2027 to 2029 based on company size and type.

Regulation on Deforestation-Free Products

The Regulation (EU) 2023/1115 on deforestation-free products (“the EUDR”) is a key component of the EU’s biodiversity strategy for 2030, the new EU forest strategy for 2030, and the European Green Deal. It aims to reduce the EU’s contribution to global deforestation and forest degradation, as well as to mitigate the EU’s impact on global greenhouse gas emissions and biodiversity loss.

The EUDR imposes due diligence requirements for operators and traders who place the following commodities on the EU market or export them from the EU: palm oil, cattle, wood, coffee, cocoa, rubber, and soy. The rules also apply to various derived products listed in its Annex, such as chocolate, furniture, printed paper, and a range of products made from palm oil.

Companies must perform due diligence to ensure their supply chains do not contribute to deforestation. This involves collecting geographic information on the land where the commodities were produced, tracing their products’ origin and providing evidence that they are deforestation-free and produced according to the local laws of the country of origin. Non-compliance can result in significant penalties, including fines and the removal of the products from the EU market.

The EUDR came into force on 29 June 2023 and was originally destined to enter into application at the end of 2024. However, the EC proposed that the application date be pushed back to the end of 2025 for large and medium companies, and 30 June 2026 for small companies and microenterprises. An amending Act to this effect is expected to be adopted and published before the end of the year, pending Council endorsement.

Protection and Restoration of Natural Resources

Implementation of Nature Restoration Law

The Nature Restoration Law (Regulation (EU) 2024/1991) entered into force on 18 August 2024. Its purpose is to enable the long-term recovery of biodiverse and resilient ecosystems across the EU's land and sea areas. It also aims to enhance food security and contribute to achieving the EU's climate mitigation and adaptation objectives. It provides for binding EU targets to introduce restoration measures for at least 20% of the EU's land and sea areas by 2030 and for all ecosystems in need of restoration by 2050. Specific targets are also set for particular ecosystems (eg, terrestrial, coastal, freshwater, marine, agricultural, urban and forest) and species - notably, pollinators and trees. For habitats in good condition or not yet subject to restoration measures, EU member states must put in place measures aimed at preventing significant deterioration.

EU member states are required by 1 September 2026 to prepare national restoration plans identifying the measures needed to meet the restoration targets contained in the Nature Restoration Law. Such plans should cover the period up to 2050 and will be submitted to the EC for assess-

ment. Each EU member state must review and revise its plans, and include supplementary measures, by 30 June 2032 and subsequently by 30 June 2042.

Implementation of new Environmental Crime Directive

Directive (EU) 2024/1203 on the Protection of the Environment Through Criminal Law (the "new Environmental Crime Directive (ECD)") entered into force on 20 May 2024. Updating the Environmental Crime Directive (2008/99/EC) (the "2008 ECD"), the revised rules significantly increase the penalties for environmental crimes to include imprisonment terms and fines for some offences calculated at least at 5% of worldwide turnover. The new rules also expand the list of environmental offences to include:

- unlawful ship recycling;
- unlawful water extraction;
- serious breaches of EU chemicals legislation;
- serious breaches of legislation on invasive alien species; and
- breaches of the EUDR.

The new ECD pushes for EU member states to consider ecocide as a "qualified offence", where the conduct leads to the destruction of - or widespread and substantial damage that is either irreversible or long-lasting to - an ecosystem of considerable size or environmental value or a habitat within a protected site or the quality of air, soil or water. Furthermore, the new ECD establishes aggravating and mitigating circumstances.

It does not apply to Denmark and Ireland, where the 2008 ECD will still be in force.

FINLAND

Law and Practice

Contributed by:

Kari Marttinen, Tarja Pirinen, Outi Iso-Markku and Laura Leino
HPP Attorneys Ltd



Contents

1. Regulatory Framework and Law p.157

1.1 Environmental Protection Policies, Principles and Laws p.157

2. Enforcement Authorities and Mechanisms p.158

2.1 Regulatory Authorities p.158

2.2 Co-operation p.158

3. Environmental Protections p.158

3.1 Protection of Environmental Assets p.158

3.2 Breaching Protections p.159

4. Environmental Incidents and Permits p.159

4.1 Investigative and Access Powers p.159

4.2 Environmental Permits/Approvals p.159

4.3 Regulators' Approach to Policy and Enforcement p.160

4.4 Transferring Permits/Approvals p.161

4.5 Consequences of Breaching Permits/Approvals p.161

5. Environmental Liability p.161

5.1 Key Types of Liability p.161

5.2 Disclosure p.161

6. Environmental Incidents and Damage p.162

6.1 Liability for Historical Environmental Incidents or Damage p.162

6.2 Reporting Requirements p.162

6.3 Types of Liability and Key Defences p.162

7. Corporate Liability p.163

7.1 Liability for Environmental Damage or Breaches of Environmental Law p.163

7.2 Environmental Taxes p.163

7.3 Incentives, Exemptions and Penalties p.164

7.4 Shareholder or Parent Company Liability p.164

7.5 ESG Requirements p.164

7.6 Environmental Audits p.165

8. Personal Liability p.165

8.1 Directors and Other Officers p.165

8.2 Insuring Against Liability p.165

9. Insurance p.165

9.1 Environmental Insurance p.165

10. Lender Liability p.166

10.1 Financial Institutions/Lender Liability p.166

10.2 Lender Protection p.166

11. Civil Liability p.166

11.1 Civil Claims p.166

11.2 Exemplary or Punitive Damages p.167

11.3 Class or Group Actions p.167

11.4 Landmark Cases p.167

12. Contractual Agreements p.167

12.1 Transferring or Apportioning Liability p.167

12.2 Environmental Insurance p.167

13. Contaminated Land p.167

13.1 Key Laws Governing Contaminated Land p.167

13.2 Clearing Contaminated Land p.168

13.3 Determining Liability p.168

13.4 Proceedings Against Polluters p.168

13.5 Investigating Environmental Accidents p.169

14. Climate Change and Emissions Trading p.169

14.1 Key Policies, Principles and Laws p.169

14.2 Targets to Reduce Greenhouse Gas Emissions p.169

15. Asbestos and Polychlorinated Biphenyls (PCBs) p.170

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs p.170

16. Waste p.170

16.1 Key Laws and Regulatory Controls p.170

16.2 Retention of Environmental Liability p.171

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods p.171

16.4 Rights and Obligations Applicable to Waste Operators p.171

17. Environmental Disclosure and Information p.172

17.1 Self-Reporting Requirements p.172

17.2 Public Environmental Information p.172

17.3 Corporate Disclosure Requirement p.173

17.4 Green Finance p.173

18. Transactions p.173

18.1 Environmental Due Diligence p.173

18.2 Disclosure of Environmental Information p.174

18.3 Key Issues in Environmental Due Diligence p.174

HPP Attorneys Ltd (HPP) was established in 1975. HPP is Finland's leading legal services provider in environmental law, land use, mining and construction. HPP has one of the largest dedicated environmental teams in Finland, with eight skilled and experienced lawyers specialising in all aspects of environmental law. The team assists a diverse array of clients in addressing environmental challenges related to their projects. In areas such as green transition,

real estate, finance transactions and other M&A activities, where environmental aspects and additional investments are of central importance, HPP is ideally positioned to assess risks and offer solutions that incorporate environmental law concerns. The firm's clients include leading operators in the forestry, metals, chemicals, mining, battery, energy, food, waste management and logistics sectors.

Authors



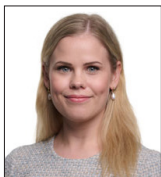
Kari Marttinen is a partner at HPP Attorneys Ltd and heads the firm's environmental group. His areas of expertise include matters pertaining to the application of administrative law

and matters pertaining to environmental liability and nature protection, as well as permit procedures, waste management, and recycling and infrastructure projects. Kari has particular experience of liability issues related to old industrial areas and complex matters related to permits and complaints in accordance with the Water Act, the Environmental Protection Act and the Land Use and Building Act, as well as of dispute resolution concerning environmental liabilities. He has held principal responsibility as an attorney in several major projects.



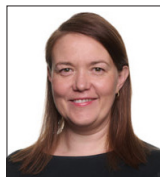
Tarja Pirinen is a partner at HPP Attorneys Ltd, specialising in advising clients on environmental law matters and legal questions concerning mining and other industrial and

infrastructure projects. Her areas of expertise include environmental and other permit procedures, administrative court procedures, and matters pertaining to environmental liabilities and nature protection. Tarja has extensive experience in mining law and the wide range of environmental and other legal issues relating to mineral exploration and mining operations. She has assisted several domestic and foreign mining companies with their operations in Finland in different phases of their projects' life cycle and has been involved in numerous M&A and finance transactions in the mining sector.



Outi Iso-Markku is a partner at HPP Attorneys Ltd and has more than ten years' experience in advising clients on issues concerning environmental and water permits, environmental

liabilities, environmental impact assessments, nature conservation, and land use planning. Her specific areas of expertise also include waste legislation and environmental criminal law. Outi has broad experience of assisting a wide range of industrial clients in environmental administrative court procedures. She also provides daily support to operators developing large and complex industrial projects in sectors such as forestry, energy, batteries, chemicals, mining and infrastructure. Outi is a member of the Finnish Bar Association's environmental law expert team.



Laura Leino is a partner at HPP Attorneys Ltd, specialising in advising clients on environmental law and regulatory matters, especially with regard to energy and green

transition projects. With dual qualifications in law and hydrobiology, Laura has an in-depth understanding of matters relating to environmental conservation and water law. She has extensive practical experience of assisting clients on permit, environmental impact assessment and land use processes for large energy, infrastructure, and industrial projects. Laura also has relevant experience with the Supreme Administrative Court, where she specialised in environmental and land use matters, as well as at an energy and environmental consulting firm, an energy company, and the United Nations.

HPP Attorneys Ltd

Bulevardi 1 A
FI-00100
Helsinki
Finland

Tel: +358 40 779 7878
Email: kari.marttinen@hpp.fi
Web: www.hpp.fi



HPP ATTORNEYS

1. Regulatory Framework and Law

1.1 Environmental Protection Policies, Principles and Laws

In Finland, environmental issues are regulated by many different national laws, provisions, degrees and policies. In addition, as an EU member state, a considerable share of the Finnish environmental legislation and policies is based on the EU's environmental policies and regulations – either as directly applicable EU regulations or through implementation of the EU Directives.

The most essential Finnish environmental laws include:

- the Environmental Protection Act (No 527/2014) (*ympäristönsuojelulaki*), which implements the EU's Industrial Emissions Directive (2010/75/EU) (IED) and governs emissions caused by industrial operations;
- the Water Act (No 587/2011) (*vesilaki*), which governs water-related construction projects and the use of water resources and the aquatic environment;
- the Waste Act (No 646/2011) (*jätelaki*), which governs waste management and littering, the prevention of waste generation, and the prevention of danger and harm to human health and the environment caused by waste;
- the Nature Conservation Act (No 9/2023) (*luonnonsuojelulaki*), which governs nature and landscape conservation and management;
- the Land Use and Building Act (No 132/1999) (*maankäyttö- ja rakennuslaki*), which governs planning, building development and the use of land and water areas (as of 1 January 2025, the Act will be divided into the Land Use Planning Act (No 132/1999) (*alueidenkäyttölaki*), governing the planning, construction and use of land, and the Building Act

(751/2023) (*rakentamislaki*), governing the planning, construction and use of buildings); and

- the Chemicals Act (No 599/2013) (*kemikaalilaki*), which governs the enforcement of EU chemicals legislation and certain national obligations regarding chemicals.

The most essential environmental principles implemented by the environmental legislation include:

- pollution prevention and minimising harmful impact - harmful environmental impact must be prevented or, if it cannot be prevented completely, reduced to a minimum (ie, the operator must reduce any emissions to the environment or sewer network to a minimum);
- caution and care - proper care and caution must be taken to prevent pollution, taking into account the nature of the activity and the probability of pollution, risk of accidents, and opportunities to prevent accidents and limit their effects;
- best available technique - the best available technique must be used in the operations;
- best environmental practice - best practices, fuels and raw materials must be used in the operations in order to prevent pollution;
- knowledge obligation - operators must have sufficient knowledge of the environmental impacts of their activities, as well as the risks and mitigation measures;
- obligation to prevent pollution – should the activities cause environmental pollution (or a threat thereof), the operator must take the appropriate action without delay in order to prevent pollution (or the threat thereof) or, if pollution has already occurred, reduce it to a minimum; and
- “polluter pays” principle - the party responsible for the activity producing pollution, shall

be responsible for the costs resulting from preventing and minimising environmental damage and restoring the environment.

2. Enforcement Authorities and Mechanisms

2.1 Regulatory Authorities

The main general authority that controls environmental policy, drafts environmental legislation and guides other authorities' work relating to environmental issues is the Ministry of the Environment (*ympäristöministeriö*).

The competent permitting authorities for environmental permits are the Regional State Administrative Agencies (*aluehallintovirasto*) and the municipalities. The Regional State Administrative Agencies are in charge of issuing environmental permits for activities with major environmental impacts, as well as all permits under the Water Act. Other environmental permits are dealt with by the municipal environmental protection authorities (*kunnan ympäristönsuojeluviranomainen*).

The competent supervisory authorities are the regional Centres for Economic Development, Transport and the Environment, the ELY Centres (*elinkeino-, liikenne- ja ympäristökeskus*, or *ELY-keskus*), and the municipalities. The ELY Centres also act as contact authorities in environmental impact assessments (EIAs) carried out in accordance with the Act on Environmental Impact Assessment Procedures (No 252/2017) (*laki ympäristövaikutusten arviointimenettelystä*), and issue reasoned conclusions on the significant environmental impacts of the projects as part of the assessment.

The municipalities' role is central in relation to land use planning, as they have wide discretionary power to decide whether to approve or reject a plan. Municipalities also function as permit authorities for construction permits and other permits granted under the Land Use and Building Act.

2.2 Co-operation

The requirement for co-operation among various authorities is mandated by legislation and is evident in scenarios such as communication between different permit authorities during simultaneous permit procedures. Additionally, it involves consulting the relevant supervisory authority during the permit procedure to ensure clarity and thoroughness in the matter.

There is currently a "single-window approach" legislative project in progress aiming to ensure that in future a single environmental authority with national competence will be responsible for the progress and co-ordination of permitting and other procedures resulting in a single decision and a single appeal option. The aim is for the one-stop service to enter into force on 1 January 2026. For further details of the single-window approach, please see the Finnish [Trends and Developments](#) chapter of this guide.

3. Environmental Protections

3.1 Protection of Environmental Assets

Environmental assets such as air, water and soil are protected by the Environmental Protection Act, which governs emissions caused by industrial operations and aims to prevent the pollution of the environment (and any risk of that), prevent and reduce emissions, eliminate adverse impacts caused by pollution, and prevent environmental damage.

In addition, other environmental assets such as flora, fauna, natural habitats, landscapes and the aquatic environment are mainly protected by the Nature Conservation Act, as well as the Water Act and the Forest Act (No 1093/1996) (*metsälaki*). The protection provisions can directly concern species – for example, by prohibiting the deliberate disturbance of the protected animals or by prohibiting the picking and destruction of a protected plant species. In addition, the protection provision can also concern the habitats of the protected species by prohibiting the deterioration and destruction of a habitat important for the survival of a species under strict protection or of breeding sites and resting places used by specimens of certain animal species, for example.

Besides the above-mentioned protection provisions for species, certain areas (national parks, nature reserves, landscape management areas, certain natural habitats, areas included in the EU Natura 2000 network) are subject to protection. The content of the protection provisions differs based on the legal basis of the protection and also on a case-by-case basis.

3.2 Breaching Protections

Breaching the protection provisions under the Nature Conservation Act might lead to a prohibition on continuing or repeating the offence or instance of negligence. One can also be required to correct the unlawful situation or redress the negligence under threat of penalty or suspension. In addition, the penalty for causing damage to the environment – or for any other nature conservation offence – is laid down in the Criminal Code (No 39/1889) (*rikoslaki*). Please also see **5.1 Key Types of Liability** and **13.4 Proceedings Against Polluters**.

4. Environmental Incidents and Permits

4.1 Investigative and Access Powers

Pursuant to the Environmental Protection Act, relevant authorities have the power to obtain information from authorities and operators of a site suspected of engaging in contaminating activities, for example – even if such disclosure may conflict with confidentiality obligations. The authority may also gain access to the site where the suspected contaminating activities have occurred and take measurements and soil samples.

The right of access is not subject to challenge, nor is consent of the involved parties required. However, according to the Administrative Procedure Act (No 434/2003) (*hallintolaki*), as a general rule the authorities are obligated to give prior notification of an upcoming inspection on a site or property. Any investigations involving criminal liability are carried out by the police.

4.2 Environmental Permits/Approvals

Pursuant to the Environmental Protection Act, an environmental permit is required for activities that involve a risk of environmental pollution. The operations requiring an environmental permit are listed in Annex 1 of the Environmental Protection Act, which covers both the installations covered by the EU's Industrial Emissions Directive (2010/75/EU) (IED) and installations subject to permits under the national legislation. In addition, an environmental permit is required for activities that may cause pollution of a water body, for conveying waste water that may lead to the pollution of a ditch, spring or streamlet, and for activities that may place an unreasonable burden on the surroundings. A lighter registration or notification procedure is applicable with

regard to some minor operations listed in Annexes 2 and 4 of the Environmental Protection Act.

An environmental permit must be applied for in accordance with the Environmental Protection Act. The permit consideration is based solely on judicial discretion, meaning that the environmental permit must be granted to the operator if the requirements set out in the Environmental Protection Act are fulfilled.

Rejection of a permit application or a permit decision and individual permit regulations may be appealed against. Further, the parties affected by the activity (permit applicants, neighbours and other concerned persons), environmental NGOs and those who may be affected by the operations also have a right to appeal.

The first appellate instance is the Administrative Court of Vaasa and the second and final instance is the Supreme Administrative Court. However, it should be noted that the right to appeal to the Supreme Administrative Court in environmental cases is subject to a requirement of leave to appeal, which is granted under the Administrative Judicial Procedure Act (No 808/2019) (*Jäki oikeudenkäynnistä hallintoasioissa*) if the matter involves a need for a precedent or an obvious error or if there are some other serious grounds for granting the leave to appeal.

4.3 Regulators' Approach to Policy and Enforcement

Authorities supervise polluting activities through surveillance visits and requests for information, monitoring reports provided by the operators, and possible further clarifications that the authorities may request from the operators. In accordance with the Environmental Protection Act, a supervisory authority may issue an administrative order placing obligations on the opera-

tor in order to rectify a violation or negligence. A supervisory authority may prohibit an operator who violates the Environmental Protection Act or the permit regulations from continuing or repeating a malpractice or may order a violating operator to fulfil its obligations in some other way (eg, it may order the operator to apply for an environmental permit in respect of an action that is conducted without a permit).

It may also order the operator to terminate its operations. Unless it is deemed unnecessary, the competent authority will issue the administrative orders with a threat of interruption, penalty payment, and/or remediation or other measures at the expense of the operator. The competent supervisory authority will ensure that the order or prohibition provided in the administrative order is complied with.

It is also in the supervisory authority's power to order the operator to restore the environment to the state in which it was before the violation or to eliminate the harm to the environment caused by the violation. The supervisory authority can also order the operator to investigate the environmental impacts of the operations if there is a justified cause to suspect that they are causing pollution.

Before issuing an administrative order, the authority shall give the operator an opportunity to be heard in the matter, as provided in the Administrative Procedure Act. If necessary, other concerned parties, supervisory authorities, and authorities protecting the public interest will also be heard.

Pursuant to the Environmental Protection Act, the supervisory authorities are obliged to report a matter to the police for preliminary investigation if they suspect that a criminal violation of a

rule of environmental law, government decree or permit regulation has been committed. No notification needs to be made if the act can be considered minor in view of the circumstances and the public interest does not require charges to be brought. However, the recent tendency has generally been for supervisory authorities to report the matter to the police for preliminary investigation.

4.4 Transferring Permits/Approvals

Environmental permits can be transferred to another operator without reassessment or the consent of the environmental authorities. Pursuant to the Environmental Protection Act, the new operator must notify the relevant supervisory authority of the change.

4.5 Consequences of Breaching Permits/Approvals

If the operator does not comply with the permit conditions, the competent authority can intervene by urging compliance and issuing administrative orders with the threat of interruption of operations, penalty payment, and/or carrying out of the required tasks by the authority at the cost of the operator.

The operator may also be prosecuted under the Criminal Code for a breach of an environmental permit or regulations of the Environmental Protection Act as a criminal offence punishable by a fine and/or imprisonment. Criminal sanctions may be imposed for acts in breach of permits or legislation that have been carried out intentionally or through negligence or gross negligence. Depending on the gravity of the punishable offence, criminal sanctions for environmental offences include:

- fines imposed on natural persons (corporation officers responsible for the offence);

- fines imposed on the corporation; and
- imprisonment ranging from four months to six years.

Further, the property and the value of savings derived from an offence can be confiscated by the State.

Please also see 7.1 Liability for Environmental Damage or Breaches of Environmental Law.

5. Environmental Liability

5.1 Key Types of Liability

Finnish legal environmental liability consists of public liability, civil liability and criminal liability. The key Finnish environmental legislation regarding environmental liability is:

- the Environmental Protection Act;
- the Act on Compensation for Environmental Damage (No 737/1994) (*laki ympäristövahinkojen korvaamisesta*);
- the Act on the Remediation of Certain Environmental Damages (No 383/2009) (*laki eräiden ympäristövahinkojen korjaamisesta*); and
- the Criminal Code.

Please see 6.3 Types of Liability and Key Defences.

5.2 Disclosure

According to the Environmental Protection Act, the operator must notify the state supervisory authority without delay of any substantial pollution of a water body and damage to protected species and natural habitats and imminent risks. Failure to comply with this notification requirement – whether intentionally or through negligence – is punishable by a fine under the Envi-

ronmental Protection Act, unless a more severe punishment is provided elsewhere by law.

Please see also **17. Environmental Disclosure and Information** and **18.2 Disclosure of Environmental Information**.

6. Environmental Incidents and Damage

6.1 Liability for Historical Environmental Incidents or Damage

In general, based on the fundamental “polluter pays” principle, anyone who is operating (or has operated) an activity or has taken a measure that has caused a nuisance or damage to the environment is liable for the environmental damage and must restore the contaminated area to a condition that will not cause harm to health or the environment nor present a hazard to the environment. The principle is contained, for example, in the Environmental Protection Act.

The liability to compensate for environmental damage caused by activities carried out in certain areas and resulting from pollution of the water, air or soil or from noise, vibration, radiation, light, heat or smell – or from a similar nuisance – lies with the operator to whom the activity that has caused the environmental damage has been assigned, if the assignee knew or should have known about such environmental damage or nuisance (or the threat of the same) at the time of the assignment.

With regard to cases where historical environmental incidents or damage have led to soil contamination, please see **13. Contaminated Land**.

6.2 Reporting Requirements

Please see **17.1 Self-Reporting Requirements**.

6.3 Types of Liability and Key Defences

As explained in **5.1 Key Types of Liability**, Finnish legal environmental liability consists of public liability, civil liability and criminal liability.

Pursuant to the Environmental Protection Act, any party whose activities have caused the contamination of soil or groundwater is required to restore said soil or groundwater to a condition that will not cause harm to health or the environment nor represent a hazard to the environment. The supervisory authority has the power to order the operator to restore the environment to the state in which it was before the incident or to eliminate the harm to the environment caused by the incident. Environmental liability is strict liability, which means that restoration obligations may be ordered even if the pollution is not caused negligently or intentionally.

As mentioned in **6.1 Liability for Historical Environmental Incidents or Damage** and according to the Act on Compensation for Environmental Damage, compensation must be paid for a loss defined as environmental damage that is caused by activities carried out in a certain area and resulting from pollution of the water, air or soil or from noise, vibration, radiation, light, heat or smell (or from a similar nuisance). Compensation will be paid if it can be shown that there is a probable causal link between the activities and the above-mentioned loss.

In assessing the probability of causality, consideration must be given to – among other things – the type of activity and loss and the other possible causes of loss. Even when the loss has not been caused deliberately or negligently, liability for compensation lies with the person whose activity has caused the environmental damage or a person who is comparable to the person carrying out the activity. As mentioned in **6.1**

Liability for Historical Environmental Incidents or Damage, liability for compensation also lies with the person to whom the activity that caused the environmental damage has been assigned, if the assignee knew or should have known about the loss or nuisance (or the threat of such) at the time of the assignment.

Finally, according to the Criminal Code, criminal liability lies with the person within whose sphere of responsibility the act or negligence that has caused the incident or damage belongs. In the allocation of liability, due consideration will be given to the position of said person, the nature and extent of the person's duties and competence, and the person's involvement in both the initiation and the perpetuation of the unlawful situation.

Please see also **8. Personal Liability**, **9.1 Environmental Insurance** and **13. Contaminated Land**.

7. Corporate Liability

7.1 Liability for Environmental Damage or Breaches of Environmental Law

The Finnish legal system makes no explicit distinction between corporate entities and natural persons. In Finland, as in many other countries, the “polluter pays” principle is the main rule. This means that a corporate entity can also be liable for environmental damages and breaches of environmental law.

Moreover, Finland recognises the criminal liability of a legal person involved in an environmental crime. The corporate criminal liability applies irrespective of the liability of natural persons and a corporate fine may be imposed even if a natural person offender cannot be identified or will

not be punished. The amount of a corporate fine ranges from EUR850 to EUR850,000 and the court has wide discretion as to how to calculate the amount of the fine. The fine will be imposed in proportion to the harmfulness and dangerousness of the offence and the size/financial standing of the liable corporation. In recent case law, the imposition of forfeiture orders – which require the surrender of proceeds derived from criminal activity – has grown in significance, potentially surpassing the impact of corporate fines as a deterrent.

Furthermore, the obligations of the Environmental Protection Act regarding environmental permits and the sanctions relating to possible non-compliance apply especially to corporate entities (see **4.5 Consequences of Breaching Permits/Approvals**).

7.2 Environmental Taxes

The most relevant environmental taxes in Finland are:

- excise duty on liquid fuels;
- excise duty on electricity and certain fuels;
- excise duty on beverage containers;
- waste tax;
- car registration tax;
- annual vehicle tax; and
- environmental liability contribution (from 1 January 2025).

Energy taxes, taxes on road transport, and so-called special environmental taxes and fiscal levies are considered as green or environmental taxes. In addition to tax revenues, environmental taxes strengthen incentives for energy efficiency, energy savings and low-emission energy production. The accrual of environmental taxes and environmental charges constitutes approximately 6% (in 2022) of cumulative total revenue

in Finland. There has been a slight increase in accrual caused by the 5% increase in energy taxes.

The most significant environmental taxes (75% accrual of all environmental taxes) are EU-harmonised energy taxes, predominantly consisting of excise taxes on liquid fuels and electricity and certain other fuels. The focus has been shifted to carbon dioxide tax, with the aim of taking the average emissions resulting from the fuel during its life cycle into consideration.

Both registration-based car tax and annual vehicle tax take environmental factors into consideration, with CO₂ emissions affecting the level of tax. The accrual of car tax has fallen mainly because of lower CO₂ emissions and the electrification of vehicles.

Waste tax has encouraged waste recovery and decreased the amount of waste ending up in landfills. There is a possibility that the Finnish government will expand the waste tax base further.

The excise duty on beverage containers has encouraged the use of recyclable containers.

The Environmental Damage Fund will take effect on 1 January 2025. The funds are part of the secondary environmental liability systems and they are collected as tax-like environmental liability contributions from operators whose activities might pose a risk of environmental pollution.

7.3 Incentives, Exemptions and Penalties

There are no specific incentives or exemptions for good environmental citizenship in Finnish legislation. With regard to environmental taxes that can to some extent be considered as incentives, see 7.2 Environmental Taxes. Penalties

for breaches against environmental laws are covered in 3.2 Breaching Protections, 4.5 Consequences of Breaching Permits/Approvals and 7.1 Liability for Environmental Damage or Breaches of Environmental Law.

7.4 Shareholder or Parent Company Liability

According to the Finnish Limited Liability Companies Act (No 624/2006) (*osakeyhtiölaki*), a limited liability company is a legal entity separate from its shareholders and therefore the shareholders are not liable for the company's debts, obligations or liabilities (including environmental damage or breaches). The same applies to parent companies. Thus, shareholders and parent companies are not liable for environmental damages or breaches of environmental law.

However, Finnish jurisprudence has shared the view that – in certain exceptional circumstances – a shareholder could be liable for the company's obligations without the explicit support of the law. This kind of limited liability without legal support refers to the principle of piercing the corporate veil.

7.5 ESG Requirements

In Finland, ESG requirements are regulated by several different laws. There is therefore no specific corporate social responsibility (CSR) law in Finland, which further means that the reporting, monitoring and enforcement of obligations vary depending on the subject matter and the specific legislation applicable. By way of example, laws safeguarding the social component of CSR especially address the rights of a company's employees and its customers (ie, consumers). These laws create obligations and responsibilities for companies to actively ensure the safety of employees and consumers and this is monitored by specific authorities.

Finland, as part of the EU, has also implemented EU regulation on ESG requirements. Please see **17.4 Green Finance**.

7.6 Environmental Audits

There are no binding requirements regarding environmental audits in Finland. However, the Act on Voluntary Participation in an Environmental Management and Auditing System (No 121/2011) (*laki vapaaehtoisesta osallistumisesta ympäristöasioiden hallinta- ja auditointijärjestelmään*) implements the elements necessary for the corresponding regulation of the European Parliament and Council. The Act defines the terms related to voluntary auditing by the EU's Eco-Management and Audit Scheme (EMAS) and regulates the authorities responsible for supervising the auditing.

8. Personal Liability

8.1 Directors and Other Officers

In Finland, it is possible for directors and other officers to be held personally liable for environmental damage or breaches of environmental legislation committed by the company.

In legal practice, liability is primarily imposed on the person or persons within a company who are responsible for ensuring compliance with the relevant provisions, such as the CEO, board member, director or another employee of the company. Secondly, the liability is imposed on the company, and the company may be issued with a corporate fine. The Supreme Court has in its recent precedent (case KKO 2023:71) given weight to the facts related to the employee's actual position in the association/company and whether the employee had been in a position to ensure that the permit regulations were fulfilled and whether the employee had used all means

available to avoid the breaching of the permit regulations. Please also see **6.3 Types of Liability and Key Defences**.

8.2 Insuring Against Liability

Insurance companies provide cover against directors' and officers' indemnification liability, pursuant to the Limited Liability Companies Act – according to which, members of management may become personally liable for loss or damage caused wilfully or through gross negligence or by breaching said Act or the company's articles of association. However, such an insurance does not usually cover environmental damages referred to in the Act on Compensation for Environmental Damage and does not cover criminal penalties.

9. Insurance

9.1 Environmental Insurance

Statutory environmental damage insurance is required by law if the company's operations involve a material risk of environmental damage or cause harm to the environment (eg, those that require a chemical permit, water permit or environmental permit). The insurance covers so-called secondary environmental liability – ie, environmental damage where the responsible entity is either unknown or unable to provide compensation. The statutory insurance does not protect the operator.

As mentioned in **7.2 Environmental Taxes**, the statutory environmental insurance system will (as of 1 January 2025) be replaced by the Environmental Damages Fund, which is a specific fund maintained by the government. The funds for the Environmental Damages Fund are collected as tax-like environmental liability contri-

butions from operators whose activities might pose a risk of environmental pollution.

It is possible for the operator to take out voluntary environmental insurance. A regular liability insurance may cover compensation for environmental damage caused by sudden and unexpected events to another party. However, there are also specific environmental insurance products available that may also cover long-term damage or damages caused to the insured party itself (eg, property damage or remediation costs) and interruption of business caused by environmental damage.

10. Lender Liability

10.1 Financial Institutions/Lender Liability

In practice, lender liability is theoretically possible under the Act on Compensation for Environmental Damage, which concerns tort law liability. In addition to the party causing environmental damage, liability for compensation also lies with a party who is comparable to the person carrying out the activity. In establishing whether a lender is comparable to the person/entity carrying out the activity, consideration is given to the following factors:

- the competence of the lender and control over the person/entity carrying out the activity;
- the lender's financial relationship with the person/entity carrying out the activity; and
- the profit the lender seeks from the activity.

There are no precedents on the aforementioned question. In such cases, the court makes a case-by-case assessment of the role and actions of the lender before establishing potential liability.

10.2 Lender Protection

In practice, liability for environmental damages resulting from breaches of environmental law does not extend to lenders. Under normal circumstances, the likelihood of financial institutions or lenders being held liable is considered low. In order to protect themselves from the liability risk, lenders should not be involved in the running of the operations or using their control over the actual operations in a way that would make their role comparable to that of the actual operator.

11. Civil Liability

11.1 Civil Claims

As mentioned in 6.1 Liability for Historical Environmental Incidents or Damage and according to the Act on Compensation for Environmental Damage, compensation must be paid for a loss defined as environmental damage that is caused by activities carried out in a certain area and resulting from:

- pollution of the water, air or soil;
- noise, vibration, radiation, light, heat or smell; or
- other similar nuisance.

The compensation will be paid if it is shown that there is a probable causal link between the activities and the loss and if the tolerating the nuisance is considered unreasonable. The Act on Compensation for Environmental Damage does not apply to contractual liability for compensation.

According to the Environmental Protection Act, one can also submit an application to the permit authority to claim compensation for damage

not foreseen when an environmental permit was granted.

11.2 Exemplary or Punitive Damages

Finnish law does not recognise any exemplary or punitive damages. Therefore, it is not possible to award compensation beyond the damage actually caused.

11.3 Class or Group Actions

Class or group actions are not possible for environmental-related civil claims in Finland.

11.4 Landmark Cases

In Supreme Court case KKO 2015:21 concerning nuisance, the Supreme Court decided that even though the Act on Compensation for Environmental Damage is applied as a general law, in some cases the preceding Neighbouring Act (No 26/1920) (*laki eräistä naapuruuksuhteista*) could be applicable when considering compensation.

12. Contractual Agreements

12.1 Transferring or Apportioning Liability

Indemnities and other contractual agreements can be used to transfer or apportion liability for incidental damage or breaches of law; however, such contractual agreements are only binding inter partes. Indemnities and other contractual agreements are not binding on regulators or other authorities or the parties suffering damage (if not contracting parties themselves).

12.2 Environmental Insurance

Please see 9.1 Environmental Insurance.

13. Contaminated Land

13.1 Key Laws Governing Contaminated Land

The provisions governing remediation of contaminated land depend on when the contamination was caused, as follows.

- The Environmental Protection Act (and its predecessor) applies to soil pollution caused after 1994.
- The repealed Waste Management Act (No 673/1978) (*jätehuoltolaki*) applies to soil pollution caused by an activity that took place on or after 1 April 1979 but before 1994.
- Soil pollution caused by an activity that has completely ceased operating before 1 April 1979 is governed by inconclusive case law.

Under the Environmental Protection Act, the operator has a general obligation to prevent pollution and a specific prohibition on causing any pollution of soil. If the activities cause or may directly result in environmental pollution, the operator must take the appropriate action without delay in order to prevent pollution or – if pollution has already resulted – to reduce it to a minimum.

The operator whose operations have caused the pollution of soil has an obligation to restore the polluted soil. Indicative concentration thresholds for several hazardous substances in soil and guidance for the risk assessment regarding remediation are established in the Government Decree on Contaminated Soil (No 214/2007) (*valtioneuvooston asetus maaperän pilaantuneisuuden ja puhdistustarpeen arvioinnista*).

13.2 Clearing Contaminated Land Party Responsible for Contaminated Land

The Finnish regulation regarding liability for contaminated land is based on the overriding “polluter pays principle” – according to which, the operator carrying out polluting activity must restore the contaminated land to a condition that will not cause harm to health or the environment, nor present a hazard to the environment.

However, if the polluter cannot be established or reached – or cannot be forced to fulfil its remediation duty – and the contamination occurred with the consent of the occupier (owner or tenant, as applicable) or the occupier knew or should have known the state of the area when it was acquired, the occupier must restore the soil insofar as this is not clearly unreasonable. Where the polluter or the occupier of the polluted area cannot be required to remedy the contaminated soil, the municipality must establish the need for and conduct soil remediation.

Possibility of Transferring Liability to a Purchaser

Public liability for the remediation of contaminated soil enforced by the authorities under the Environmental Protection Act (or earlier legislation) cannot be transferred to a purchaser. Therefore, under the aforementioned legislation, the authority may direct its orders towards whoever has contributed to the contamination.

However, the parties may transfer the liability inter partes from a seller to a purchaser by an agreement and a liable party may attempt to secure recourse from another party through contractual indemnity. Nevertheless, these civil agreements are valid only between the parties and do not bind the authorities or third parties.

13.3 Determining Liability

The Finnish environmental liability legislation rests upon the “polluter pays” principle. The Environmental Protection Act does not include any specific provisions on the division of the liability if more than one party has contributed to the contamination. However, pursuant to the Supreme Administrative Court’s precedent on the issue (KHO 2005:11), if several operators are suspected to have caused soil contamination, the parties are considered jointly and equally responsible for conducting the contamination studies and bearing the related costs if the parties cannot clearly verify their contribution to the contamination.

Furthermore, if the soil is considered contaminated and several operators have been operating in the area, in case law, the parties have been responsible for only their share of the contamination. If the parties’ share of the contamination cannot be separated from one another, the parties are considered jointly and severally liable.

13.4 Proceedings Against Polluters

As mentioned throughout **6.1 Environmental Incidents and Damage**, in accordance with the Act on Compensation for Environmental Damage, compensation must be paid for damage resulting from pollution or other similar nuisance to those affected by the pollution if it is shown that there is a probable causal link between the activities and the loss. However, this compensation will be paid only if toleration of the nuisance is deemed unreasonable. When considering the nature of the nuisance, consideration will be given to – among other things – local circumstances, the situation resulting in the occurrence of the nuisance, and the regularity of the nuisance elsewhere in similar circumstances. However, the obligation to tolerate the nuisance will not apply to loss inflicted deliberately or criminally,

nor to bodily injury or material loss of more than minor significance.

In criminal cases involving an infringement of public interest, the ELY Centre is the claimant. In connection with proceedings of criminal cases subject to public prosecution, private persons may also file claims for compensation. Further, according to the Environmental Protection Act, the permit authority will – when granting an environmental permit – order compensation for any damage from water pollution caused by the activity. One can also submit an application to the permit authority to claim compensation for damage not foreseen when the permit was granted. When an application is submitted to a permit authority, the matter cannot be simultaneously handled in a district court as an action.

13.5 Investigating Environmental Accidents

The general rule is that when there is a suspicion that the soil has been contaminated, the polluter is responsible for inspecting the state of the soil and the need for remediation. Regardless of the outcome of the inspection, the findings must be reported to the supervisory authority (ELY Centre). If the polluter has not conducted the necessary inspection, the ELY Centre can order the polluter to conduct the required studies and investigations. Based on the conducted study, the ELY Centre will render its decision regarding the need for remediation.

In addition, under the Environmental Protection Act and the Waste Act, the supervisory authorities are obliged to report a matter to the police for preliminary investigation if they suspect that a crime has been committed. However, notification is not required if the act is considered minor under the circumstances and it is determined that public interest does not necessitate press-

ing charges. However, supervisory authorities are increasingly likely to report matters to the police for preliminary investigation.

14. Climate Change and Emissions Trading

14.1 Key Policies, Principles and Laws

The key legislation in connection with climate change and emissions trading is:

- the Climate Act (No 423/2022) (*ilmastolaki*); and
- the Emissions Trading Act (No 1270/2023) (*päästökauppalaki*).

14.2 Targets to Reduce Greenhouse Gas Emissions

Carbon Neutrality

The Climate Act's primary goal is to ensure a significant reduction in greenhouse gas emissions and an increase in the removals by greenhouse gas sinks, with the target of achieving carbon neutrality by 2035. This means that Finland aims to reach a point where its greenhouse gas emissions are equal to the removals. The Climate Act also aims to ensure that greenhouse gas emissions from the effort-sharing and emissions trading sectors decrease by at least 60% by 2030 and by at least 80% by 2040 compared to 1990 levels. The Climate Act applies to the government authorities in the preparation of climate policies and in ensuring their implementation. It does not impose direct obligations on operators.

Emissions Trading Act

Finland has its own emission trading system, which is based on the Emissions Trading Act. The purpose of the Emissions Trading Act is to promote the reduction of greenhouse gas emissions cost-effectively and economically.

The new Emissions Trading Act entered into force on 1 January 2024. The amendments made extended and clarified the scope of the Emissions Trading Act to reflect the changes made to the EU regulation by reducing the number of free allowances and extending the scope of the law to cover not only installations and aviation but also maritime transport.

Coal Ban

The Act Banning the Use of Coal for Energy (No 416/2019) (*laki hiilen energiakäytön kieltämisestä*) prohibits the use of coal as fuel for the production of electricity or heat from 1 May 2029. The Act Banning the Use of Coal for Energy is supported by the Government Decree on Investment Aid for Projects Replacing Coal for Energy Use in 2020–25 (No 129/2020) (*valtioneuvoston asetus hiilen energiakäyttöä korvaavien hankkeiden investointituesta vuosina 2020–25*), which aims to promote the voluntary, accelerated phasing-out of coal. The aim of the legislation is to ensure that power plants or heating investments or replacement investments that rely on coal energy are no longer viable.

15. Asbestos and Polychlorinated Biphenyls (PCBs)

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs

Asbestos

In Finland, the use of asbestos became licensed in 1988 and was banned in 1993 (as it was in the EU in 2005). The use of crocidolite was banned in 1976. In general, if it does not cause health or environmental hazards, there is no direct obligation to remove asbestos that is lawfully contained in products or structures.

Asbestos removal work can only be carried out by private persons or legal persons such as limited companies, co-operatives and public entities that have been authorised to do so. The licensing authority, the Occupational Safety and Health Authority of the Regional State Administrative Agency, is responsible for handling permits, promoting occupational safety, and the proper supervision of the register of licensed asbestos removal workers.

PCBs

The manufacture, use and importation of PCBs is prohibited in Finland. The Council Directive on the disposal of polychlorinated biphenyls and polychlorinated terphenyls (96/59/EC) aims to ensure the safe disposal of PCBs and of the equipment containing PCBs by imposing certain obligations on EU member states.

16. Waste

16.1 Key Laws and Regulatory Controls

Finland's waste legislation primarily follows the development of the EU's waste legislation and policy.

The key legislation governing waste and waste management in Finland is the Waste Act and the Environment Protection Act, which implement the EU's Waste Framework Directive (2008/98/EC). In addition, there are several lower-level national provisions, such as the Government Decree on Waste (No 978/2021) (*valtioneuvoston asetus jätteistä*), the Government Decree on Waste Incineration (No 151/2013) (*valtioneuvoston asetus jätteen polttamisesta*) and the Government Decree on Landfills (No 331/2013) (*valtioneuvoston asetus kaatopaikoista*).

Waste legislation provides regulations for all waste, excluding certain special types of waste, such as nuclear and radioactive waste. Under Finnish law, an environmental permit is required for the institutional or commercial treatment of waste (including storing or disposing of waste).

16.2 Retention of Environmental Liability

According to the Waste Act, the waste holder's liability for the organisation of waste management ceases and is transferred to the new holder when the waste is handed over to:

- a person who has the right to receive such waste based on the registration in the waste management register; or
- a person who has received such waste based on an environmental permit in accordance with the Environmental Protection Act or based on the registration in the environmental protection database under the same Act.

Waste may also be delivered to a recipient who does not require the above-mentioned approval, an environmental permit or registration if they have sufficient expertise and economic and technical capacity to handle waste management.

The waste holder's liability for the organisation of waste management ceases and is transferred to the new holder when the waste is handed over to the above-mentioned recipient. The responsibility is not transferred to the driver who carries the waste.

The waste driver must dispose of the waste at the location indicated by the waste holder or the authority. If the waste is not accepted, the driver must return the waste to the holder, who must collect the waste.

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

Finland has implemented an extended producer responsibility scheme for certain types of waste. Duties to collect and recycle or dispose of waste apply to producers of:

- electronic and electrical appliances;
- batteries and accumulators;
- tires from motor vehicles,
- other vehicles and equipment;
- cars, vans and comparable vehicles;
- printing paper and paper for manufacturing other paper products;
- packaging;
- cups for beverages made of single-use plastics, including their covers and lids;
- air balloons made of single-use plastics;
- tobacco products with filters made of single-use plastics; and
- fishing gear made of single-use plastics.

16.4 Rights and Obligations Applicable to Waste Operators

Waste operators must comply with the obligations regulated by the Waste Act. One fundamental principle is the order of priority - according to which, the following priority order must be complied with when handling waste: reuse, recycling, and other ways of recovery and disposal.

A waste holder should know the properties of the waste relevant to organising waste management. The waste holder must, if necessary, disclose this information to other waste management operators. Waste may not be abandoned or treated in an uncontrolled manner. Waste management may not endanger or harm health, the environment, general safety or public or private interests.

All professional waste collectors are obligated to register in the waste management register or apply for an environmental permit. A waste operator must monitor and control its waste management to ensure that the activity fulfils the applicable legal requirements and that the information necessary for the supervision of the activity may be submitted to the supervisory authority.

If a waste operator does not comply with the aforementioned obligations, the supervisory authority may prohibit it from continuing or repeating the conduct, order it to fulfil its obligations, order it to restore the environment or to eliminate the harm, or order temporary measures concerning the waste. The party that acted in violation of regulations is responsible for any costs incurred due to the temporary measures. The supervisory authority will, unless it is clearly unnecessary, reinforce an order it has issued by a notice of a conditional fine.

Administrative fines may be imposed on a party that fails to submit a notification for registration in the waste management register or neglects other reporting duties. Several different types of breaches against the waste legislation are punishable as criminal offences either under the Waste Act or the Criminal Code.

17. Environmental Disclosure and Information

17.1 Self-Reporting Requirements

Under the Environmental Protection Act, if an exceptional situation causes emissions or generates waste (or if there is an immediate threat of such an event), an operator or a holder of the waste must notify the relevant authority immediately. Further, permit-holders, registered opera-

tors or related holders of waste have an obligation to notify the relevant authority if they are not able to comply with the permit or relevant governmental decrees owing to an exceptional situation.

If waste or some other substance that may cause contamination has entered the soil or groundwater, the polluter must notify the supervisory authority immediately. If there is reason to suspect that the soil or groundwater has been contaminated, the party responsible for treatment (whose operations have caused the contamination) must establish the level of contamination of the area and the need for treatment. The report must be delivered to the state supervisory authority.

17.2 Public Environmental Information

In general, most documents prepared by or delivered to an authority are publicly available under the Act on the Openness of Government Activities (No 621/1999) (*julkisuuslaki*). Public authorities keep registers of environmental information regarding environmental permits, for example, so information may be requested from the relevant authorities. To some extent, materials are also available through public web services. However, there are some limitations to the publicity of documents/information – for example, corporate secrets are considered classified.

The Supreme Administrative Court addressed this topic in a recent precedent (KHO 2024:70), whereby it balanced the publicity of environmental information with questions relating to water security. The court ruled that the exact location of the groundwater plant's monitoring pipes and water intake wells could be considered as confidential information.

17.3 Corporate Disclosure Requirement

Pursuant to the Accounting Act (No 1336/1997) (*kirjanpitolaki*), large and public companies as well as public-interest entities have an obligation to include information on environmental impacts in their annual management report. Public-interest entities must also prepare an annual statement of non-financial information, which must include information on how the company manages environmental matters. Please also see 17.4 Green Finance.

Moreover, environmental permit-holders have an obligation to prepare regular reports for the supervisory authority. The details for reporting are included in the permit. Registered operators may have an obligation to prepare regular reports in accordance with the relevant governmental decree.

17.4 Green Finance

Green finance-related regulation applicable in Finland mainly derives from EU legislation, comprising – inter alia – the Taxonomy Regulation, the Sustainable Finance Disclosure Regulation (SFDR), the Corporate Sustainability Reporting Directive (CSRD) and the Corporate Sustainability Due Diligence Directive (CSDDD).

Although the Taxonomy Regulation and the SFDR are directly applicable regulations in Finland, the CSRD was implemented into the national legislation. In Finland, national implementation of the CSRD primarily resulted in amendments to the Accounting Act, the Auditing Act (1141/2015) (*tilintarkastuslaki*) and the Limited Liability Companies Act. The sustainability reporting obligations of the CSRD became applicable on 1 January 2024, obliging companies subject to the CSRD to report in accordance with European Sustainability Reporting Standards (ESRS). The company's external auditor must audit the

report. The CSRD reporting compliance will be phased in from 2024 to 2029. The reporting obligations currently apply to large companies subject to the EU's Non-Financial Reporting Directive (NFRD) and the first financial year covered is 2024 (the first year of reporting being 2025).

In addition, the CSDDD entered into force on 25 July 2024, aiming to ensure that companies identify the adverse impacts of their business activities on human rights and the environment and to mitigate such impacts. EU member states have two years to implement the national provisions necessary to comply with the CSDDD, which will apply as of July 2027.

Generally, green finance plays a fundamental role in the achievement of Finland's energy and climate targets. In 2021, the Finnish government introduced its Sustainable Growth Programme for Finland, highlighting a green transition as a core pillar. This pillar seeks to support the economy's structural adjustment and establish a foundation for a carbon-neutral welfare society. This naturally has increased and will continue to increase the interest in and appetite and need for sustainable investments and green finance arrangements in Finland.

18. Transactions

18.1 Environmental Due Diligence

Environmental due diligence is an established part of due diligence in M&A, finance and property transactions. The need and scope of environmental due diligence are dependent on the target – ie, the anticipated environmental risks associated with the target – and are, therefore, assessed on a case-by-case basis. Environmental due diligence is typically conducted in transactions involving the amendment or ter-

mination of business with potential impacts on the environment or natural resources, such as transactions concerning industrial companies, mines, power plants or old industrial sites. Furthermore, environmental due diligence is typically conducted as part of a property transaction to determine the possible history of the site, contamination or other environmental damages related to the property in question, and the need and liability for environmental remediation.

In recent years, there has been a constant rise in demand for environmental due diligence, resulting from growing awareness of the risk of high costs related to environmental liability and possible need for remediation.

18.2 Disclosure of Environmental Information

The seller of real estate is obliged to provide the new owner or tenant with information on the activity carried out on the property and on any waste or substances that may cause contamination in the soil or groundwater. Furthermore, the seller must provide the purchaser with the conducted surveys and information regarding possible remediation action on the property. Failure to do so may result in the annulment of the real estate deed of sale, a reduction in price or compensation for damages. The seller may be held liable for the prior contamination of real estate if they fail to disclose the information at the point of sale.

As warranties are used to secure the purchaser, it is in the seller's interest to disclose the relevant environmental information in a regular due diligence process and thereby avoid contractual liability for breaching a warranty.

18.3 Key Issues in Environmental Due Diligence

Common environmental issues arising in legal due diligence are highly dependent on the project subject to due diligence as well as on the objectives of the contemplated transaction. Issues reviewed in due diligence include permits required for the operations including their validity and the operator's compliance with the permit terms, possible administrative compulsion processes, or compliance with applicable legislation in general. Furthermore, key issues reviewed also include:

- potential (or risk of) soil or groundwater contamination or other emissions caused by the operations, such as discharged waste water;
- existence of protected sites/items or other restrictions in the affected area, including needs for possible additional permits in relation thereto;
- ownership of or access routes to the relevant areas; or
- zoning.

Trends and Developments

Contributed by:

Kari Marttinen, Tarja Pirinen, Outi Iso-Markku and Laura Leino
HPP Attorneys Ltd

HPP Attorneys Ltd (HPP) was established in 1975. HPP is Finland's leading legal services provider in environmental law, land use, mining and construction. HPP has one of the largest dedicated environmental teams in Finland, with eight skilled and experienced lawyers specialising in all aspects of environmental law. The team assists a diverse array of clients in addressing environmental challenges related to their projects. In areas such as green transition,

real estate, finance transactions and other M&A activities, where environmental aspects and additional investments are of central importance, HPP is ideally positioned to assess risks and offer solutions that incorporate environmental law concerns. The firm's clients include leading operators in the forestry, metals, chemicals, mining, battery, energy, food, waste management and logistics sectors.

Authors



Kari Marttinen is a partner at HPP Attorneys Ltd and heads the firm's environmental group. His areas of expertise include matters pertaining to the application of administrative law

and matters pertaining to environmental liability and nature protection, as well as permit procedures, waste management, and recycling and infrastructure projects. Kari has particular experience of liability issues related to old industrial areas and complex matters related to permits and complaints in accordance with the Water Act, the Environmental Protection Act and the Land Use and Building Act, as well as of dispute resolution concerning environmental liabilities. He has held principal responsibility as an attorney in several major projects.

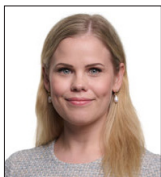


Tarja Pirinen is a partner at HPP Attorneys Ltd, specialising in advising clients on environmental law matters and legal questions concerning mining and other industrial and

infrastructure projects. Her areas of expertise include environmental and other permit procedures, administrative court procedures, and matters pertaining to environmental liabilities and nature protection. Tarja has extensive experience in mining law and the wide range of environmental and other legal issues relating to mineral exploration and mining operations. She has assisted several domestic and foreign mining companies with their operations in Finland in different phases of their projects' life cycle and has been involved in numerous M&A and finance transactions in the mining sector.

FINLAND TRENDS AND DEVELOPMENTS

Contributed by: Kari Marttinen, Tarja Pirinen, Outi Iso-Markku and Laura Leino, **HPP Attorneys Ltd**



Outi Iso-Markku is a partner at HPP Attorneys Ltd and has more than ten years' experience in advising clients on issues concerning environmental and water permits, environmental

liabilities, environmental impact assessments, nature conservation, and land use planning. Her specific areas of expertise also include waste legislation and environmental criminal law. Outi has broad experience of assisting a wide range of industrial clients in environmental administrative court procedures. She also provides daily support to operators developing large and complex industrial projects in sectors such as forestry, energy, batteries, chemicals, mining and infrastructure. Outi is a member of the Finnish Bar Association's environmental law expert team.



Laura Leino is a partner at HPP Attorneys Ltd, specialising in advising clients on environmental law and regulatory matters, especially with regard to energy and green

transition projects. With dual qualifications in law and hydrobiology, Laura has an in-depth understanding of matters relating to environmental conservation and water law. She has extensive practical experience of assisting clients on permit, environmental impact assessment and land use processes for large energy, infrastructure, and industrial projects. Laura also has relevant experience with the Supreme Administrative Court, where she specialised in environmental and land use matters, as well as at an energy and environmental consulting firm, an energy company, and the United Nations.

HPP Attorneys Ltd

Bulevardi 1 A
FI-00100 Helsinki
Finland

Tel: +358 40 779 7878
Email: kari.marttinen@hpp.fi
Web: www.hpp.fi



HPP ATTORNEYS

Introduction

The green transition has become a central theme in Finland's legislative and political landscape, reflecting broader European and global trends towards sustainability and climate neutrality. The current Finnish government's legislative programme outlines a comprehensive plan to transform Finnish economy into a sustainable, low-carbon model. The outlined legislative initiatives include tax credits, state subsidies, the streamlining of permitting processes, and increased financial support for projects advancing the green transition – all aimed at accelerating the shift towards a more sustainable economy and meeting both national and international environmental targets.

As an EU member state, the environmental legislation in Finland is heavily guided and influenced by EU legislation. In addition to the country's own legislative initiatives and sustainability targets, many of the EU regulations currently in the process of being implemented into national legislation – such as the Critical Raw Materials Act (2024/1252/EU) (CRMA), the Net-Zero Industry Act (2024/1735/EU), and the objectives of the Renewable Energy Directive III (2023/2413/EU) (“RED III”) – reflect the same ambitious targets and goals at EU level as those set by the Finnish government in its own legislative programme.

This article highlights topical regulatory measures and developments aimed at promoting and facilitating the green transition in Finland.

Introduction of New Permitting Authority and Single-Window Approach to Speed Up and Streamline Permit Processes

National priority legislation was introduced in 2023

The Finnish government has acknowledged that smooth permit procedures are a prerequisite for

attracting investments and especially for transitioning into a clean economy. Projects with environmental impacts may require many separate permits or approvals, which are currently applied for and granted by different authorities as governed by different environmental laws. Subsequently, the Finnish government proposes several measures to tackle the current problem of prolonged and expanding permitting processes.

One of these planned solutions is the establishment of a new national permit and supervisory authority. In the new draft legislative proposal, it is proposed that the new authority would replace the current permitting authorities and supervisory authorities with a single national permitting and supervision authority.

A legislative proposal to integrate various permit application processes is also being prepared, with the aim of making the permitting process faster and more efficient. This includes introducing a “single-window approach” (*yhden luukun periaate*), allowing multiple permit applications for the same project to be handled in one combined process. The intention is that this streamlined approach will enforce joint hearings for different permits and result in a single permit decision and appeal process, instead of separate ones for each permit.

In addition, the proposed reform of the national environmental administration grants the new environmental authority responsibility for ensuring that permit applicants have the chance to discuss their obligations, submissions and requirements concerning the permitting process with the relevant environmental authority prior to submitting their permit application. This would allow applicants to pre-negotiate the permit application and the requirements related thereto early on and thereby aims to minimise

unnecessary requests for additional information at a later stage of the permitting process by promoting effective co-operation between all parties involved.

The draft legislative proposal also highlights the existing challenges related to the ever-expanding scope of the environmental impact assessment (EIA) procedures and the excessive level of detail required in documents related thereto. The draft proposal calls for significant development in practices, which could be implemented as a part of the single-window approach project.

The aim is to ensure that the EIA procedure focuses only on the significant environmental impacts of projects, thereby speeding up the procedure and reducing the administrative burden placed both on the operators and relevant environmental authorities. Further, co-ordination of the permit procedure and the EIA procedure is promoted by expanding the scope of the joint hearing of the EIA report and the permit application.

The current estimation is that the new national environmental authority will be established on 1 January 2026, in conjunction with the enforcement of the single-window approach legislation.

Priority in Permitting and Permitting Timelines Applicable to Certain Projects Advancing Green Transition

The 2023 environmental legislation reform introduced a priority system for specific projects aligning with the green transition. Under this legislation, certain project types that contribute to the green transition are eligible for priority status in environmental and water permitting, as well as in administrative court proceedings.

Originally, the law establishing the priority procedure was set to run from 2023 to 2026, but the new draft legislative proposal would extend the application period until 2030. In addition, possible appeals against prioritised permit applications will be processed as urgent in the administrative courts from 2023-28, and the new legislative proposal would extend this policy until the end of 2032.

Projects eligible to obtain priority status are determined by the law. The exhaustive list includes the following:

- energy production establishments that use renewable energy to produce energy, as well as offshore wind farms and the related water resources management projects;
- industrial projects based on renewable energy or electrification that replace the use of fossil fuels or raw materials;
- manufacture and utilisation of hydrogen, except for manufacture of hydrogen from fossil fuels;
- capture, utilisation and storage of carbon dioxide;
- battery factory and manufacture, recovery and reuse of battery materials; and
- data centres, where most of the waste heat generated is utilised (according to the new legislative proposal).

The operator applying for priority status must make a separate request for access to the priority system and provide a report of compliance with the “Do No Significant Harm” principle. This principle was originally established by Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (the “Taxonomy Regulation”).

A priority application is subject to the same permitting regulations and requirements as a regular permit application, but the aim of priority treatment is to speed up the processing of applications so that the overall processing time is shorter than average. The targeted processing time is 12 months - although the legislation does not stipulate any binding timelines for permit proceedings nor sanctions for the authorities in case the targeted timeline is not met.

Several green transition projects that have received priority status are already well underway. As of May 2024, 32 projects have been given priority status. These projects, located all over Finland, represent a diverse range of sectors - for example, production of biomethane in an anaerobic digestion process, production of green hydrogen, synthetic methane or ammonia, and seasonal storage of heat. Among the prioritised projects are also several battery chemicals plants.

Furthermore, all the prioritised projects have received their environmental permits in less than a year, meaning that the 12-month target processing timeline has been met so far. There is confidence that the processing time target can also be met in the future if resources at the permitting authorities remain at the required level.

Moreover, according to the Ministry of Environment, feedback on the priority system has been mainly positive and priority projects have not delayed the processing of other permit applications. This is down to the added resources both at the permitting authorities and administrative courts.

EU-based requirements to implement binding timelines for permitting of certain strategic projects

In addition, national implementation of the EU regulations streamlining permitting procedures and timelines for strategic projects under the EU's CRMA and Net-Zero Industry Act is currently ongoing in Finland. The proposed EU-level changes require new provisions to be added to the existing national legislation and are expected to enter into force in Finland during 2025.

Strategic projects under the CRMA are initiatives that are crucial for reducing dependence on imports and securing the EU's supply of critical raw materials. These raw materials are vital for key sectors, such as renewable energy and digital technologies. The CRMA sets binding timelines (15 to 27 months) for the permitting of strategic projects. The CRMA also requires that strategic projects must be given the highest possible national status and be treated accordingly in the permitting procedures. The co-ordination of permit processes and communications between the operator and authorities is conducted by one national authority to simplify the process.

Provisions of the CRMA will be specified according to a new draft legislative proposal on national implementation of the CRMA, whereby Finland will take advantage of the chance offered by the CRMA to possibly extend the permitting timelines for strategic projects if the requirements for the extension governed by the CRMA are met. It should also be noted that the proposed legislation would not amend any permit requirements, which would continue to be stipulated by the Environmental Protection Act and the Water Act, for example.

Net-zero industry refers to the technologies, equipment and components that are needed to produce affordable carbon-neutral energy, such as battery technologies. The EU's Net-Zero Industry Act establishes the framework of measures for innovating and increasing the manufacturing capacity of net-zero technologies, such as binding timelines for the permit-granting process of projects falling within its scope of application. As national legislation is required to ensure the efficient enforcement of the Net-Zero Industry Act, a new draft legislative proposal has been drafted to implement the Act and promote the green transition by proposing that strategic net-zero projects should be given priority in the permitting processes and in the administrative courts over other projects subject to the Environmental Protection Act and the Water Act.

Additionally, the new Act would include provisions on the designation of a national competent authority acting as a single point of contact towards the operator. The contact authority would be responsible for facilitating and coordinating the permitting process for net-zero technology manufacturing projects, as well as providing information on the streamlining of administrative procedures. The proposed legislation would also include provisions for monitoring permit processing timelines and a process for possibly extending them if the requirements for the extension governed by the Net-Zero Industry Act are met.

Special Siting Permit for Clean Transition Projects Proposed to Streamline Land Use Planning

In connection with the ongoing reform of the Building Act, the Finnish government aims to speed up the transition away from fossil fuels by introducing a special siting permit for clean transition projects. The siting permit would allow

the land use assessment of a clean transition project to be conducted without detailed land use plans, which would normally dictate the granting of building permits. The legislative proposal, which is currently in the process of being debated and approved by the Finnish Parliament, outlines the requirements for obtaining a siting permit for clean transition projects. These requirements include:

- a thorough assessment of the project's environmental, social, cultural, and community impacts - for instance, the site must cover at least 1,000 square metres and not cause risk of flood or landslide;
- the project should align with the surrounding environment, infrastructure, and traffic safety while ensuring no harm to cultural or natural values or to neighbours;
- the project must not impose undue costs on public entities for road, water, or sewage systems, nor negatively impact water supply or waste water management;
- the Seveso III Directive (2012/18/EU) must also be considered for hazardous chemical facilities; and
- the project must not cause any significant deterioration in anyone's living environment that is not justified considering the objectives of the siting permit.

Clean transition industrial projects covered by the legislative proposal include:

- renewable energy production facilities, excluding wind and solar power plants;
- industrial projects replacing fossil fuels or raw materials with renewable energy or electrification;
- hydrogen production and utilisation, excluding hydrogen from fossil fuels;
- carbon capture, utilisation, and storage;

- battery factories and the production, recovery, and reuse of battery materials; and
- investments in clean transition industries located in areas defined under the EU's Net-Zero Industry Act to strengthen the net-zero technology manufacturing ecosystem.

The new Building Act enters into force on 1 January 2025 and replaces the current Land Use and Building Act with regard to the provisions concerning construction.

Big Expectations Regarding Finnish Hydrogen and EEZ Offshore Wind Power Production

The Finnish government has ambitious plans regarding hydrogen production. In accordance with the current government programme, as well as the government resolution on hydrogen published in 2023, the Finnish government is committed to turning Finland into a leading hydrogen producer in the EU and utilising the competitive advantages Finland has in this field - namely, its large renewables production capacity, as well as its strong energy systems already in place. The government programme lays out an objective for Finland to account for 10% of the EU's clean hydrogen production and at least 10% of hydrogen use. Many hydrogen-related projects are under construction, in planning or undergoing feasibility study.

RED III, which includes regulation concerning the production of renewable hydrogen, is to be implemented in Finland by May 2025 via the Act on Biofuels and Bioliquids and the Act on Promoting the Use of Biofuels for Transport (the "Distribution Obligation Act"). The Government Proposal on the Distribution Obligation Act was submitted to Parliament on 23 September 2024 and is expected to enter into force on 1 January 2025. The Distribution Obligation Act mandates

that a share of the distribution obligation is filled with advanced biofuels or renewable fuels of non-biological origin.

A working group has been set up to examine the changes to national legislation required by the sustainability criteria in RED III and the updated Sustainability Act is expected to enter into force in May 2025 at the latest. Furthermore, it is foreseen that the Electricity Market Act will be amended to allow for the option of direct connection between plants producing renewable fuels of non-biological origin (including renewable hydrogen) and renewable energy production plants.

Hydrogen projects in Finland are also supported via many additional policy measures - for example, by promoting a favourable general investment environment and funding for research and development. In addition to the implementation of the EU legislation, the Finnish government has given national gas transmission company Gasgrid the task of promoting the development of a national hydrogen transmission network nationally as well as in the Baltic Sea region, which is vital for the development of the hydrogen economy and for exporting hydrogen. Gasgrid is currently studying possible routing options for hydrogen transmission needs.

Furthermore, the Finnish government has also recognised the need to create functional and predictable regulation for offshore wind projects in Finland's exclusive economic zone (EEZ), as interest in offshore wind power production in Finland is growing. The aim is to develop regulation and administrative procedures that guarantee sufficient investment certainty for offshore wind power projects.

The government has recently submitted a legislative proposal for a new Act regarding offshore wind power projects in the EEZ to Parliament and it is proposed that the new Act shall enter into force on 1 January 2025. The proposed Act aims to resolve current issues related to offshore wind farm projects, particularly concerning the selection of operators, compliance with EU state aid rules, required permits, and the applicable legislation for projects within the EEZ. The overarching goal is to establish a system that works for the benefit both of project operators and the Finnish State.

The proposed solution in the legislative proposal is a competitive tendering model for offshore wind projects, whereby the right to exploit the EEZ would be decided by a tender organised by the Finnish Energy Agency. This model would determine how the rights to exploit wind energy in the EEZ would be allocated in a fair and transparent manner, considering the EU's state aid rules and ensuring the selection of an operator capable of promoting a long-term and costly offshore wind project.

The Finnish government would select the areas to be tendered, considering the overall interest of society. The successful bidder would have the exclusive right to apply to the government for the right to exploit the tendered area for offshore wind power. The exploitation right would allow the successful bidder to explore the offshore wind site and apply for the necessary permits (eg, water permit and EIA).

Finnish Environmental Administration Implements Various Measures to Advance Circular Economy

Traditionally, Finland is known as a pioneer of the circular economy, given that it drafted the world's first national roadmap to a circular econ-

omy in 2016. More recently, Finland promotes the circular economy through legislation and aims to increase Finland's material efficiency and carbon-neutrality.

This mindset is further reflected in the Ministry of the Environment's initiative to replace the existing Waste Act with a new Circular Economy Act - the main purpose of which is to clarify legislation in the waste sector and strengthen the life cycle perspective of the regulation. The aim is to reduce the regulatory burden, clarify the relationship between waste regulation and product and chemical regulation, and to develop the operating and investment environment for circular economy operators. At the same time, it will be assessed whether some parts of the current Waste Act should be divided into separated Acts. The working group responsible for outlining the reform was established in the summer of 2024 and will operate until the end of 2025.

Finland has also adopted its first national end-of-waste decrees in recent years. The first of these was the government decree on end-of-waste criteria for crushed concrete that came into force in 2022. In June 2024, a new government decree on end-of-waste criteria for mechanically recycled plastics was adopted. The aim of these regulations is to streamline permitting procedures and to promote the use of waste-derived material, consequently mitigating the extraction of natural resources and virgin raw materials.

In addition to legislative measures, in order to advance the circular economy, Finland uses several voluntary instruments developed in co-operation with the private sector and based on voluntary contributions from companies. By way of example, the recently launched Circular Economy Green Deal is a voluntary strategic com-

mitment shared by companies, municipalities, counties, organisations and the State, whereby the participating organisations commit to reducing their use of natural resources, setting effective goals, and taking actions that promote a low-carbon circular economy. The overarching goal of the Circular Economy Green Deal is to promote resource efficiency and Finland's transformation into a sustainable economy by 2035. The participants' commitments aim to reduce the use of raw materials, extend the useful life of materials and products, increase the supply of options that place less burden on the environment and strengthen the natural capital, and develop new operational and business models that are in line with a circular economy.

Preparation of Legislative Proposals for State Aid Programme and Tax Credit for Significant Investments Advancing Green Transition

In order to improve Finland's competitiveness and attract green investments, the Finnish government is also planning to introduce a range of different financial measures to support clean transition projects and investments.

State aid programme for significant investments advancing green transition

The Ministry of Economic Affairs and Employment is currently in the process of preparing a state aid programme in the form of government subsidies for significant new investment projects, which would be regulated by a government decree. The aim is to contribute to the climate objectives of the government programme and to strengthen the attractiveness of Finland's investment environment. The regulation concerns investment subsidies for the low-carbonisation of industrial production processes through electrification or the use of renewable hydrogen and energy efficiency measures, as well as for accelerating investment in sectors

that are strategic for the transition towards a climate-neutral economy.

The proposed government decree lays down the conditions for the state aid programme and the granting of state aid under the programme to eligible investment projects. According to the draft decree, subsidies could be awarded if the eligible costs of the investment are at least EUR30 million. In addition, subsidies could be granted for investment projects in Finland, excluding the territory of the province of Åland. The granting authority for subsidies would be Business Finland, which is the government organisation for innovation funding and trade, travel and investment promotion.

The investment state aid programme still requires approval from the EC. The decree is expected to enter into force as soon as possible once the EC has approved the state aid programme as compatible with the EU's internal market. The subsidies would be granted by the end of year 2025.

Tax credit for significant investments advancing green transition

Based on the temporary state aid framework adopted by the EC in spring 2023, the Ministry of Finance is preparing a new tax credit for significant industrial investments promoting the clean transition. The tax credit can be allocated to investments other than renewable electric production that accelerate the green transition and reduce dependency on fossil fuels. Therefore, the new tax credit would support the development of clean industry in Finland.

The tax credit would be granted only for new projects. Projects would be eligible to receive the tax credit if they relate to:

- renewable energy production (including hydrogen and hydrogen fuels);
- storage of electricity and heat;
- storage of renewable hydrogen, biofuels, bioliquids, biogases and biomass fuels;
- decarbonisation of industrial production processes and energy efficiency measures; and
- investments in the production of equipment (eg, batteries), key components and related critical raw materials essential to the transition to a net-zero economy.

As the tax credit is intended to cover only significant investments, the minimum size of eligible investments would be EUR50 million, and each investment would be considered individually. The tax credit should not exceed 20% of the investment cost and would be capped at EUR150 million per company. The EUR150 million cap would be calculated on a consolidated basis for groups of companies. The tax credit would be carried out as a deduction from the company's corporate income tax.

As with the aforementioned state aid programme, the tax credit system is also subject to the approval from the EC before its adoption. According to the draft legislative proposal, the right to the tax credit should be applied for in advance, and the right to the subsidy should be granted by the end of 2025. The tax credit can be claimed for the first time in the year of completion of the investment - albeit no earlier than 2028.

FRANCE



Law and Practice

Contributed by:

Carine Le Roy-Gleizes, Corentin Chevallier, Alice Messin-Roizard and Antoine Juquin

UGGC Avocats

Contents

1. Regulatory Framework and Law p.189

1.1 Environmental Protection Policies, Principles and Laws p.189

2. Enforcement Authorities and Mechanisms p.189

2.1 Regulatory Authorities p.189

2.2 Co-operation p.190

3. Environmental Protections p.190

3.1 Protection of Environmental Assets p.190

3.2 Breaching Protections p.190

4. Environmental Incidents and Permits p.191

4.1 Investigative and Access Powers p.191

4.2 Environmental Permits/Approvals p.191

4.3 Regulators' Approach to Policy and Enforcement p.192

4.4 Transferring Permits/Approvals p.193

4.5 Consequences of Breaching Permits/Approvals p.193

5. Environmental Liability p.194

5.1 Key Types of Liability p.194

5.2 Disclosure p.195

6. Environmental Incidents and Damage p.195

6.1 Liability for Historical Environmental Incidents or Damage p.195

6.2 Reporting Requirements p.195

6.3 Types of Liability and Key Defences p.196

7. Corporate Liability p.196

7.1 Liability for Environmental Damage or Breaches of Environmental Law p.196

7.2 Environmental Taxes p.197

7.3 Incentives, Exemptions and Penalties p.197

7.4 Shareholder or Parent Company Liability p.197

7.5 ESG Requirements p.197

7.6 Environmental Audits p.198

8. Personal Liability p.198

8.1 Directors and Other Officers p.198

8.2 Insuring Against Liability p.198

9. Insurance p.199

9.1 Environmental Insurance p.199

10. Lender Liability p.199

10.1 Financial Institutions/Lender Liability p.199

10.2 Lender Protection p.199

11. Civil Liability p.199

11.1 Civil Claims p.199

11.2 Exemplary or Punitive Damages p.200

11.3 Class or Group Actions p.200

11.4 Landmark Cases p.200

12. Contractual Agreements p.201

12.1 Transferring or Apportioning Liability p.201

12.2 Environmental Insurance p.201

13. Contaminated Land p.201

13.1 Key Laws Governing Contaminated Land p.201

13.2 Clearing Contaminated Land p.202

13.3 Determining Liability p.202

13.4 Proceedings Against Polluters p.202

13.5 Investigating Environmental Accidents p.202

14. Climate Change and Emissions Trading p.203

14.1 Key Policies, Principles and Laws p.203

14.2 Targets to Reduce Greenhouse Gas Emissions p.203

15. Asbestos and Polychlorinated Biphenyls (PCBs) p.204

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs p.204

16. Waste p.204

16.1 Key Laws and Regulatory Controls p.204

16.2 Retention of Environmental Liability p.205

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods p.205

16.4 Rights and Obligations Applicable to Waste Operators p.205

17. Environmental Disclosure and Information p.206

17.1 Self-Reporting Requirements p.206

17.2 Public Environmental Information p.206

17.3 Corporate Disclosure Requirement p.206

17.4 Green Finance p.207

18. Transactions p.207

18.1 Environmental Due Diligence p.207

18.2 Disclosure of Environmental Information p.207

18.3 Key Issues in Environmental Due Diligence p.208

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UGGC Avocats was founded in 1993 and is one of the first independent law firms in France covering all areas of law. In Paris, the environment team's expertise mainly focuses on four areas: the management of facilities, risks and pollution, which encompasses support and assistance with industrial projects (including securing administrative proceedings, compliance issues, environmental and health issues and technological risk management); site redevelopment, including the development of strategies for the reconversion of industrial sites and the environmental aspects of corporate or real estate trans-

actions; waste management, including waste recycling, waste-to-energy conversion and the restructuring of extended producer responsibility programmes; and sustainable management of companies and their products, including environmental reporting, hazardous product management and the regulation of substances such as biocide and nanomaterial. The environment team in Paris is composed of Corentin Chevallier and Carine Le Roy-Gleizes (partners), along with Antoine Juquin and Alice Messin-Roizard (associates).

Authors



Carine Le Roy-Gleizes is a partner at UGGC Avocats who works on litigation before administrative, civil and criminal courts. She advises on environmental regulations in

relation to classified facilities, industrial risks, waste management, water or air impacts, soil and groundwater contamination, health and safety issues, sustainable development and chemical products. Carine has developed specific expertise in regulatory/contractual/litigation issues concerning contaminated land. She is a member of the Paris Bar, the environmental law committee of MEDEF (the largest employer federation in France), the scientific committee of Intersol and the Club des Avocats Environnementalistes (the French Environmental Law Attorneys Club). Carine regularly attends conferences with/organised by professional federations.



Corentin Chevallier is a partner at UGGC Avocats who focuses on environmental, public and mining law and international litigation matters. He counsels clients on mining and

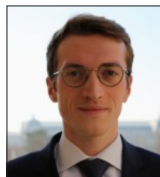
environmental issues, including those regarding hazardous and registered facilities, waste law, water and air quality law, and energy regulations. A member of the Paris Bar, Corentin has worked on matters relating to major infrastructure projects in the energy sector, the environmental criminal liability of industrial operators and government liability (including for expropriation claims). He is also a member of the scientific committee of Atmos'Fair (a conference on outdoor and indoor air pollution).

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UGGC Avocats



Alice Messin-Roizard is an associate specialising in environmental law at UGGC Avocats. With two years of prior experience in environmental law, she joined the firm in 2024.

Since 2019, she has been involved in teaching environmental law, serving as a co-lecturer and student tutor at Sciences Po Paris. Alice advises on issues related to classified facilities, soil contamination, waste management and mining law, among others; she also assists clients in litigation.



Antoine Juquin is an associate who has been specialising in environmental law at UGGC Avocats since 2024, with several years of experience in the field. Antoine has previously worked

in environmental law teams, advising and litigating on issues related to industrial facilities, mining law, polluted sites and waste management. His expertise also extends to administrative and public business law, making him a well-rounded professional in the field.

UGGC Avocats

47 rue de Monceau
75008 Paris
France

Tel: +33 1 56 69 70 00
Fax: +33 1 56 69 70 71
Email: paris@uggc.com
Web: www.uggc.com



1. Regulatory Framework and Law

1.1 Environmental Protection Policies, Principles and Laws

The main provisions concerning environmental protection are included in the French Environmental Charter and the French Environmental Code.

Please note that there are additional implementation provisions that have not been codified in the French Environmental Code and that the mining regulation is provided by the French Mining Code (not covered in this chapter).

Key Policies

A key aspect of French environmental law concerns the regulation of classified facilities, which applies to industrial or agricultural facilities that may have an impact on the environment.

French law defines classified activities and sets thresholds for declaration, registration or authorisation, allowing authorities to impose requirements on these facilities (see **4.2 Environmental Permits/Approvals**). A similar regulation provides that an activity affecting waters (surface waters and groundwater) can be subject to declaration or authorisation from the relevant authorities. Those authorities may impose some requirements on regulated activities.

Another major aspect of environmental regulation concerns waste management. The governing principle is that waste producers or owners are legally responsible for waste collection, elimination and recycling.

Key Principles

The French Environmental Charter enshrines the fundamental principles of environmental protection at a constitutional level. Indeed, this charter

contains important principles such as the precautionary principle, the right to live in a healthy environment, the right to environmental information, the duty not to harm the environment, and the duty to preserve the environment and repair the damage - as well as the “polluter pays” principle. The prevention principle is also included in this charter. In addition, the charter sets out the principle of sustainable development as a central objective of public policies.

Additional principles are defined in the French Environmental Code and embody legal concepts such as the principle of participation, which allows affected people to express their opinion on a project with potential environmental impacts. Another key principle is “non-regression”, which implies that measures protecting the environment can only be improved through constant scientific progress and shall not be reduced.

2. Enforcement Authorities and Mechanisms

2.1 Regulatory Authorities

In France, the key regulatory authorities are the Ministry for the Environment and the prefects of departments, who directly represent the Ministry at a local level. The missions of the Ministry mostly involve the drafting of environmental regulatory provisions.

Prefects are responsible for issuing orders or authorisations relating to classified facilities and for ensuring compliance with regulatory requirements. To do so, prefects rely on local administrative services – such as the Regional Directorates for the Environment, Planning and Housing (DREAL) as well as the Departmental Directorate of the Territories (DDT) - all of which participate

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in the local implementation of national policy. At a local level (*c communes*), mayors also exercise environmental-related enforcement (eg, waste law).

Moreover, the Environmental Authority, an advisory body on projects likely to affect the environment, delivers an opinion on the quality of the environmental impact assessment (see **4.2 Environmental Permits/Approvals**). The Environmental Authority shall remain totally independent and be distinct from the authority in charge of delivering permits.

Finally, other specific agencies play a role in some defined sectors – eg, the Nuclear Safety Authority (ASN) and the Regional Health Agency (ARS). Also, the *Office Français de la Biodiversité* (OFB) was created in 2019: it aims to better protect biodiversity by merging all the services responsible for the preservation of French ecosystems into a single agency.

2.2 Co-operation

Globally, local-level authorities may work together to deal with an environmental issue that has, for example, sanitary implications - as they may be complementary. Specifically, the Inter-Services Mission for Water and Nature (*Mission Inter-Services de l'Eau et de la Nature*, or MISEN) is an authority whose goal is to facilitate coherence in enforcing and financing actions for the implementation of water and biodiversity policies. MISEN includes various regional authorities such as DREAL, the Regional Directorate of Food, Agriculture and Forestry (DRAAF), the DDT and the OFB, among others. MISEN operates under the authority of the prefect in each department.

Additionally, the Operational Committee to Combat Environmental Crime (COLDEN), created in

September 2023, is an authority that develops and implements strategies that mobilise the full range of administrative and legal levers to combat environmental crime. COLDEN may impose both administrative and criminal sanctions, has a wide range of stakeholders - for example, magistrates, public prosecutors, the DDT, DREAL, the OFB and the national police - and operates under the authority of a prosecutor.

3. Environmental Protections

3.1 Protection of Environmental Assets

The protection of environmental assets in France is mainly governed by the French Environmental Code, which groups together the laws and regulations governing environmental protection. This Code protects the natural heritage - ie, all fauna, flora, geological, soil, mineralogical, paleontological and ecological resources – and is divided into several “books” and chapters, each dedicated to a particular asset.

These provisions apply to all French territories. On top of these rules, certain rules laid down by EU regulations also apply to the protection of environmental assets. For instance, EU Regulation 2024/1991 of June 2024 aims at restoring degraded terrestrial and marine ecosystems in all EU countries.

3.2 Breaching Protections

Violating environmental protection rules can lead to three different types of sanction: administrative, criminal and civil. The administration plays the role of regulator in environmental protection and can impose numerous obligations, with penalties for non-compliance. For the same offence in which the administration intervenes, criminal sanctions may also be imposed, and the offender may be held civilly liable. By way of example,

in the emblematic case of the Erika, the companies involved were sanctioned at all three levels.

4. Environmental Incidents and Permits

4.1 Investigative and Access Powers

Under French law, the environmental authorities have investigative and access powers with regard to environmental incidents and breaches of law/permits. They have both administrative and criminal enforcement rights.

Administrative Inspections

The French Environmental Code provides conditions under which administrative inspections can be performed. During such inspections, the administrative authority has several powers regarding access to the facility and documents. The 2019 OFB Law gives additional powers to environmental inspectors, who are authorised to take samples and place them under seal. A December 2020 law has extended their competence even further.

If irregularities are found during the inspection, the administrative authority can impose sanctions. After the inspector's visit, the operator receives a copy of the report and thus becomes aware of the case against them and can respond to the prefect. Before actual sanctions are imposed, the operator is given the chance to comply (prior formal notice).

The 2019 OFB Law has introduced a new criminal offence. If an operator who has conducted their activity without authorisation or certification is ordered to take remediation measures in the context of the cessation of their activity, and does not respect this order, the sanction might

result in a two-year prison sentence and a maximum fine of up to EUR100,000.

Negotiated settlements are not allowed under French law. Authorities cannot agree to either reduce sanctions or decline to bring an enforcement action in their role as administrative police.

Criminal Investigations

Criminal investigations are accomplished by regulatory authorities in the case of a breach of environmental law. In the event of a criminal investigation, the inspection performed is similar to the administrative procedure, but the prerogatives of the inspector are extended – for example, they may conduct identity checks.

Similarly, the inspector issues a report to the prosecutor and remains (along with the prefect) at the prosecutor's disposal for further investigations. By way of example, the inspector may question the operator on behalf of the prosecutor. Since the OFB Law, environmental inspectors are also able to collaborate with other police services on a given case, while remaining entirely autonomous in their investigations. Since December 2020, these environmental inspectors have the same powers as judicial police officers for the judicial investigations they lead.

4.2 Environmental Permits/Approvals

Environmental permits may be required, depending on the project. The classified facilities regulation and the water activities regulation provide categories and thresholds that determine the legal framework applying to the project (ie, declaration, registration and authorisation for classified facilities). Facilities with the highest environmental risks fall under a special category, determined by the Seveso Directive.

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An environmental authorisation (ie, a permit) is required for activities that materially affect protected interests listed in the French Environmental Code (environment, water, health, etc).

Since March 2017, all the procedures necessary for projects subject to authorisation under the classified facilities regulation or the water regulation have been merged into a single environmental authorisation. This environmental authorisation thus covers other specific authorisations when they are required for the project (eg, land-clearing activities and derogation for destruction of protected species). However, the building permits are not included in this broad authorisation.

The French Environmental Code provides specific criteria and procedures to obtain environmental permits; they are progressively more restrictive, ranging from the simplest (declaration) to the most stringent (registration and environmental authorisation, including an environmental impact assessment).

The Environmental Impact Assessment Directive sets criteria and thresholds, which are integrated into French law, and determines whether the projects are likely to have notable consequences. Projects with a potential impact on the environment must undergo either a systematic environmental assessment or an assessment after a case-by-case review, depending on certain thresholds.

After a public inquiry, regulatory authorities issue the authorisation with prescriptions or refuse it with justifications. To appeal permitting decisions, it is mandatory to lodge a claim before the administrative court within two months following the permitting decision for the operator, and within four months for interested third parties.

Recently, a “Green Industry” law was adopted: it aims to shorten the deadlines necessary to obtain the environmental permits.

Finally, the revised EU Directive on the prevention and reduction of industrial emissions from certain sectors was published in July 2024. This directive introduces a new condition for industrial operations, requiring the establishment of emission limit values for the consumption and use of certain resources, notably water. Emission limit values are also set for waste and resources other than water. This directive will have to be transposed by member states before 2026.

4.3 Regulators’ Approach to Policy and Enforcement

Since 2017, the French political approach to environmental policy and enforcement has favoured simplifying procedures for facility operators. Indeed, the French government created the “environmental authorisation” in 2017 (see **4.2 Environmental Permits/Approval**). Its most important goal is to improve the efficiency of project authorisation procedures for operators, reduce the time required for obtaining an authorisation and, at the same time, limit the number of disputes that may arise in connection with a single project. This procedure has not only improved the process for industrial petitioners but also case examination and public access to environmental information.

In the same spirit, and as part of the development of low-carbon energy production sectors, a law was passed in March 2023 concerning the acceleration of renewable energy production. Additionally, a second law was adopted in June 2023 relating to the acceleration of new nuclear facilities construction.

Finally, an October 2023 law relating to the Green Industry encourages procedural simplification. The main provision of this law is the simplification of the environmental authorisation procedure. Public consultation will be led – alongside the examination of the application file – by the environmental authority, so as to reduce the period of issuance of the environmental authorisation by half. Additionally, exceptional procedures are introduced for industrial projects of major national interest (known as PIINM), identified by decree. Compatibility of local planning documents will be achieved more rapidly, building permits will be issued by the state rather than by local authorities, and exemptions from restrictions posed by protected species will be facilitated.

The regulators' approach is also in favour of strengthening waste management, following a law that was passed in 2020 in order to reinforce extended producer responsibility (REP) and circular economy mechanisms. Regulators are also focusing on improving knowledge of polluted sites and soils, the effectiveness of remediation measures and the attractiveness of the areas where these sites are located.

4.4 Transferring Permits/Approvals

Under French law, an environmental permit can generally be transferred. The change in the permittee is contingent upon the declaration by the new permittee to the regulatory authority within three months following the transfer.

While most permits can be transferred through a simple declaration, the transfer of the environmental authorisation for facilities requiring financial guarantees (landfilling, quarries or some other polluting activities) must be authorised by the prefect. The new operator must file an application for the transfer in order for the regulatory

authorities to review the financial guarantees. If the authority authorises the transfer, it may impose additional prescriptions or requirements.

Finally, a procedure for the partial transfer of environmental authorisations was introduced in 2021, thereby enabling a permittee to transfer part of its site to one or more other beneficiaries, who will then hold new and separate environmental authorisations. This possibility is subject to strict conditions – namely, the transfer must not adversely affect interests protected by environmental law, and the responsibilities of the beneficiaries must be clearly divisible.

4.5 Consequences of Breaching Permits/Approvals

Both criminal and administrative sanctions punish breaches of permitting requirements.

Firstly, if one runs a facility without an environmental authorisation, the criminal sanctions include a one-year prison sentence and a maximum fine of EUR75,000. If the offender is a corporate entity, this maximum fine is multiplied by five.

Secondly, the regulatory authority may:

- require, by issuing a formal notice, compliance with the regulation within a time limit; and
- then impose administrative sanctions on the offender.

In addition to the suspension of the facility's activity, the regulatory authority may hold a deposit until the required work is completed. The authority can also have the prescribed measures carried out automatically, in place of the person summoned and at their own expense.

To ensure that the measures will be fully implemented, the regulatory authority can impose a maximum fine of up to EUR15,000 or a daily penalty payment of up to EUR1,500 until compliance is achieved. According to the 2021 Climate and Resilience Law, the sanction can be more severe when a risk of lasting harm to the environment results from this offence.

The revised EU directive on the prevention and reduction of industrial emissions from certain sectors (see **4.2 Environmental Permits/Approvals**) also provides, for the most serious violations committed by a legal entity, an administrative financial penalty of a maximum amount equal to at least 3% of the operator's annual sales within the EU. Alternatively, member states can also resort to criminal sanctions.

In addition, in April 2024, a new EU directive on the protection of the environment through criminal law has strengthened compliance with environmental protection legislation through more effective, proportionate and dissuasive criminal sanctions. This directive will have to be transposed by member states before May 2026 and will certainly affect the French legislation, in which the directive provides for penalties proportional to turnover (penalties of 5% of the company's total worldwide turnover or an amount corresponding to EUR40 million for the most serious offences).

5. Environmental Liability

5.1 Key Types of Liability

Under French law, three types of liability can be imposed on operators and polluters.

Administrative liability (also called environmental liability) is imposed by regulatory authorities

on operators of facilities or activities subject to environmental laws and regulations. The regulatory authorities evaluate the damage and the measures taken to prevent or mitigate it in order to determine liability.

Civil liability in environmental matters occurs for torts or negligence resulting in pollution. The causal link between the harmful event and the damage has to be proven and may result in the award of compensatory damages. Furthermore, the French Civil Code embodies the ecological prejudice reparation concept, codifying the Erika case resolution (see **11. Civil Liability**).

Additionally, it is possible to be held liable for environmental damage under contractual liability. Such liability would likely arise in land purchases where a seller retains important information regarding the facility and the industrial history of the land (see **16. Transactions**).

Criminal liability applies to both individuals and corporate entities. The head of a company may be criminally liable for the actions of the company. Sanctions can include imprisonment or a criminal fine. The 2021 Climate and Resilience Law introduced new environmental offences, notably:

- a general offence of environmental damage, sanctioned by a five-year prison sentence and a EUR1 million fine;
- an uncontrolled waste-dumping offence, sanctioned by a three-year prison sentence and a EUR150,000 fine; and
- an “ecocide” offence, introduced in cases of voluntary environmental endangerment and sanctioned by a ten-year prison sentence and a EUR4.5 million fine.

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Two more offences now sanction the endangerment of the environment when caused by the breach of a formal notice. The sanction is a three-year prison sentence and a EUR250,000 fine.

5.2 Disclosure

If there is a threat of persistent damage to the environment, the operator of a classified facility must report the following to the regulatory authorities: the nature of the threat, the preventive measures that the operator implements and their effects. In case of damage, the operator must inform the authorities without delay, in addition to taking measures to end the causes of the damage and limit its aggravation, as well as its impacts on human health and ecological services.

The regulatory authorities must address a formal notice to the operator in the event of non-disclosure or incomplete disclosure of these pieces of information. Upon expiry of the period determined by the regulatory authority in its formal notice, and without any reply from the operator, the regulatory authority will proceed with sanctions such as a fine of up to EUR15,000.

6. Environmental Incidents and Damage

6.1 Liability for Historical Environmental Incidents or Damage

Administrative obligations and liability for historical incidents or damage may be transferred from one operator to another if the new operator is conducting the same activities. Therefore, the new operator will be liable for the pollution relating to the continued activity even if they were not the operator at the time the pollution originated.

Liability for pollution from the former operator that is unrelated to the continued activity is not transferred. The landowner cannot be liable for historical environmental incidents or damage, except under specific circumstances. In that regard, if none of the aforementioned former stakeholders can be identified, the owner of the contaminated land may be liable if their negligence or participation in the pollution can be proven.

6.2 Reporting Requirements

The French Environmental Code provides for at least three reporting requirements in the event of an environmental incident or damage.

First, the operator of a classified facility must declare, as soon as possible, to the classified facilities inspectors any accidents or incidents arising from the operation of its facility that are likely to affect the environment.

Second, concerning application of the polluter pays principle, in the event of damage to the environment, the operator (ie, for this purpose, any natural or legal person – public or private – who exercises or controls a profit-making or non-profit-making economic activity on a professional basis) must immediately inform the administration authority and take measures to put an end to the causes of the damage, as well as to prevent or limit its worsening and its impact on human health and ecological services.

Third, regarding activities that specifically affect water, any person aware of any incident or accident that endangers the safety of the public and the quality, circulation or conservation of water must inform the mayor and the prefect as soon as possible.

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6.3 Types of Liability and Key Defences

Administrative Liabilities

When the classified facilities regulation applies, the prefect may order any administrative measure necessary to address a threat to the environment. Similar provisions are applicable under the water regulation and to any type of environmental damage supervised by a regulatory authority.

State liability

Interested third parties (eg, neighbours of a classified facility) may seek the state's legal responsibility for the lack of action taken to protect the environment. Public authorities can elude liability if they demonstrate that they have conducted the necessary checks to ensure the facility's safety.

More generally, there is an overall tendency to seek state liability for its inaction or insufficient action regarding environmental protection. By way of example, the Administrative Supreme Court found the state liable in several landmark cases concerning the insufficiency of the measures enshrined in the Protective Atmospheric Plan, whereby the state was ordered to pay a penalty of EUR10 million for every six months of inaction.

Furthermore, in May of 2024, the Douai Administrative Court of Appeal found the state liable in several cases where residents living near classified facilities had requested the prefect to implement clean-up measures. Although the prefect had exercised adequate monitoring and made appropriate use of their powers to issue formal notices and impose penalties on the operator, the prefect did not require a significant reduction in atmospheric pollutants at a greater number of discharge points, thus not anticipating national standards.

Civil liability

The key concepts of civil liability include “disturbances of the neighbourhood” and “control over the things under one's guard” (see **11.1 Civil Claims**). The French Civil Code also sets out the ecological prejudice reparation concept and provides that any person who causes an ecological prejudice must repair it.

7. Corporate Liability

7.1 Liability for Environmental Damage or Breaches of Environmental Law

A corporate entity may be liable for environmental damage or breaches of environmental law when acts of negligence or faults are demonstrated. Under French criminal law, the liability of the individual does not exclude the liability of the corporate entity. The maximum fine for a corporate entity is five times the sanction for an individual.

The European Public Prosecutor, Environmental Justice and Specialised Criminal Justice Law of December 2020 provides the option for corporate entities whose actions have harmed the environment to pay a public fine, within the framework of an environmental judicial agreement (known as CJIP). Moreover, the same law has created a specialised court in charge of environmental disputes.

As regards the interaction between corporate law and environmental law, a 2019 law (*Loi PACTE*) prescribes that any decision related to the company management must take into account corporate social responsibility (CSR) and environmental considerations.

Voluntary firms may explain their “reason for being” to justify what they can bring to custom-

ers in a competitive market. Furthermore, companies should be mindful of their advertising duties, as the 2021 Climate and Resilience Law imposes rules on greenwashing.

7.2 Environmental Taxes

Nearly 40 environmental taxes generate more than EUR50 billion in France. The main taxes are as follows.

General Tax on Polluting Activities (TGAP)

A company that has a polluting activity or uses polluting products is subject to the TGAP.

Companies are subject to this tax if their activity involves the storage, treatment or transfer to another country of hazardous or non-hazardous waste, or if it emits one of 18 polluting substances.

Taxes on Air Pollution

The bonus-penalty system for automobiles aims at changing the fleet to the lowest-CO₂-emitting vehicles by increasing the price of diesel (and, to a certain extent, oil) motors, and by encouraging the production and increasing the number of electric cars. An ordinance of July 2023 transposes the new EU framework governing road pricing for heavy goods vehicles planned for the European Collectivity of Alsace. It also enables regions and departments to voluntarily introduce an eco-contribution system for heavy goods vehicles.

Taxes on Water Pollution

These taxes are implemented through water agencies. They aim to limit water pollution and cover, for example, the emission of pesticides by taxing companies that discharge polluting products in a watercourse.

Taxes on Waste

“Incentive pricing” (*tarification incitative* (TI), *taxe d’enlèvement des ordures ménagères incitative* (TEOMI), *redevance d’enlèvement des ordures ménagères incitative* (REOMI)) consists of linking the amount of the household waste collection tax to the quantity of waste produced. It aims to reduce overall waste, as well as the quantities of unsorted waste sent to landfill or incineration.

7.3 Incentives, Exemptions and Penalties

French law does not directly provide for incentives or penalties for “good” or “bad” environmental behaviour. However, in September 2023, the French Ministry announced a bonus-penalty system aimed at improving plastic bottle collection and recycling rates. Local authorities, responsible for household packaging collection, are subject to this system.

Since May 2024, an eco-modulation system has been in place for the REP policy. This bonus-penalty system applies to eco-contributions based on environmental criteria. In concrete terms, they aim to support the use of sustainable, reusable and recyclable products, while limiting the presence of hazardous substances in products.

7.4 Shareholder or Parent Company Liability

As of 2010, the French Environmental Code provides that a parent company may be held financially liable for the remediation measures of contaminated land if it wrongfully contributes to its subsidiary’s bankruptcy.

7.5 ESG Requirements

Under the French Commercial Code, certain companies have to include a non-financial performance statement in their annual management report. The obligation to publish such a state-

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ment falls on companies with more than 500 employees, as well as on listed companies with total assets of EUR20 million or a turnover of EUR40 million and non-listed companies with EUR100 million in total assets or a EUR100 million turnover.

The statement must tackle environmental and societal issues such as climate change, social commitments to sustainable development and the circular economy. Listed companies must also add to their statement pieces of information concerning their activity's effects on human rights and the fight against corruption and tax avoidance.

In December 2023, France transposed the EU Corporate Sustainability Reporting Directive into French law, extending the scope of companies required to publish sustainability information, opening the auditing of such information to new players and introducing new sanctions. Further transposition measures will also be required later, given the directive's progressive timetable, which sets different deadlines for different types of company.

7.6 Environmental Audits

In France, environmental audits are used in a wide variety of operations. Although the situations an environmental audit covers are varied, European Regulation 1221/2009 provides that it is a "systematic, documented, periodic and objective evaluation of the environmental performance of an organisation, management system and processes designed to protect the environment".

Environmental audits are often used by companies following the detection of an anomaly or the occurrence of an incident or accident on an operating site.

In France, there is no general obligation for companies to carry out an environmental audit, but certain circumstances imply that one should be performed. By way of example, an environmental audit is often required:

- prior to the purchase of land, an industrial building or a factory; or
- in the event of the acquisition of a brownfield or the transfer of remediation obligations.

8. Personal Liability

8.1 Directors and Other Officers

Directors and officers can be held personally liable for environmental damage or violations of environmental law if their personal conduct contributed to the offense or if they had knowledge of the offense and failed to act. This standard applies beyond the environmental sector.

The individual's level of authority is not considered when finding them liable, but rather the fact that they were acting in the capacity of a company's representative or acting on the company representative's instruction or delegation. In the latter situation, the judge will carefully examine the scope and regularity of the delegation or representative's instruction.

The penalties for environmental offences range from a fine of up to EUR100,000 to a prison sentence of up to two years. Additional penalties, such as prohibition from doing business in a similar area for a time period of up to five years, may also be imposed.

8.2 Insuring Against Liability

Global liability insurance for company directors can cover defence expenses and damages arising from civil procedures (thus including envi-

ronmental matters) and can sometimes benefit the spouse and/or inheritors or legal representatives. Criminal fines are not covered by liability insurance. The company will be the signatory of the insurance contract for the benefit of all natural persons likely to be held personally responsible and therefore who had, have or will have an executive or representative position in the company or in its subsidiaries.

9. Insurance

9.1 Environmental Insurance

In France, environmental insurance may be purchased specifically to cover any type of contamination or nuisance (detailed further in **12.2 Environmental Insurance**). However, French law does not impose any obligation on operators to purchase an environmental insurance.

Almost all environmental risks can be covered by environmental insurance, except for:

- environmental damage resulting from contamination identified prior to signing the contract;
- chronic contamination due to the operator's activity; or
- damages resulting from a lack of maintenance of the facility.

10. Lender Liability

10.1 Financial Institutions/Lender Liability

Financial institutions and/or lenders can be held liable for damages arising from projects they fund, depending on their level of involvement and their awareness of the risks. The same liabil-

ity regime applies to financial institutions as to any corporate entity.

Furthermore, the French government has demonstrated its will to promote green finance by launching a new label, Greenfin. This certification aims at ensuring transparency and the environmental involvement of financial products.

10.2 Lender Protection

Since financial institutions and/or lenders' liability is not specific to environmental project funding, these entities should be aware of the risks taken in becoming involved in their borrower's projects and of the level of involvement. The more involved a lender or financial institution is, the more likely it is to be held liable for a damage or breach, including an environmental damage or breach.

This is why thorough due diligence is necessary (see **18.1 Environmental Due Diligence**). In this respect, the 2019 Energy Climate Law requires investment companies to include in their policies information about the risks associated with climate change and biodiversity.

11. Civil Liability

11.1 Civil Claims

As mentioned in **6.3 Types of Liability and Key Defences**, some of the key concepts of civil liability applied to the environment are "disturbances of the neighbourhood" and the "control over the things under one's guard".

The former provides that no one should cause excessive damage to their neighbourhood, even if an environmental permit authorises the industrial activity. However, the theory of "prior occupation" applies under certain conditions - ie,

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UGGC Avocats

one could not bring claims over a nuisance that already existed prior to their occupation of the neighbouring site.

The second concept provides that a person may be held liable for the harms caused by the things under their effective control. Moreover, the French Civil Code provides for tortious liability, which may impose an obligation to repair the damage resulting from wrongful acts or negligence.

Finally, since 2016 the French Civil Code states that anyone who causes environmental damage can be held liable and be obliged to repair it in kind. If impossible, the reparation ought to be pecuniary. This provision incorporates what is referred to as a “pure” environmental damage, meaning that it is no longer necessary to prove the violation of a “human interest” - for example, financial loss, physical injury or property damage.

11.2 Exemplary or Punitive Damages

Under French law, exemplary or punitive damages cannot be awarded. This category of damages would be a violation of the principle of full compensation of prejudices. Indeed, the French judge must contribute to the repair of the full extent of prejudice caused.

11.3 Class or Group Actions

A 2016 law created the possibility of group actions. The French Environmental Code states that a group action is possible when several people in a similar situation suffer from an environmental damage, caused by the same person and with a breach in legal or contract-based duties as its common origin. Such legal action may seek the cessation of the violation and/or the reparation of the damage.

Environmental “approved associations” (which is a specific status) can lead to a group action. Approved associations working for the defence of those who suffered physical injury damage or defending an economic interest may also do so.

11.4 Landmark Cases

The landmark case establishing civil liability for environmental damage was the 2012 Erika case concerning the oil spill caused by the sinking of a tanker. In this case, in addition to criminal liability, the court recognised the legal concept of ecological prejudice for the first time.

Climate litigation is currently increasing considerably, and this trend is certainly going to assume greater importance in years to come. Gradually, liability regarding climate change and global warming is being sought more and more – for example, the French state has been found liable for its lack of climate action.

In addition, the fire at the Lubrizol chemical products plant and warehouse in September 2019 will surely become a major civil and criminal case. It is already giving rise to a governmental action plan for the prevention and management of industrial risks, as well as generating regulatory changes in relation to the prevention and management of accidents on hazardous sites (see 17.1 Self-Reporting Requirements).

Finally, an important decision has been issued concerning transnational water pollution. The judge found an operator liable for causing environmental damage and fined them more than EUR9 million vis-à-vis a foreign state.

12. Contractual Agreements

12.1 Transferring or Apportioning Liability

It is possible to transfer or apportion liability for incidental damage or breaches of law through a contract between two private parties. Such private contract does not affect private parties' potential liability to regulatory authorities.

The last operator of a classified facility may transfer its administrative liability through an "interested third party" (*tiers demandeur*) that carries out the facility's remediation, and more recently, may also ensure its safety under the provisions issued by the regulatory authority. This results in the transfer of the last operator's liability to the purchaser. The operator has a residual liability if the third party cannot fulfil its new obligations.

12.2 Environmental Insurance

Environmental insurance contracts are available for events that can occur in the course of operating activities, including events causing ecological prejudice. There is also a special insurance for historic pollution, but it only covers currently unidentified pollution and is yet to be further developed in France.

13. Contaminated Land

13.1 Key Laws Governing Contaminated Land

First, one of the key laws is the classified facilities regulation. This regulation addresses the contaminated land obligations in the context of the cessation of activity.

Contaminated land under French law has no definition. However, a 2017 French methodol-

ogy provides criteria to determine the environmental condition according to which a site shall be managed.

The general approach taken by regulatory authorities is a risk-versus-use approach and respect for the protected environmental interests

Remediation is mandatory at the end of the facility operations. Remediation goals are devised in a manner consistent with the expected future use of the site. Usually, the mayor and the landowner (if different from the operator) are consulted on the use suggested by the operator, and the prefect makes the final decision on the future use. Several operators can be held responsible for parts of the remediation where different activities have generated pollution on the same site.

Secondly, on sites where pollution that poses a threat to public health or safety occurs – or might occur – the regulatory authority may implement the necessary remediation works at the expense of the person responsible for the remediation. The regulatory authority may also charge a deposit until the remediation works are finalised.

When remediation has been carried out properly, the person who changes the use must provide measures to manage the pollution to ensure that the land is compatible with public safety or health. Additionally, consultancy firms are increasingly involved in cessation of activities procedures: they now have to deliver several certifications for the operator of an industrial site in order to prove to the regulatory authorities that they complied with their requirements.

A December 2022 Decree defines eight types of use for the management of polluted soils and also defines the concept of change in use. The uses include, among others, industrial, residen-

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tial, outdoor recreational, agricultural and re-naturation.

13.2 Clearing Contaminated Land

Traditionally, the last operator of an industrial site would only be responsible for the remediation necessary to allow the safe continued operation of the site for industrial purposes, while a person seeking to change the use of the site would be responsible for the additional remediation needed to permit the change of use. As detailed in **6.3 Types of Liability and Key Defences**, when neither the last operator or stakeholders can be identified, the owner of the land may be held responsible if their negligence or participation in the pollution can be proven.

13.3 Determining Liability

Each operator is liable for the impacts of the activities of the facilities that they have operated, as well as for the impacts caused by the operators whom they succeed in the same activity. If impacts on the same site arise from different activities, the administration must identify each operator as far as it is concerned (see **6.1 Liability for Historical Environmental Incidents or Damage**).

13.4 Proceedings Against Polluters

The rules governing locus standi require that a legal action must be useful to the plaintiff. More precisely, people affected by contaminated land must prove that they have a direct and personal interest to bringing proceedings against polluters/landowners/occupiers, and that this interest is legitimate and present. Associations, for their part, must prove that the contamination directly affects the interests they have set out to defend, in accordance with their statutes.

The application of these requirements may vary depending on the courts (civil, administrative or

criminal). However, the requirements are generally considered to be broadly construed and easily met.

13.5 Investigating Environmental Accidents

In France, following an environmental accident, a classified facility's operator must report to the classified facilities inspector and the prefect. The report must analyse the causes of the accident, and the effects and consequences thereof on the environment and the population. The operator must also report the measures undertaken to prevent any similar future accident or incident and the measures carried out to overcome the accident's impacts in the medium to long term.

Public prosecutors play a special role in investigating environmental accidents. If the public prosecutor decides to pursue the case, the victim or complainant is informed, and an investigation may take place. Furthermore, the OFB may investigate a site and issue fines for offences. Criminal investigations are carried out by the OFB under the authority of the public prosecutor.

On top of that, the French Environmental Code provides that a technical investigation may be led by the Office for Investigation and Analysis of Industrial Risks (known as BEA-RI), on its own initiative or as required by the Ministry for Ecological Transition and Territorial Cohesion. The investigation aims to improve the security of the site and prevent future accidents, without determining potential liabilities. On the basis of the investigation, the BEA-RI drafts security recommendations.

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14. Climate Change and Emissions Trading

14.1 Key Policies, Principles and Laws

France is involved in international climate negotiations within the framework of the United Nations Framework Convention on Climate Change (UNFCCC).

France hosted the 2015 21st Conference of the Parties (COP21), which resulted in the Paris Agreement. The French Climate and Resilience Law of August 2021 states that France aims to respect the reduction goals set in the Paris Agreement.

Key Policies

Reduction of atmospheric concentrations of greenhouse gases (GHGs) to prevent dangerous anthropogenic interference with Earth's climate system is considered a national priority. This goal is implemented through sectoral policies and global targets. France aims to cut its GHG emissions by 50% by 2030 compared with 1990 levels.

Key Principles

To meet the objectives of the Paris Agreement and the commitments to GHG reduction made by France through its Intended Nationally Determined Contribution (INDC), the French Climate Plan unveiled in 2018 (the "Climate Plan") sets the goal of carbon neutrality by 2050. The Climate Plan focuses on several areas: thermal renovation, clean mobility development and the circular economy. It also aims to achieve carbon neutrality by 2050 through banning new hydrocarbon exploration projects and reinforcing green taxes. National Low Carbon Strategy 2 (*Stratégie Nationale Bas-Carbone 2* (SNBC 2)), which is in force today, includes the same objectives defined by the Climate Plan.

Key Laws

Key laws relating to climate change are the 2009 Grenelle II Law and the 2015 Energy Transition for Green Growth. In 2019, the *Energie, Climat* law (discussed in 2.1 Regulatory Authorities) introduced the concept of "ecological and climate emergency".

The 2021 Climate and Resilience Law has introduced new sets of climate policies on food, work and production, transport, housing and criminal law matters. This law also established the objective of zero net artificialisation of the soil, which aims to slow the pace of urbanisation. Many decrees were passed in 2022 to implement this law.

The 2005 EU Emissions Trading Scheme (EU ETS) is the EU's main instrument for reducing GHG emissions. The recent reform of the scheme is part of the "Fit for 55" package, a set of proposals to revise and update EU climate, energy and transport legislation. In France, the European system is implemented through the National Quota Allocation Plan (PNAQ), which allocates GHG emission quotas to over 1,300 plants. The current PNAQ phase runs from 2021 to 2030.

14.2 Targets to Reduce Greenhouse Gas Emissions

Legal goals are determined by the French Energy Code, which contains a legal target for GHG emissions reduction of 40% between 1990 and 2030. For 2021–30, the government has issued a series of objectives aimed at reducing GHG emissions by 43% (by comparison to 2005 levels), with a particular focus on aviation and industry. The goal is also to reach carbon neutrality by 2050.

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The Environmental Code outlines reduction targets for GHG emissions, including a 40% cut in fossil energy consumption by 2030 under the 2019 *Energie, Climat* law. While the Ukraine war led France to reopen coal plants, in September 2023, the French President reaffirmed his pledge to convert the last two coal plants to biomass by 2027.

15. Asbestos and Polychlorinated Biphenyls (PCBs)

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs

Exposure to asbestos is widespread and is the most common cause of workplace death in France.

Use of asbestos and all products containing asbestos is strictly forbidden in France subsequent to a decree issued in 1996.

Protection measures for the general public against asbestos range from organising research and monitoring of the state of conservation of buildings containing asbestos to setting out the rules in connection with the responsibility of building/apartment owners and organising the communication of technical documentation between participants (landlords, construction companies, lessors, etc).

The Labour Code also provides a set of rules to protect workers from inhaling asbestos in the course of their normal work activities in direct connection with asbestos products (dismantling or handling thereof).

Physical harm or injury does not have to be established for a damages claim. Since 2010, French courts have recognised the existence

of a specific anxiety prejudice for workers who have been exposed to asbestos during their past work activities and who are expecting a possible diagnosis of an asbestos-related illness.

16. Waste

16.1 Key Laws and Regulatory Controls

The key laws governing waste come from an EU Directive on waste management that was incorporated into the French Environmental Code. Their main principles and objectives are to limit the production and toxicity of future waste at their source, to organise waste management so as to be respectful of the self-sufficiency and proximity principles, to add value to waste through recycling and to proceed to the disposal of waste as a last-recourse solution. Therefore, there is a hierarchy in waste management.

Traditionally, the person responsible for waste management is either the waste producer or the waste holder.

The mayor is the regulatory authority for the application of the waste regulation, except if the waste is subject to the classified facilities regulation (where the prefect is competent).

A February 2020 law made the circular economy a priority, through improving waste recovery and recycling and undermining planned obsolescence. This law also provides further duties for producers: there will be a global prohibition of the destruction of unsold products in order to preserve resources.

This law also introduces a deposit return scheme in order to increase recycling and significantly reduce the amount of waste. An ordinance of July 2020 (transposing EU directives) comple-

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ments this law, aiming to broaden the exit from waste status and to strengthen the management of biowaste. A law of November 2021 plans the recycling of digital sector products.

The Green Industry Act has also introduced a number of innovations in terms of waste management, notably by specifying that by-products from industrial platforms may not be considered as waste under certain conditions.

16.2 Retention of Environmental Liability

Any waste producer or waste holder is responsible for the management of waste until its final disposal or recycling. The person responsible for the waste must ensure that the person to whom they deliver it is authorised to take charge of it and will comply with the applicable regulations.

In a 2023 decision, the Administrative Supreme Court ruled that the person collecting and transporting wastes on behalf of third parties cannot be qualified as a producer or holder of wastes under environmental law unless they acted with negligence. This means that the environmental liability for the disposal of waste, assigned to the transporter or collector, remains with the producer or consignor.

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

The French Environmental Code has provided for the principle of REP since 1975. The responsibility reverts to the producer of the product, the manufacture of which ultimately results in the creation of the waste.

Approximately 30 sectors are now regulated, including sport, building materials and toys. Producers usually have to pay an eco-contribution in order to fulfil their REP obligation. In addition,

a penalty is established for producers that do not meet the objectives.

The 2020 legislation has also launched a system of economic bonuses and maluses to encourage more environmentally friendly methods of production. This system will apply to every product that belongs to a REP sector.

The law also extends the existing obligation of the manufacturer to take back an old device, free of charge, when the consumer buys a new one. This obligation also applies to online commerce. Also, from January 2023, companies that put waste-generating products on the national market will have to inform consumers about the environmental qualities and characteristics of these products.

16.4 Rights and Obligations Applicable to Waste Operators

Waste operators are considered as managers of waste storage and disposal facilities, and are therefore subject to legislation on classified facilities. They are subject to two types of liability: as facility operators and as waste holders.

Their main obligations are to treat and manage waste in accordance with their environmental permit.

Furthermore, to make companies more accountable, French regulations require waste to be traceable, so that precise information can be kept on the characteristics, origin and destination of the waste. A waste-tracking slip, which can be added to the *Trackdéchets* platform, is used to track waste and ensure that it is treated in accordance with regulations and can be identified in the event of faulty management.

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The waste-tracking system also benefits waste operators, who can demonstrate their lack of liability more easily in the event of waste-related issues.

17. Environmental Disclosure and Information

17.1 Self-Reporting Requirements

The operator of a classified facility must report incidents or accidents potentially harmful to protected interests under the French Environmental Code. The report must detail the causes, consequences and measures taken to prevent recurrence and mitigate long- and medium-term effects.

Since the Lubrizol incident (see **11.4 Landmark Cases**), much has been carried out to improve crisis management and information within facilities in which dangerous substances could be the cause of major accidents. A September 2020 decree aimed at improving the prevention and management of industrial risks is one such example.

For activities that affect water, the mayor and the prefect must be informed as soon as possible by any person aware of any incident or accident that endangers public safety or the quality, circulation or conservation of water (see **6.2 Reporting Requirements**).

17.2 Public Environmental Information

Under French law, the public has the right to obtain environmental information from public authorities and bodies. This principle applies to every interested person – and to all public and private bodies – in the name of environmental public service to the extent that it is not sensitive

information (classified, public security, etc) and is related to environmental matters.

Specific activities (relating to waste, high industrial risks, contaminated lands, etc) are regulated by particular provisions.

The [Géorisques website](#) enables the public to be informed about both natural and technological risks, as well as historic pollution.

17.3 Corporate Disclosure Requirement

Under the French Commercial Code, some corporate entities are obliged to annually disclose information concerning the entity's corporate and social responsibility (CSR) engagement with their shareholders. This includes management of the social and environmental consequences of its activity.

Furthermore, the Duty of Vigilance Law of 2017 creates an obligation for the parent company to implement a "vigilance plan", which applies to approximately 150 companies.

The plan aims to control the corporate entity's activities and prevent significant breaches in environmental or human rights regulations. Since January 2020, several major French companies have been subject to claims brought by NGOs challenging the climate-related aspects of their compliance plans; however, the rulings so far have mainly concerned procedural aspects. Moreover, one NGO is publishing a comparative legal study of the plans of 25 multinationals with ranks and marks since 2020.

The EU Directive on Corporate Sustainability Due Diligence, effective from 2024 and applicable by 2027, aims to promote sustainable corporate practices. It requires companies to identify and address human rights and environmental

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impacts across their operations and global value chains.

Lastly, in 2024, new chambers were established within both the Paris Judicial Court and the Paris Court of Appeal to handle environmental disputes involving large corporations more efficiently. These chambers will have exclusive jurisdiction over cases concerning corporate sustainability due diligence.

17.4 Green Finance

The EU Sustainable Finance Disclosure Regulation (SFDR) and the EU Taxonomy Regulations both apply in France. France is also required to transpose the EU Corporate Sustainability Reporting Directive (see **7.5 ESG Requirements**).

As of 2021, the SFDR imposes mandatory ESG disclosure obligations for asset managers and financial market participants. The SFDR aims to help investors by providing transparent information about the extent to which financial products take social and environmental features into account.

Furthermore, the EU Taxonomy reporting must take place annually, in the non-financial statement or in a separate report until 2024 and in the management report from 2025 onwards. Among other things, this taxonomy enables companies to demonstrate their commitment to the low-carbon transition and enables investors to have a better understanding of the risks and opportunities of their investment portfolios.

The 2021 French Energy Climate Law, aligned with the EU SFDR Regulation, requires portfolio management companies to disclose climate change and biodiversity risks. They must also provide a document detailing their policy on incorporating environmental criteria into their

investment strategy and contributing to the energy and ecological transition.

18. Transactions

18.1 Environmental Due Diligence

Environmental due diligence is typically conducted on M&A but is less frequent for financial and real estate transactions.

Environmental due diligence is particularly important when a classified facility is included in the deal, as environmental due diligence is the only way to identify compliance issues regarding every environmental regulation and the liabilities issued in connection with contaminated lands.

Environmental due diligence performed by a purchaser typically ensures that the seller complies with applicable environmental regulations. In the case of a classified facility, the environmental due diligence will also check the possession and validity of the permits and licences required for the activity, as well as the fulfilment of the prescribed conditions. The buyer will also check the legal implications of the different identified risks and contingencies.

18.2 Disclosure of Environmental Information

The seller of land must inform the purchaser via a written statement that a classified activity used to operate on the site. The landowner must also inform the potential buyer of any danger or harm resulting from the previous facility operation.

When the seller is also the facility's operator, the contract must demonstrate that the seller provided information concerning whether or not the facility's operation led to the use or storage of hazardous substances.

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As regards M&A transactions, there is a general duty to provide information.

A seller who fails to provide the appropriate information because of voluntary omission or negligence might retain environmental liability in the following situations.

- **Hidden defects warranty:** The seller is liable for hidden defects that significantly reduce or prevent the property's use, affecting the buyer's decision to purchase. The buyer may cancel the sale, but many contracts exclude seller liability for hidden defects. However, this exclusion does not apply if the seller knew of the defect at the time of sale.
- **Fraud:** When the seller intentionally retains information to mislead the buyer, the buyer may cancel the contract.

18.3 Key Issues in Environmental Due Diligence

In France, the most common legal issues concern non-compliance with applicable environmental regulations. These breaches may include obligations relating to waste management, polluting emissions or the protection of biodiversity. On the other hand, the absence of permits or authorisations to operate classified facilities, although important, is less frequent. There are also soil and groundwater contamination issues. However, these must be assessed on a case-by-case basis.

Trends and Developments

Contributed by:

Carine Le Roy-Gleizes, Corentin Chevallier, Alice Messin-Roizard and Antoine Juquin

UGGC Avocats

UGGC Avocats was founded in 1993 and is one of the first independent law firms in France covering all areas of law. In Paris, the environment team's expertise mainly focuses on four areas: the management of facilities, risks and pollution, which encompasses support and assistance with industrial projects (including securing administrative proceedings, compliance issues, environmental and health issues and technological risk management); site redevelopment, including the development of strategies for the reconversion of industrial sites and the environmental aspects of corporate or real estate trans-

actions; waste management, including waste recycling, waste-to-energy conversion and the restructuring of extended producer responsibility programmes; and sustainable management of companies and their products, including environmental reporting, hazardous product management and the regulation of substances such as biocide and nanomaterial. The environment team in Paris is composed of Corentin Chevallier and Carine Le Roy-Gleizes (partners), along with Antoine Juquin and Alice Messin-Roizard (associates).

Authors



Carine Le Roy-Gleizes is a partner at UGGC Avocats who works on litigation before administrative, civil and criminal courts. She advises on environmental regulations in

relation to classified facilities, industrial risks, waste management, water or air impacts, soil and groundwater contamination, health and safety issues, sustainable development and chemical products. Carine has developed specific expertise in regulatory/contractual/litigation issues concerning contaminated land. She is a member of the Paris Bar, the environmental law committee of MEDEF (the largest employer federation in France), the scientific committee of Intersol and the Club des Avocats Environnementalistes (the French Environmental Law Attorneys Club). Carine regularly attends conferences with/organised by professional federations.



Corentin Chevallier is a partner at UGGC Avocats who focuses on environmental, public and mining law and international litigation matters. He counsels clients on mining and

environmental issues, including those regarding hazardous and registered facilities, waste law, water and air quality law, and energy regulations. A member of the Paris Bar, Corentin has worked on matters relating to major infrastructure projects in the energy sector, the environmental criminal liability of industrial operators and government liability (including for expropriation claims). He is also a member of the scientific committee of Atmos'Fair (a conference on outdoor and indoor air pollution).

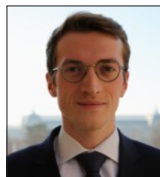
FRANCE TRENDS AND DEVELOPMENTS

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UGGC Avocats



Alice Messin-Roizard is an associate specialising in environmental law at UGGC Avocats. With two years of prior experience in environmental law, she joined the firm in 2024.

Since 2019, she has been involved in teaching environmental law, serving as a co-lecturer and student tutor at Sciences Po Paris. Alice advises on issues related to classified facilities, soil contamination, waste management and mining law, among others; she also assists clients in litigation.



Antoine Juquin is an associate who has been specialising in environmental law at UGGC Avocats since 2024, with several years of experience in the field. Antoine has previously worked

in environmental law teams, advising and litigating on issues related to industrial facilities, mining law, polluted sites and waste management. His expertise also extends to administrative and public business law, making him a well-rounded professional in the field.

UGGC Avocats

47 rue de Monceau
75008 Paris
France

Tel: +33 1 56 69 70 00
Fax: +33 1 56 69 70 71
Email: paris@uggc.com
Web: www.uggc.com



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France's Green Industry Act: Addressing Key Sector Challenges

The relative value of French industry has halved since 1970: in 2022, the sector represented 16.8% of national GDP, compared with an average of 23.5% for the European Union as a whole. The French industrial sector faces challenges that a recent Act has aimed to meet. In accordance with the Paris Agreement (2015), France is committed to taking action to keep global warming below 2°C by 2100, by reducing its emissions and adapting to the effects of climate change.

The Green Industry Act (*loi industrie, verte*), implemented on 23 October 2023, addresses these challenges by focusing on two primary goals: environmental sustainability and economic growth. Implementation provisions were published in July 2024, clarifying many of the Act's key measures.

On the environmental front, the Act aims to respond to the climate emergency by cutting 41 million tons of CO₂ equivalent by 2030, representing a reduction in the carbon footprint of imports of nearly 5% and a 1% reduction in the country's overall footprint. This substantial decrease in greenhouse gas emissions aligns with global efforts to mitigate climate change.

Economically, the new Act seeks to reindustrialise France, create jobs and reduce dependency on foreign markets, particularly as a response to the US Inflation Reduction Act of 2022. It is expected to strengthen France's industrial sovereignty by reducing imports and bolstering domestic production, particularly in sectors such as photovoltaics, wind power, batteries and heat pumps. According to the French government, the Act is projected to directly generate 40,000 jobs over the next decade and attract EUR23 bil-

lion in investment in these key industries, driving sustainable growth and innovation.

The Green Industry Act focuses primarily on the country's industrial development, with a particular emphasis on planning and simplifying procedures to promote faster, more efficient economic development. This industrial dimension forms the core of the legislative project.

However, other related themes, although less central, also play an important role. These include the circular economy, remediating and redeveloping brownfield sites, restoring biodiversity and financing green industry, all of which contribute to the transition to a more sustainable and responsible model.

Industrial development

An environmental authorisation is required for activities that materially affect the protected interests listed in the French Environmental Code, namely nature and the environment, water, health, safety, agriculture, historical monuments and archaeological heritage. Since 2017, a single environmental authorisation has been established to streamline this process.

Speeding up the environmental permitting procedure

The Green Industry Act promotes the simplification of the environmental permitting process, aiming to accelerate project approval times.

The procedure has been streamlined, transitioning from three phases to two by merging the file review and public consultation stages into a single, unified phase.

In this new process, opinions from various departments and bodies, such as government technical services, town halls and environmental

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authorities, as well as from the public, are gathered simultaneously while the prefect examines the application.

This parallel consultation not only simplifies the process but also strengthens the capacity of the public bodies responsible for reviewing applications. As a result, the time required to establish new facilities is expected to be reduced from the current average of 17 months to under nine months, facilitating faster project implementation.

Exceptional procedure for projects of major national interest †

To ensure that strategic industrial projects for the ecological transition or national sovereignty can be set up, the Green Industry Act introduces the status of “project of major national interest” (PINM; *projets industriels d'intérêt national majeur*).

This status enables strategic industrial projects at risk of being delayed during certain procedures prior to implementation (eg, urban planning permission, connecting the project to the power grid, obtaining a protected species exemption) to benefit from acceleration measures. This applies to projects of particular importance to the ecological transition or national sovereignty.

These projects are supported by several fast-tracking measures, including priority access to electricity grid connections and building permits issued by the state, instead of local authorities, consistent with urban planning documents.

In addition, the new regulations make it easier to obtain protected species exemptions, which should simplify project implementation; however, this is likely to lead to considerable legal

disputes, and NGOs have already challenged the Act in court on this point.

Drawing up a national strategy

Faced with environmental and economic challenges, the Green Industry Act aims to reindustrialise the country. In particular, it calls for the government to draw up a national green industry strategy for the period 2023–30 in order to identify “strategic sectors that should be established or developed as a priority on national territory”, as well as “national needs in materials and products”. The national strategy must also encourage experimentation with new products and processes that can contribute to the ecological transition.

Circular economy

The circular economy is a pillar of the transition and refers to producing goods and services in a sustainable way by limiting the consumption and wastage of resources and the production of waste.

End of waste procedure

Under French law, waste is subject to a special regime and must be managed from conception to disposal or recovery.

To move towards a circular economy, a new measure simplifies the reuse of waste as a raw material under certain conditions. Under the new law, a substance or object produced in a production facility that uses waste as a raw material, in whole or in part, no longer has the status of waste (ie, has end-of-waste status) if it is similar to the substance or object that would have been produced without the use of waste.

Less waste in industrial platforms

A 2019 law introduced the concept of the industrial platform (*plateforme industrielle*) into the

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French Environmental Code. This innovation provides a new legal framework for the concentration of facilities that carry out similar activities within a restricted geographical area, and can thus mutualise the administration of certain goods and services required for their activity.

From an environmental point of view, the pooling of industrial platforms' facilities enables them to reduce waste production and energy consumption, and optimise safety controls. The Green Industry Act encourages the creation of these platforms by allowing by-products to not take on the status of waste if certain conditions are fulfilled, thus promoting the development of the circular economy.

Remediation and redevelopment of brownfields

In pursuit of the dual objective of having sites available to host new industrial activities and reusing degraded land, the government aims to facilitate the reuse of such sites and land.

A more attractive interested third-party procedure

Traditionally, when a classified facility ceases operations, the operator is required to remediate the site, in accordance with a specific use, and keeps part of the liability even if the operator sells the site. This principle may have dissuaded some operators from selling sites, leading to the development of brownfield sites.

The legislator thus instituted a new mechanism, the interested third-party procedure (*tiers demandeur*), which allows the last operator of a classified facility to transfer their administrative responsibility to a third party who carries out the remediation in accordance with the provisions set by the regulatory authority. The liability of the last operator is then transferred to the purchaser.

Despite the relative success of this procedure, which has made it possible to remediate sites where the operator had disappeared or did not have the means to carry out the remediation, the Green Industry Act has sought to rectify a few provisions.

Now, with the new Act, the interested third-party can carry out not only the remediation, but also all or part of the site's security measures. The procedure can also be initiated earlier by the third party, thus saving time.

In the event of the interested third-party's default and the inability to implement financial guarantees, the last operator will remain responsible only for securing the facility in question (and no longer for remediation measures).

Strengthening requirements for pollution management measures

In the event of cessation of activity or the use of the interested third-party procedure, the new regulations require that the operator or interested third-party must include, within the pollution management measures for the affected environments (both on- and off-site), actions to eliminate concentrated pollution (subject to exceptions).

The role of consulting firms

Consulting firms will be increasingly involved in certifying the proper completion of various remediation stages when an industrial site ceases its activity. The aim is to speed up the reviewing process and reduce the daily work of the environmental authorities, in order to allow them to focus on the most significant matters.

Restoration of biodiversity

Nature is the foundation of the global economy, and a significant portion of France's GDP accord-

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ingly relies on the materials provided by various ecosystems. Therefore, to restore degraded or destroyed ecosystems and revitalise the economy, the Green Industry Act includes measures aimed at restoring biodiversity.

Establishment of natural sites for compensation, restoration and renaturation

The Green Industry Act has updated the natural compensation site system, initially created through the 2016 Biodiversity Law, by replacing it with natural sites for compensation, restoration and renaturation (SNCRR; *sites naturels de compensation, de restauration et de renaturation*) – the previous system was deemed too complex and thus rarely applied.

These sites fall under a supply-side compensation system, allowing the expected ecological gains from such sites to be converted into compensation, restoration and renaturation units, which can offset the environmental damage caused by an industrial project.

This process is still under development and will be further detailed in upcoming decrees.

Financing the green industry

The Green Industry Act aims to accelerate the mobilisation of both public and private funding to support the transition.

This financial support for the green industry is facilitated by various mechanisms, such as a savings product for individuals under the age of 21 that will be exempt from taxes and social contributions.

Additionally, the law provides for the creation of a tax credit for investments in the green industry, as well as the implementation of decarbonisation

assistance for small to medium-sized enterprises (SMEs) and intermediate-sized companies.

Conclusion

To conclude regarding the Green Industry Act and its implementing decrees of 2024, it is essential to emphasise that this legislation is part of a wider drive to promote new industrial projects and, in particular, renewable energies, as demonstrated by the APER Act (*Accélération de la Production des Énergies Renouvelables*). Enacted in March 2023, this law aims to accelerate the deployment of renewable energies in France by reducing administrative hurdles and facilitating development procedures.

The APER Act contains a number of administrative simplification measures designed to facilitate the development of renewable energies, in order to encourage local players, local authorities, businesses, landowners and farmers to develop these new sources of green energy production. The key measure of the APER Act concerns the designation of acceleration zones for the installation of renewable energies. These zones, determined by local authorities in consultation with local residents, will give priority to renewable energy production projects, regardless of whether they are photovoltaic or based on wind or renewable gas. The location of these projects must take into account the configuration of the territory, the possibilities for connection and the objectives defined by the French government.

This law is valuable because it contributes to France's energy security while reducing dependence on fossil fuels and achieving the target of carbon neutrality by 2050 set by the European Commission. It is an essential lever for the ecological transition, while at the same time being compatible with the economic and environmental ambitions set out in the Green Industry Act.

INDIA

Law and Practice

Contributed by:

Ritwick Dutta and Krishnendu Mukherjee
Doughty Street Chambers



Contents

1. Regulatory Framework and Law p.218

1.1 Environmental Protection Policies, Principles and Laws p.218

2. Enforcement Authorities and Mechanisms p.219

2.1 Regulatory Authorities p.219

2.2 Co-operation p.220

3. Environmental Protections p.221

3.1 Protection of Environmental Assets p.221

3.2 Breaching Protections p.223

4. Environmental Incidents and Permits p.223

4.1 Investigative and Access Powers p.223

4.2 Environmental Permits/Approvals p.223

4.3 Regulators' Approach to Policy and Enforcement p.223

4.4 Transferring Permits/Approvals p.223

4.5 Consequences of Breaching Permits/Approvals p.223

5. Environmental Liability p.223

5.1 Key Types of Liability p.223

5.2 Disclosure p.224

6. Environmental Incidents and Damage p.224

6.1 Liability for Historical Environmental Incidents or Damage p.224

6.2 Reporting Requirements p.224

6.3 Types of Liability and Key Defences p.225

7. Corporate Liability p.225

7.1 Liability for Environmental Damage or Breaches of Environmental Law p.225

7.2 Environmental Taxes p.225

7.3 Incentives, Exemptions and Penalties p.225

7.4 Shareholder or Parent Company Liability p.225

7.5 ESG Requirements p.226

7.6 Environmental Audits p.226

8. Personal Liability p.226

8.1 Directors and Other Officers p.226

8.2 Insuring Against Liability p.226

9. Insurance p.226

9.1 Environmental Insurance p.226

10. Lender Liability p.226

10.1 Financial Institutions/Lender Liability p.226

10.2 Lender Protection p.226

11. Civil Liability p.227

11.1 Civil Claims p.227

11.2 Exemplary or Punitive Damages p.227

11.3 Class or Group Actions p.227

11.4 Landmark Cases p.227

12. Contractual Agreements p.227

12.1 Transferring or Apportioning Liability p.227

12.2 Environmental Insurance p.227

13. Contaminated Land p.227

13.1 Key Laws Governing Contaminated Land p.227

13.2 Clearing Contaminated Land p.227

13.3 Determining Liability p.228

13.4 Proceedings Against Polluters p.228

13.5 Investigating Environmental Accidents p.228

14. Climate Change and Emissions Trading p.228

14.1 Key Policies, Principles and Laws p.228

14.2 Targets to Reduce Greenhouse Gas Emissions p.228

15. Asbestos and Polychlorinated Biphenyls (PCBs) p.228

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs p.228

16. Waste p.228

16.1 Key Laws and Regulatory Controls p.228

16.2 Retention of Environmental Liability p.229

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods p.229

16.4 Rights and Obligations Applicable to Waste Operators p.230

17. Environmental Disclosure and Information p.230

17.1 Self-Reporting Requirements p.230

17.2 Public Environmental Information p.230

17.3 Corporate Disclosure Requirement p.230

17.4 Green Finance p.230

18. Transactions p.231

18.1 Environmental Due Diligence p.231

18.2 Disclosure of Environmental Information p.231

18.3 Key Issues in Environmental Due Diligence p.231

Doughty Street Chambers has a climate and environmental justice (CEJ) group which brings together barristers from across a range of Chambers' core practice areas, pooling existing specialisms to respond comprehensively to a crisis which is global, multifaceted and complex. The climate and ecological emergency is profoundly influencing the application and understanding of existing legal norms, and Doughty Street's CEJ group is well placed to advise and act in climate litigation domestically and abroad. Doughty Street Chambers' commitment to en-

vironmental and climate justice is long-standing, as is the climate literacy of its members. The multidisciplinary CEJ group brings together barristers working across a number of areas of law to offer innovative and cross-cutting solutions to address matters ranging from mitigation and adaptation to climate inequality and biodiversity loss, to defending the rights of climate and environmental justice campaigners.

The firm would like to thank Namrata Caleb for her contribution to this chapter.

Authors



Ritwick Dutta is an India-based advocate who has focused exclusively on environmental law for over two decades. He is the founder of the Legal Initiative for Forest and Environment (LIFE),

which focuses on access to information, public participation and access to justice on matters concerning the environment, and which received the Right Livelihood Award, 2021, also known as the "Alternative Noble Prize". Ritwick is an Ashoka Fellow and a Fellow at the Right Livelihood College. He is widely published on environmental law and actively advises civil society groups, government and international organisations on matters related to environmental law.



Krishnendu Mukherjee is a barrister and Indian advocate based at Doughty Street Chambers, working between the UK and India. His current work in India includes compensating

those diagnosed with asbestos-related diseases, working to improve the situation of mineworkers in Rajasthan, and focusing on the Indian Sundarbans to improve the legal response to global warming. He co-founded the Business and Human Rights (BHR) Group in Chambers and is listed in Chambers and Partners Global Guide for BHR. He also regularly advises civil society organisations, trade unions and law firms on BHR.

Doughty Street Chambers

53-54 Doughty Street
London
WC1N 2LS
United Kingdom

Tel: +44 20 7404 1313
Fax: +44 20 7404 2283
Email: r.dutta@doughtystreet.co.uk
Web: www.doughtystreet.co.uk



1. Regulatory Framework and Law

1.1 Environmental Protection Policies, Principles and Laws

The Constitutional Framework

The Indian Constitution, as originally adopted in 1950, did not have any specific provision related to environment or environmental protection. It is only by way of the 42nd Amendment of the Constitution in 1976, that environmental protection found mention in India's constitution, requiring firstly the state to "protect and improve the environment" (Article 48A), which is part of the Directive Principles, and secondly, a fundamental duty of citizens to protect and improve the environment (51A (g)). However, both the Directive Principles and fundamental duty, by themselves do not have legal sanction for their violation. It is pertinent to point out that while the state has a duty to protect the "environment", the citizen's duty extends to "natural environment". However, while the Constitution includes "Forest", "Wildlife" and "Water" in the list of subjects to be divided between the centre and the state, there is no mention of "environment" in any list. As a result, it comes within the "residuary" subjects, and the power to legislate exists only with the Parliament and not the state

legislature. Therefore, legislating on environment is the exclusive domain of the Parliament.

The Supreme Court has, however, expanded the provisions of the Constitution to include environmental protection as well as the right to a clean environment within the scope of fundamental rights. The Constitution of India, under Article 21, provides that "No person shall be deprived of his life or personal liberty except according to procedure established by law". This fundamental "right to life" has been interpreted by the Supreme Court of India to include the fundamental right to a clean environment [see *M.C. Mehta v Kamal Nath and Ors* (2000) 6 SCC 213]. It was held that "Any disturbance of the basic environmental elements, namely, air, water and soil, which are necessary for 'life', would be hazardous to 'life' within the meaning of Article 21 of the Constitution". Recently, in March 2024, the Supreme Court of India held that the right to be free from the adverse effects of climate change is a facet of the fundamental right to equality under Article 14 and the fundamental right to life under Article 21. [see *M K Ranjitsinh and Others v Union of India and Others* 2024 SCC OnLine SC 570]. It was held that "without a clean environment which is stable and unimpacted by the vagaries of climate change, the right to life is not

fully realised”. Though the judgment has been [praised](#) for recognising the intersection between climate change and international human rights, particularly the right to health and the right to equality, it has been [criticised](#) for potentially encouraging a “conflation of climate action with renewable energy promotion”, while refraining from adequately addressing the need to boost climate adaptation and resilience, as a necessary component of this right. The judgment’s myopic emphasis the benefits of renewable energy, while ignoring its [potential problems](#), such as restricting access of traditional communities to land, fragmentation of wildlife habitats, and unsustainable consumption of water.

2. Enforcement Authorities and Mechanisms

2.1 Regulatory Authorities

The key regulatory authorities for environmental policy and enforcement include the following.

- Ministry of Environment, Forests and Climate Change, Government of India (MoEFCC) is responsible for developing the nation’s environmental policies. Several statutes confer powers on the central government to frame guidelines and grant clearances/approvals. For instance, developmental projects and activities that fall under the Category A of the Schedule of the EIA Notification, 2006, are referred to the central government for the grant of environmental clearance. These include, for example, all oil and gas exploration, river valley projects with power generation above 50 MW, and all nuclear power projects.
- A State Level Environment Assessment Authority (SEIAA) is constituted by the central government in consultation with the

concerned state government. Category B projects are referred to SEIAA for the grant of environmental clearance. These include, for example, river valley projects with power generation below 50 MW but above 25 MW.

- The Central Pollution Control Board (CPCB) is constituted under Section 3 of the Water (Prevention and Control of Pollution) Act, 1974 and performs functions for the prevention and control of both air pollution and water pollution. The functions of the CPCB include advising the central government on issues such as abatement of pollution and collecting and publishing technical and statistical data relating to air and water quality along with preparing manuals or guidelines on the same. Recent amendments made to the Air (Prevention and Control of Pollution) Act, 1981 allows the central government, in consultation with the CPCB, to exempt certain categories of industrial plants from requiring consent of State Pollution Control Boards (SPCB) before establishing such plants. Previously, consent of the SPCB was required for all such plants.
- The SPCBs are similarly constituted under the Water (Prevention and Control of Pollution) Act, 1974 and are tasked with inspecting equipment, industrial plants, manufacturing processes, and issuing directions to persons operating such equipment or plants for the control or abatement of air and water pollution, and laying down, in consultation with the CPCB, standards for emission of air and water pollutants from industrial plants and automobiles, etc. However, the functioning of the CPCB and SPCBs has been plagued by lack of capacity, persistent vacancies in technical positions, lack of funding, and concerns over conflicts of interest. A [Performance Audit Report](#) prepared by the Comptroller and Auditor General for the Gujarat Pollution Control Board (GPCB) for the year 2022, for

example, indicates that that the GPCB monitored Ambient Air Quality (AAQ) at 62 stations covering only 14 cities. AAQ was not being monitored in major industrial estates and areas prone to air pollution. In addition, despite a CPCB direction to ensure the installation of an Online Continuous Emission Monitoring System (OCEMS) in 2016, six years later, 67 units were lacking such a monitoring system. Further, online emission data for 17 category units were not available in the public domain. SPCBs do not have the power to impose spot fines or penalties proportionate to environmental harm on errant industries, however, they can issue orders for the closure of industries or the cessation of operations.

- The Commission for Air Quality Management in the National Capital Region and Adjoining Areas (CAQM) was established to resolve air quality issues in the National Capital Region of Delhi and neighbouring areas which experience dangerous dips in air quality, especially around the winter season. The CAQM implements the Graded Response Action Plan (GRAP) which is an emergency response mechanism with various stages, triggered when the Air Quality Index (AQI) reaches “poor levels”. The stages involve enforcement of regulations on the plying of certain diesel vehicles, limited operation hours for certain diesel generators, and in a situation where the AQI exceeds 450, potential closure of educational institutions and non-essential businesses.
- The National Board for Wildlife (NBW) is constituted under Section 5A of the Wildlife Protection Act, 1972 and consists of the Prime Minister, Minister-in-Charge of Forests and Wildlife, eminent conservationists, ecologists and environmentalists, and the Chief of Army Staff, among other members. It is tasked with, inter alia, framing policies on promot-

ing wildlife conservation, controlling poaching and illegal trade, and carrying out impact assessments of various projects and activities on wildlife habitats and granting clearances.

2.2 Co-operation

Regulatory bodies are constituted by the government and work under the supervision of the government. Although they are “autonomous”, they are not fully independent.

Industries and project proponents co-operate with regulatory authorities in the following manner:

- Public consultation – the EIA Notification provides for “public consultation” as one of the steps prior to being granted an environmental clearance. This allows stakeholders and locally affected communities to air their concerns.
- Environmental Impact Assessment (EIA) – co-operation involves disclosing important information regarding distance from wildlife habitats, geological vulnerabilities, etc, in the Form-1 prior to the preparation and preparing of extensive EIA reports, conducting public consultations, and addressing concerns raised during the EIA process.
- Environmental Management Plans (EMP) – developing plans to manage and mitigate the environmental impact of projects, including monitoring, reporting and remediation activities.
- Corporate Social Responsibility (CSR) – companies co-operate with authorities by engaging in CSR activities that may benefit the environment and local communities.
- Audits and inspections – authorities conduct audits and inspections to ensure compliance. Companies co-operate by providing access to facilities, records, and assisting inspectors during their visits.

3. Environmental Protections

3.1 Protection of Environmental Assets

The Environment (Protection) Act, 1986 is a comprehensive Act which empowers the central government to issue notifications, rules and guidelines on the standards of quality of water, soil or air, the maximum permissible limits of environmental pollutants, and the restriction on the location of industries and processes in different areas.

Specific Legislation

Specialised legislation such as the EIA Notification, 2006 and the CRZ Notifications, provide for detailed steps for the impact assessment of developmental activities near coastal stretches and ecologically sensitive areas.

Breaching protections

Recent amendments under the Jan Vishwas (Amendment of Provisions) Act, 2023 have revised fines under the EPA, Water Act and Air Act. Offences under the same have been “decriminalised” and will no longer attract imprisonment. However, the fines prescribed are a minuscule proportion of most violating companies’ annual turnover and are likely to promote a culture of “pollute and pay”.

Contravention of any conditions in an environmental clearance may result in the clearance being revoked. Where an errant industry has breached provisions and caused substantial environmental degradation, the National Green Tribunal has imposed costs and compensation and ordered restitution. Under Section 26 of the NGT Act, 2010, the NGT may impose imprisonment which may extend to three years or a fine which may extend to INR100 million as punishment for any non-compliance of its order, award or decision.

Environmental Incidents and Permits

Investigative and access powers

- Authority to conduct inspections – the CPCB and SPCB have been empowered to carry out inspections at industrial facilities to ensure compliance with emission standards and norms. They can initiate inspections based on complaints from the public or suo moto in a situation where they suspect a violation.
- Information gathering – while conducting an inspection, the authorities may seek information about effluent discharges, emissions and waste disposal from the operators of an industry.
- Surveys and sampling – officials of the SPCB are also empowered to take air, water and soil samples to assess compliance with prescribed standards.
- Request for further information – officials can request the operator of a facility or industry to provide other information for their investigation.

Environmental permits/approvals

Before establishing any industry or developmental activity, project proponents must obtain certain clearances and permits.

- Consent to Establish (CTE) – the project proponent must apply for a CTE from the SPCB or PCC before commencing any project.
- Consent to Operate (CTO) – once the industry has been established, the project proponent needs to obtain a CTO from the same authority that issued the CTE.
- Forest Clearance (FC) – if the project requires forest land, a forest clearance is required under the Forest (Conservation) Act, 1960. Permission from the Gram Sabha may also be required, if forest rights of scheduled tribes or indigenous communities are involved.

- Environmental clearance – depending on the project's location, nature of activity, and scale, an environmental clearance may be necessary.
- Other permits – depending on the nature of the activity, other permits may be required. Groundwater usage may require a No Objection Certificate (NOC) from the Central Ground Water Authority (CGWA). Projects falling within National Parks, Wildlife Sanctuaries, Tiger Reserves, and Corridors, or within the 10 km radius of any protected area, require a wildlife clearance from the Standing Committee of the National Board of Wildlife (NBWL).

Environmental permit regime

Appeal mechanism– project proponents may appeal a decision of the SPCB under Section 31 of the Air Act and Section 28 of the Water Act before the Appellate Authority. They may also appeal against a decision of the SPCB before the NGT. As aforementioned, decisions granting or refusing forest clearances or environmental clearances may also be appealed before the NGT. Additionally, an aggrieved party may also file a Writ Petition against the decision of an authority before the High Court or Supreme Court of India under Article 226 and Article 32 of the Constitution respectively.

Approach to policy and enforcement

Legislation such as the EPA, Air Act, Water Act, and the Environmental Impact Assessment Notification, 2006 were enacted in fulfilment of India's commitment at the 1972 UN Conference on the Human Environment in Stockholm to protect and improve the environment and prevent hazards to human beings, other living creatures, plants and property. However, in recent times, there have been many regressive amendments to these laws with the intention of reducing the

“burden” of compliance, and promoting “ease of doing business”. This despite the fact that the NGT has recognised the “principle of non-regression” which, according to the International Union for the Conservation of Nature (IUCN) is “an international law principle... requiring that norms which have already been adopted by states not be revised, if this implies going backward on the standards of protection”. This is exemplified by the recent decriminalisation of offences under the EP Act and Air Act by way of the Jan Vishwas (Amendment of Provisions) Act, 2023 which aims to “amend certain enactments for decriminalising and rationalising offences to further enhance trust-based governance for ease of living and doing business”.

Transferring permits/approvals

An existing Consent to Operate (CTO) may be transferred from the previous owner to the new one, within the same validity period, in the case of a merger or acquisition, where the industry will continue at the same scale. The new owner must inform the SPCB to confirm the transfer. If there is an expansion in the activity or a change in the nature of the activity, a fresh CTO application is required. Similarly, a forest clearance and environmental clearance may be transferred as long as the nature of activity, scale, etc, of the project remains unchanged.

Consequences of breaching permits/ approvals

The Water Act, Air Act, and the EPA prescribe penalties for offences by companies. Individuals in managerial positions can be held responsible if the company commits an offence. However, they can avoid liability if it is proved that the offence had been committed without their knowledge or that they exercised all due diligence and precautions to prevent the commission of the offence. Suppression of information

and submission of false information in the EC application can also lead to cancellation/revocation of an environmental clearance. The CPCB has devised a formula to calculate environmental compensation for violations based on factors such as the extent of pollution, duration of the violation, scale of operation and the location. The NGT, High Courts and Supreme Court are empowered to impose additional penalties.

3.2 Breaching Protections

Recent amendments under the Jan Vishwas (Amendment of Provisions) Act, 2023 have revised fines under the EPA, Water Act and Air Act. Offences under the same have been “decriminalised” and will no longer attract imprisonment. However, the fines prescribed are a minuscule proportion of most violating companies’ annual turnover and are likely to promote a culture of “pollute and pay”.

Contravention of any conditions in an environmental clearance may result in the clearance being revoked. Where an errant industry has breached provisions and caused substantial environmental degradation, the National Green Tribunal has imposed costs and compensation and ordered restitution.

4. Environmental Incidents and Permits

4.1 Investigative and Access Powers

See the discussion on investigative and access powers in **3.1 Protection of Environmental Assets**.

4.2 Environmental Permits/Approvals

See the discussion on environmental permits/approvals in **3.1 Protection of Environmental Assets**.

4.3 Regulators’ Approach to Policy and Enforcement

See the discussion on India’s approach to policy and enforcement in **3.1 Protection of Environmental Assets**.

4.4 Transferring Permits/Approvals

See the discussion on transferring permits/approvals in **3.1 Protection of Environmental Assets**.

4.5 Consequences of Breaching Permits/Approvals

See the discussion on consequences of breaching permits/approvals in **3.1 Protection of Environmental Assets**.

5. Environmental Liability

5.1 Key Types of Liability

Tortious Liability

In *MC Mehta v Union of India* [AIR (1987) SC 965] the Supreme Court of India established the “absolute liability” principle where those engaged in inherently hazardous activities are held to be absolutely liable for any harm or damage, irrespective of fault or intent.

Criminal Liability

Section 270 of the Bharatiya Nyaya Sanhita, 2023 makes “public nuisance” a crime, which includes actions or omissions that harm the public or cause significant disturbance in a community. Section 279 of the same makes fouling of the water of a public spring or reservoir to be an environmental crime.

Civil Liability

- Compensation – polluters and operators may be required to compensate victims of pol-

lution or environmental damage for health impacts, losses or damage to property.

- Restitution – courts can order the restoration or rehabilitation of polluted land, water bodies and ecosystems.
- Statutory liability – violators of the Water Act, Air Act and the EPA can be held liable for failing to comply with the law.
- Vicarious liability – entities may be held vicariously liable for the actions or omissions of their employees in violation of environmental laws.
- Joint and several liability – multiple parties can be held jointly and severally liable for the costs of remediation.
- Penalties by NGT – the NGT can impose substantial fines and penalties on violators of environmental laws and can order relief, compensation and restitution.
- Exemplary damages – the NGT may impose exemplary damages on polluters to deter environmental violations.
- Contractual liability – polluters may be subject to contractual liabilities if their activities result in environmental breaches specified in contracts or agreements.

5.2 Disclosure

EIA – environmental issues must be disclosed as part of the EIA process. Project proponents must submit a comprehensive EIA report that includes details of the project's environmental impact, mitigation measures and plans to address the concerns of persons likely to be affected.

CTE and CTO – project proponents must disclose information about effluent discharges, air emissions, waste management and compliance with standards.

Projects that require clearance for forest land must disclose the environmental impact of the

project on forests, wildlife and ecosystems as part of the FC application.

Corporate reporting – publicly listed companies in India are often required to disclose their environmental performance and initiatives in their annual reports as part of their CSR obligations.

Pollution reporting – companies and entities engaged in potentially polluting activities must regularly report their pollution and emissions data as per statutory requirements under the Water Act, Air Act and other environmental laws.

Consequences of Non-disclosure/Incomplete Disclosure

Non-disclosure can lead to the rejection of permits, clearances or approvals, and legal action including imposition of penalties and claims for compensation and restoration.

6. Environmental Incidents and Damage

6.1 Liability for Historical Environmental Incidents or Damage

In India, liability for historical environmental damage or historical pollution is subject to the law of limitation, doctrine of laches as well as statutory period of limitation under the National Green Tribunal Act, 2010

6.2 Reporting Requirements

Section 9 of the EPA, Section 31 of the Water Act and Section 23 of the Air Act require notifying the authorities when there has been a release of an environmental pollutant exceeding the specified standards or when there is an apprehension of such a release.

6.3 Types of Liability and Key Defences

Enterprises involved in inherently dangerous or hazardous activities are absolutely liable to compensate those affected by such environmental harm, irrespective of whether reasonable care was taken by them.

Liability is established upon demonstrating a causal link between the defendant's actions and environmental harm. The amount of compensation levied depends on the annual turnover or capacity of the enterprise.

Defences available include:

- proving that there has been no violation of a statutory provision;
- proving that no harm has been caused to the environment;
- proving that the harm was not due to the defendant's actions; or
- the harm was unforeseeable.

7. Corporate Liability

7.1 Liability for Environmental Damage or Breaches of Environmental Law

The EPA, Air Act and Water Act provide that any person conducting the affairs of a company shall be liable for any violation of environmental law by the company.

7.2 Environmental Taxes

The Ministry of Road Transport and Highways levies a "Green Tax" on old vehicles. The rate of tax varies according to whether the vehicle is a transport vehicle or a personal vehicle. Vehicles such as hybrids, electric vehicles, and those operating on alternative fuels such as CNG, LPG and agricultural vehicles have been exempted. In *MC Mehta v Union of India* [(2018) 18 SCC

752], the Supreme Court of India imposed an Environment Compensation Charge (ECC) of 1% for the registration of diesel cars having an engine capacity greater than 2,000 CC in Delhi-NCR.

7.3 Incentives, Exemptions and Penalties

Some investments in renewable energy or energy efficient technologies may qualify for tax benefits and incentives under Section 80-IA of the Income Tax Act, 1961.

Obtaining "Green Certifications" such as ISO 14001 (Environmental Management System), can improve a company's credibility and demonstrate a commitment to the environment.

Certain sectors and industries that may have a minimal impact on the environment such as small and medium-sized businesses in agro-based, electronic, food and beverages, plastic and textile sectors have been characterised as "white industries" and are exempt from obtaining an Environmental Clearance. Draft amendments to the Air Act and Water Act propose to exempt these "white industries" from CTO and CTE permit requirements. Such industries must "self-declare" their compliance with environmental provisions through forms submitted to the SPCBs, instead.

Companies that contravene provisions may be subject to penalties, environmental compensation and exemplary damages.

7.4 Shareholder or Parent Company Liability

Usually, the shareholder and the parent company will not be held liable for environmental damage or breach of environmental law by a company or subsidiary company. In certain exceptional circumstances, a regulator may lift the corpo-

rate veil to hold a parent company liable for environmental damage caused by a subsidiary company.

7.5 ESG Requirements

The Security and Exchange Board of India (SEBI) issued a circular providing that the top 1,000 listed companies in India are required to prepare a “business responsibility and sustainability report” which includes disclosures with respect to energy consumption, water withdrawal, air emissions, greenhouse gas emissions, waste management, sustainable sourcing, and compliance with extended producer responsibility. In addition, there are limited mandatory ESG disclosure requirements. For example, under Section 134(m) of the Companies Act, 2013 companies are required to make disclosures regarding energy conservation in their annual reports.

7.6 Environmental Audits

Environmental audits are statutorily mandated under Rule 14 of the EP rules. It makes it compulsory for all persons carrying on an industry, operation or process requiring consent under the Water Act or Air Act or both or an authorisation under the Hazardous Waste Management Rules, to submit a statement to the SPCB every year for the period ending 31 March.

8. Personal Liability

8.1 Directors and Other Officers

The EPA, Air Act and Water Act provide that any person responsible for the conduct of a company’s business including directors and key managerial persons shall be deemed guilty of all offences and shall be liable accordingly.

8.2 Insuring Against Liability

Regulation 25(10) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 mandates that the top 1,000 listed companies in India (by market capitalisation) hold a Directors & Officers (D&O) Insurance Policy for its independent directors.

9. Insurance

9.1 Environmental Insurance

Owners, users and carriers of hazardous chemicals, as defined under the EPA, who possess more than the minimal quantity specified in the Public Liability Insurance Act, 1991 are required by the Act to obtain insurance. Certain private insurance providers have introduced “green insurance” which cover liabilities arising from the pollution of water, land, air or collateral damage to the environment, which can help with the restoration of damage. Use of asbestos or lead, prior knowledge, terrorism and war are exceptions to insurance coverage.

10. Lender Liability

10.1 Financial Institutions/Lender Liability

Lenders are not directly held accountable for environmental non-compliance and damages unless they hold a position on the board of directors or are otherwise involved in the daily operations of the company.

10.2 Lender Protection

Lenders are ordinarily not exposed to liabilities for environmental non-compliance. However, lenders can conduct due diligence on the company concerned to avoid any vicarious impact of such liabilities.

11. Civil Liability

11.1 Civil Claims

The NGT has the jurisdiction to hear civil cases involving an environmental issue arising from any of the statutes mentioned in Schedule I to the NGT Act. Civil claims can also be filed in competent civil courts for compensation in relation to non-compliance with environmental laws arising out of contractual disputes.

11.2 Exemplary or Punitive Damages

Courts impose exemplary damages for harm caused to the environment. The Supreme Court has held that the quantum of compensation must be correlated to the capacity and magnitude of the enterprise at fault.

11.3 Class or Group Actions

Class actions are not prevalent in India. Order 1 Rule VIII of the Civil Procedure Code, 1908 (CPC) provides for the filing of representative suits. A representative suit is filed by one or more persons on behalf of themselves and others having a common interest in the suit. Further, a public interest litigation may be filed by a person who does not have personal interest in a matter and is not directly affected.

11.4 Landmark Cases

In *Vellore Citizens' Welfare Forum v Union of India* (1996) 5 SCC 647, the Supreme Court of India applied the precautionary principle and held that the burden of proof is on the project proponent to demonstrate that the proposed activity is environmentally benign.

In *MC Mehta v Kamal Nath* (1997) 1 SCC 388, the Supreme Court held the doctrine of public trust to be an essential part of environmental law jurisprudence. It was held that the state acts as a trustee of natural resources and bears the legal

duty to protect natural resources. There have been numerous judgments of the National Green Tribunal fixing liability on the polluters.

12. Contractual Agreements

12.1 Transferring or Apportioning Liability

The regulator fixes liability on the identified defaulter/offender/polluter. Therefore, liability cannot be transferred or apportioned between parties. However, a company can enforce indemnities or enter into contractual agreements for the recovery of fines/penalties imposed.

12.2 Environmental Insurance

See 9.1 Environmental Insurance.

13. Contaminated Land

13.1 Key Laws Governing Contaminated Land

India does not have a legislation on contaminated land. However, the EPA provides for the testing of samples, including soil samples, in an environmental laboratory notified by the central government. In case of a violation, the EPA prescribes a fine for damage caused by contamination of soil.

13.2 Clearing Contaminated Land

Section 9 of the EPA provides that where the discharge of any environmental pollutant is in excess of the prescribed standards, the person responsible for such discharge is bound to prevent or mitigate the environmental pollution caused as a result of it. This applies to land contaminated as a result of discharge of environmental pollutants.

13.3 Determining Liability

The Supreme Court has, in a number of cases, held industries to be jointly liable for environmental degradation caused by them. For instance, in *Vellore Citizens' Welfare Forum v Union of India* [(1996) 5 SCC 647], the Supreme Court held 533 tanneries responsible for discharging untreated effluents into agricultural fields, roadsides and open lands. The court imposed heavy costs on each such tannery that failed to take remedial measures.

13.4 Proceedings Against Polluters

Public-spirited citizens or non-governmental organisations can file Public Interest Litigations (PIL) before constitutional courts against polluters. In cases where individuals or communities are directly affected, a person seeking relief and compensation may approach the NGT.

13.5 Investigating Environmental Accidents

CPCBs or SPCBs have been empowered to conduct inspections at industrial entities upon receiving a complaint or suo moto. Constitutional courts may also direct authorities to carry out investigations. They can collect samples, search facilities, and ask the occupier to provide information.

14. Climate Change and Emissions Trading

14.1 Key Policies, Principles and Laws

India does not have any legislation to deal with climate change. The National Action Plan on Climate Change is a policy document and is not legally enforceable.

14.2 Targets to Reduce Greenhouse Gas Emissions

At the Conference of Parties (COP) 28 held in Dubai, India announced that it had successfully reduced the emission intensity vis-à-vis its GDP by 33% between 2005 and 2019, thus achieving the initial Nationally Determined Contribution (NDC) target for 2030, 11 years ahead of the scheduled time.

India aims to attain net-zero emissions by 2070 via an emissions trading system known as the Carbon Credit and Trading Scheme (CCTS).

India also announced that it had achieved 40% of electric installed capacity through non-fossil fuel sources, nine years ahead of the target for 2030. Between 2017 and 2023, India has added around 100 GW of installed electric capacity, of which around 80% is attributed to non-fossil fuel-based resources.

15. Asbestos and Polychlorinated Biphenyls (PCBs)

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs

India has banned asbestos mining but is the top importer of white (chrysotile) asbestos used primarily by the construction industry for asbestos-cement roofing. This despite the fact that the World Health Organisation (WHO) and several countries have opined that asbestos has no safe uses.

16. Waste

16.1 Key Laws and Regulatory Controls

Key laws and regulatory controls governing waste in India are as follows.

- The E-Waste (Management) Rules, 2022 provide for the Extended Producer Responsibility (EPR) regime for e-waste recycling and have re-introduced annual e-waste recycling targets.
- The Plastic Waste (Management) Rules, 2016 provide that producers minimise the generation of plastic waste, prevent littering of plastic waste, and segregate plastic waste at the source. The rules also provide for the collecting and recycling of plastic waste by producers via the EPR regime.
- Hazardous Waste Management Rules provide for the scientific storage, treatment and disposal of hazardous and other waste which by reason of characteristics such as physical, chemical, biological, reactive, toxic, flammable, explosive or corrosive nature are likely to cause danger to the environment and human life.
- Construction and Demolition Waste Management Rules, 2016 provide for the management of waste generated by construction, remodelling, repair and demolition of any civil structure.
- Bio-Medical Waste Management Rules, 2016 provide for the management of bio-medical waste – ie, waste generated in any form during the diagnosis, treatment or immunisation of human beings or animals or research activities or in the production or testing of biological materials or in health camps.
- Solid Waste Management Rules, 2016 provide for the safe and scientific disposal of solid waste including solid or semi-solid domestic waste, sanitary waste, commercial waste, institutional waste, catering and market waste and other non-residential waste, street waste, silt removed or collected from the surface drains, horticulture waste, agriculture and dairy waste.

- Batteries (Management and Handling) Rules, 2022 provide that producers (including importers) of batteries are responsible for the recycling of waste batteries, and materials recovered from the waste are used in the manufacture of new batteries.
- Municipal Solid Wastes (Management and Handling) Rules, 2000 provide for the management of solid waste including commercial and residential wastes generated in municipal or notified areas.

16.2 Retention of Environmental Liability

The liability for waste disposal and management primarily lies with the producer. In certain situations, responsibility is shifted to third parties such as refurbishers (under Rule 7 of the E-Waste Rules), bulk consumers (under Rule 8 of the E-Waste Rules), recyclers (under Rule 9 of the E-Waste Rules) and occupiers (under Rule 4 of the Bio-Medical Waste Management Rules, 2016).

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

Under the Plastic Waste Management Rules, 2016 an Extended Producer Responsibility (EPR) regime has been introduced which requires producers, importers, and brand owners to ensure that their plastic packaging waste is processed through recycling, re-use or end-of-life disposal via waste-to-energy, industrial composing etc. However, the implementation of this scheme has recently come under the scanner with the National Green Tribunal (NGT) issuing notice to the Central Pollution Control Board and Ministry of Environment, Forests and Climate Change (MoEFCC) on the recovery of 600,000 fake EPR certificates at four plastic recycling companies in the Indian states of Gujarat, Maharashtra, and Karnataka. The EPR certificates were being

issued to companies that utilise plastic packaging to meet legal obligations to recycle a certain percentage of plastic used by them. However, the Central Pollution Control Board (CPCB), by way of an audit, found that the companies were generating far more EPR certificates than their capacity to recycle waste.

16.4 Rights and Obligations Applicable to Waste Operators

Waste operators are bound by the “polluter pays” principle.

17. Environmental Disclosure and Information

17.1 Self-Reporting Requirements

Section 9 of the EPA, Section 31 of the Water Act, and Section 23 of the Air Act require notifying the authorities when there has been a release of an environmental pollutant exceeding the specified standards or when there is an apprehension of such a release.

17.2 Public Environmental Information

An Indian citizen may obtain environmental information via an application under the Right to Information Act, 2005. Certain information is exempted however, under Section 8 of the Act.

- Information that any court of law or tribunal has forbidden to be published, or the disclosure of which would be contempt of court.
- Information which would harm the competitive position of a third party, unless the authority believes that it would be in the interest of the public that such information be disclosed.
- Information that concerns personal information without any prevailing larger public interest.

“Public Authority” means any authority or body or institution of self-government established:

- by or under the Constitution of India;
- by any other law made by Parliament;
- by any other law made by state legislature; or
- by notification issued or order made by the appropriate government including any:
 - (a) body owned, controlled or substantially financed; or
 - (b) non-governmental organisation substantially financed, directly or indirectly, by funds provided by the appropriate government.

17.3 Corporate Disclosure Requirement

See 7.5 ESG Requirements.

17.4 Green Finance

The government of India has taken various steps to encourage the development of green finance.

- Renewable energy projects such as solar/biomass-based power generators, windmills, micro-hydel plants, street-lighting systems, and village electrification are given loans on priority as part of the Priority Sector Lending (PSL) scheme.
- The government has introduced sustainable finance instruments such as sustainability-linked loans and sustainability-linked bonds. Indian entities also raise offshore finance through green bonds, social bonds, sustainable bonds and sustainability-linked bonds.

In February 2022, the government of India declared plans to issue sovereign green bonds to fund green infrastructure such as solar, wind and small hydropower plants, along with research and development of new technologies such as tidal energy. These funds are to be used in public

sector projects which contribute towards reducing the carbon intensity of the Indian economy.

18. Transactions

18.1 Environmental Due Diligence

It is common for buyers to carry out environmental due diligence to ascertain any environmental non-compliance, and pre-transaction environmental liabilities could be transferred from the seller to the buyer. The seller may then propose to indemnify the buyer against any risks/liabilities arising out of environmental non-compliance.

18.2 Disclosure of Environmental Information

A seller is required to make the disclosure of any environmental compliances and violations to the satisfaction of the purchaser.

18.3 Key Issues in Environmental Due Diligence

Environmental due diligence is seen as a mere formality to be complied with. The lack of ethical standards means that there is a huge gap between what is claimed and what exists on the ground. The lack of publicly available information also makes due diligence difficult.

Trends and Developments

Contributed by:

Ritwick Dutta and Krishnendu Mukherjee

Doughty Street Chambers

Doughty Street Chambers has a climate and environmental justice (CEJ) group which brings together barristers from across a range of Chambers' core practice areas, pooling existing specialisms to respond comprehensively to a crisis which is global, multifaceted and complex. The climate and ecological emergency is profoundly influencing the application and understanding of existing legal norms, and Doughty Street's CEJ group is well placed to advise and act in climate litigation domestically and abroad. Doughty Street Chambers' commitment to environmen-

tal and climate justice is long-standing, as is the climate literacy of its members. The multi-disciplinary CEJ group brings together barristers working across a number of areas of law to offer innovative and cross-cutting solutions to address matters ranging from mitigation and adaptation to climate inequality and biodiversity loss, to defending the rights of climate and environmental justice campaigners.

The firm would like to thank Namrata Caleb for her contribution to this chapter.

Authors



Ritwick Dutta is an India-based advocate who has focused exclusively on environmental law for over two decades. He is the founder of the Legal Initiative for Forest and Environment (LIFE),

which focuses on access to information, public participation and access to justice on matters concerning the environment, and which received the Right Livelihood Award, 2021, also known as the "Alternative Noble Prize". Ritwick is an Ashoka Fellow and a Fellow at the Right Livelihood College. He is widely published on environmental law and actively advises civil society groups, government and international organisations on matters related to environmental law.



Krishnendu Mukherjee is a barrister and Indian advocate based at Doughty Street Chambers, working between the UK and India. His current work in India includes compensating

those diagnosed with asbestos-related diseases, working to improve the situation of mineworkers in Rajasthan, and focusing on the Indian Sundarbans to improve the legal response to global warming. He co-founded the Business and Human Rights (BHR) Group in Chambers and is listed in Chambers and Partners Global Guide for BHR. He also regularly advises civil society organisations, trade unions and law firms on BHR.

Doughty Street Chambers

53-54 Doughty Street
London
WC1N 2LS
United Kingdom

Tel: +44 020 7404 1313
Fax: +44 020 7404 2283
Email: r.dutta@doughtystreet.co.uk
Web: www.doughtystreet.co.uk



Environmental laws in India owe most of their origin to the Stockholm Conference on Human Environment, 1972. The post-Stockholm era marked the enactment of significant environmental laws in India: the Air Act, 1974, Water Act, 1981, and the Environment (Protection) Act, 1986. The Bhopal Gas disaster – regarded as one of the most horrific environmental disasters in recent history, exposed both the inadequacy of environmental legislation as well as the lack of corporate accountability. The fact that a major transnational corporation could escape with no criminal liability still remains a blight on India's environmental legislation.

The setting up of the National Green Tribunal 2010 marked a watershed in environmental litigation in India. For the first time, the Parliament recognised the right of citizens to approach a specialised judicial forum for asserting their right to a clean and healthy environment. Significantly, it recognised the right of citizens to claim damages and fix liability on entities involved in environmental harm. Over a decade and a half, the NGT has rendered significant judicial decisions which have had an immense impact on shaping the way in which environmental law is understood and implemented in India.

India is seen as a global leader when it comes to the evolution of environmental jurisprudence. Environmental law principles such as the “polluter pays” principle, precautionary principle and public trust doctrine were treated as the “law of the land” by the Supreme Court from the 1990s onwards. Later, new principles such as “eco-centric” and “species best interest standard” became part of judicial decisions. However, there has been a wide gap between law and practice. The “polluter pays” principle has become more of a “pay and pollute” regime; while the doctrine of proportionality has been extensively relied on by the courts to allow for transgressions of environmental law. Though the Supreme Court has highlighted the importance of the “Environmental Rule of law” and the centrality of the same in governance, its impact on day-to-day environmental governance is yet to be seen.

The deteriorating quality of the environment, with nearly 12 of the 20 most polluted cities in the world located in India, and lack of governmental initiative, has meant that impacted communities and citizen groups still see law and litigation as a tool for ensuring not only clean air and water but also secure environmental justice. In such a scenario, India's environmental law litigation

is bound to see a quantum leap in the years to come. Specifically, litigation around climate change, which today accounts for a minuscule percentage of cases in India as well as South Asia in general, is bound to see a quantum leap. In addition, new Conventions such as the Hong Kong Convention on Safe Recycling of Ships and the Global Plastic Treaty (GPT) will add a new dimension to environmental law implementation in India and other countries in South Asia. Overall, the trend in environmental law will be from local and national to transnational environmental concerns including issues relating to liability and trans-boundary environmental harm.

The Direction that Environmental Law Will Take in the Coming Years

Climate justice-related legal action

Climate change is bound to impact Small Island nations the most. However, in terms of total number of people impacted, it is countries in South Asia which will be most affected. In fact, factoring in climate change is crucial not only from the point of view of communities and nature but also from an economic development perspective. The Supreme Court recognised the negative effect of climate change on economic growth by relying on the report of the Reserve Bank of India which estimated a loss of 9% GDP due to climate change (*Imtiaz Versus State of Telengana*).

The climate crisis is no longer a crisis of the future: damages due to climate change are becoming more pronounced. In such a situation, the quest for a just resolution becomes more urgent. Litigation is emerging as an effective tool to address climate change-related issues and activists for climate justice are increasingly finding their voice in courts across the world. Impacted communities, concerned citizens and

groups turn to the law to urge governments and the corporate sector to take responsibility.

On 29 March 2023, the United Nations General Assembly took the unprecedented step of adopting a resolution proposed by the island nation of Vanuatu to seek an opinion from the International Court of Justice on the legal obligations of nations to protect climate systems and people affected by the climate crisis. This is a significant legal acknowledgment of the climate crisis on the one hand and the need for the international court to apply its judicial mind to an unparalleled crisis of survival.

With growing and more evident losses from climate change, expectations are quickly turning into responsibility in national legal systems to bring about climate action. The breach of such climate-related responsibilities and violation of various rights have been reaching national courts that require a decision in the civil, administrative or even criminal spheres (*Setzer and Higham, 2022*). As a result of legal practices developing through courts' precedents in favour of climate action, climate litigation risks – or climate liabilities – have become increasingly more material and the risks associated with ignoring such liabilities for companies and governments are now substantial.

In March 2024, the Supreme Court of India held that the right to be free from the adverse effects of climate change is a facet of the fundamental right to equality under Article 14 and the fundamental right to life under Article 21 [*M K Ranjitsinh and Others v Union of India and Others 2024 INSC 280*]. It was held that “without a clean environment which is stable and unimpacted by the vagaries of climate change, the right to life is not fully realised”. Though the judgment has been [praised](#) for recognising the intersec-

tion between climate change and international human rights, particularly the right to health and the right to equality, it has been criticised for potentially encouraging a “conflation of climate action with renewable energy promotion”, while refraining from adequately addressing the need to boost climate adaptation and resilience, as a necessary component of this right. Others have [criticised](#) the judgment’s myopic emphasis on the benefits of renewable energy, while ignoring its [potential problems](#), such as restricting access of traditional communities to land, fragmentation of wildlife habitats, and unsustainable consumption of water. Nevertheless, the court recorded the importance of climate litigation and the need to have a specific national law to deal with climate change.

“The topics of environmental degradation, pollution, industries and infrastructure projects have long formed the corpus of cases before courts across countries. Of late, however, an increasing number of cases are to do with climate change, in one way or another.” (Paragraph 45 of the judgment).

The Supreme Court cited some of the cases in other jurisdictions such as *State of the Netherlands v Urgenda Foundation*, *In Sacchi, et al. v Argentina, et al* and *Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment*, in order to emphasise that “these cases, all instituted and decided in the past decade, indicate the type of concerns which will travel to the courts in the next few years” (paragraph 50).

The authors see that this trend of climate litigation is bound to increase, especially in the global south, as the science behind the attribution of climate hazards to human-induced climate change advances and the link between

domestic legislation, international commitments and impacts due to climate change establishes precedents globally. The role of environmental lawyers is bound to be crucial given that the issues will relate not just to law but also to the science. In fact, it is recognised that science is central to legal debates on the links between climate change, human actions and the impacts on the environment. This, combined with advances in international law and commitments at the climate Conference of the Parties (COP), shows how trends in climate litigation are advancing as legal tools which are made available to national courts to respond to the climate emergency.

Specifically, the authors see litigation in South Asia in general and India in particular to be rather focussed around adaptation and resilience since mitigation targets remain largely voluntary in nature besides the fact that per capita emission in South Asia is among the lowest in the world. There is a crucial need for specialised legal advice in the area of environmental law in general and climate change in particular. However, addressing issues related to climate change from a purely environmental angle is unlikely to address the issue from a holistic perspective. At the centre of the climate crisis is the issue of rights. The impact of climate change is not equal.

There is a close link between climate justice and human rights at the core of the Doughty Street Chambers practice area. As climate attribution and loss and damage become more prominent, it is imperative for expert legal advice and assistance to impacted and vulnerable communities in seeking legal remedies. At another level, there will be greater need for legal advice by civil society groups while making meaningful interventions at the Conference of Parties on UNFCCC.

Toxic Trade and Waster Colonialism

The practice of exporting waste from higher-income countries to lower-income countries, which are often ill-equipped to handle this waste, is a form of [environmental racism](#) or waste colonialism. Waste trade is often referred to as “[waste colonialism](#)” due to the unequal and exploitative dynamics involved in the global movement of waste. The term highlights the [power imbalance](#) between economically developed countries of the Global North, typically the exporters of waste, and the less affluent nations that serve as recipients.

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was adopted on 22 March 1989, and entered into legal force on 5 May 1992. Numerous international scandals regarding hazardous waste trafficking that began to occur in the late 1980s spurred the call for the treaty. The objective of the Basel Convention is to protect human health and the environment from the adverse effects of waste, in particular taking into account the vulnerabilities of developing countries. Treaty obligations include: (i) reducing and minimising waste at source; (ii) managing waste within the country in which it is generated; (iii) reducing transboundary movement of waste to a minimum; (iv) managing waste in an environmentally sound manner; and (v) strictly controlling waste trade that does occur via a notification and consent mechanism known as “prior informed consent”.

One of the most significant amendments in the Convention is the Basel Ban Amendment, which is an agreement taken by Basel Convention Parties to prohibit the member states of the Organization for Economic Cooperation and Development (OECD), the European Union (EU), Liechtenstein, and the countries that have

ratified the ban amendment from exporting hazardous wastes as defined by the Convention to other countries – primarily developing countries or countries with economies in transition. After the Ban Amendment entered into legal force on 5 December 2019, it became part of the Basel Convention as Article 4a. This means that the Ban Amendment is legally binding for countries that decide to ratify the treaty after this date (such as the USA) because it will be part of the treaty. Since the Ban Amendment has now become a part of the Convention, violations are treated the same as other illegal traffic under the Convention. Violations by national citizens or corporations shall be considered illegal traffic and a criminal act to be prosecuted by the party having ratified the Ban Amendment.

Generally, with the force now of international law, exports of hazardous waste from rich industrialised powers to poorer countries will be perceived as a criminal or irresponsible act as will other forms of exploitive externalisation of real costs and harm to poorer countries. Although, India is yet to ratify the Basel Ban Amendment, there are restrictions on countries which have ratified the ban from exporting hazardous waste to India. The Basel Convention is an area that will require more legal oversight from the angle of both environmental justice and fixing liability on illegal exporters of hazardous waste.

Hong Kong Convention on Ship Recycling

South Asia is the “ship recycling hotspot”, with the majority of ships being dismantled in the coastal areas of India, Bangladesh and Pakistan. Following increased international criticism of the shipping industry’s scrapping practices, the International Maritime Organisation (IMO) Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships (HKC) was adopted at a Diplomatic Conference held in

Hong Kong, China, in May 2009. After 16 years, the HKC will enter into force on 26 June 2025. The Convention sets standards for ship recycling and puts the responsibility for enforcement on the vessel's flag state and the recycling state.

The Hong Kong Convention is aimed at ensuring that ships, when recycled after reaching the end of their operational life, do not pose any unnecessary risk to human health and safety or to the environment. The Hong Kong Convention was developed with input from IMO member states and non-governmental organisations, and in co-operation with the International Labour Organization and the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. It intends to address all the issues around ship recycling, including the fact that ships sold for scrapping may contain environmentally hazardous substances such as asbestos, heavy metals, hydrocarbons, ozone depleting substances and others. It will address concerns about working and environmental conditions in many of the world's ship recycling facilities. Regulations in the new Convention cover: the design, construction, operation and preparation of ships so as to facilitate safe and environmentally sound recycling, without compromising the safety and operational efficiency of ships; the operation of ship recycling facilities in a safe and environmentally sound manner. Ship recycling yards will be required to provide a Ship Recycling Plan, to specify the manner in which each individual ship will be recycled, depending on its particulars and its inventory. Parties will be required to take effective measures to ensure that ship recycling facilities under their jurisdiction comply with the Convention.

However, there are [serious concerns](#) with respect to how effectively the Convention has

been framed. First, it is widely accepted that the HKC has failed to provide an equivalent level of control to that of the Basel Convention. Second, it has failed the test of environmental justice as it does nothing to prevent the disproportionate burdening of developing countries from toxic waste from ships. Third, it has failed the test of cost internalisation as it has avoided attaching financial responsibility to the beneficiaries of the useful life of a ship, nor to the generators of the risks and liabilities, and has instead pushed all costs downstream. Fourth, it has failed to create an incentive or a mandate for toxic-free and more safely recyclable ships, thus failing the test of prevention through design. Notwithstanding the shortcomings, the HKC will see some changes in the arena of ship recycling and will therefore require close legal scrutiny.

Plastic Pollution and the Proposed Global Plastic Treaty

Plastic pollution is closely linked with the triple planetary crisis of climate change, biodiversity loss and pollution. Plastic is projected to account for 15% of greenhouse gas emissions by 2050 if no action is taken, and plastic pollution is clearly identified as an [important issue](#) in the 7th target of the Global Biodiversity Framework that has the aim of “preventing, reducing, and working towards eliminating plastic pollution”.

In March 2022, the United Nations Environment Assembly (UNEA) adopted resolution 5/14 entitled “End plastic pollution: towards an international legally binding instrument”. The resolution called for the Executive Director of UNEP to convene an intergovernmental negotiating committee (INC) to develop an international legally binding instrument on plastic pollution, including in the marine environment.

In a study published in the journal *Nature*, it was concluded that “plastic pollution emissions are highest across countries in Southern Asia, Sub-Saharan Africa and South-eastern Asia with the largest amount (9.3Mt/year) emitted by India, equivalent to nearly one-fifth of global plastic emissions”. The study observes:

“India reports that its dumpsites (uncontrolled land disposal) outnumber sanitary landfills by 10:1 and, despite the claim that there is a national collection coverage of 95%, there is evidence that official statistics do not include rural areas, open burning of uncollected waste or waste recycled by the informal sector. This means that India’s official waste generation rate (approximately 0.12 kilograms per capita per day (kg cap⁻¹ day⁻¹)) is probably underestimated and waste collection overestimated”.

As per the study, high-income countries have higher plastic waste generation rates, but none are ranked in the top 90 polluters, as most have 100% collection coverage and controlled disposal, the study highlighted. However, the researchers acknowledged they may have underestimated plastic waste emissions from some high-income countries, as they deliberately excluded plastic waste exports from their analysis.

It is in this context that the internationally legally binding instrument that is likely to be finalised in 2025 has to be viewed. Although the instrument is still under discussion, its focus will be on measures to manage, reduce and, where possible, eliminate emissions and releases to the atmosphere, soil, water and the marine environment of chemicals of concern and plastic products including microplastics. The instrument will focus on supply chain and total life cycle of the product. Concepts such as Extended Producer

Responsibility (EPR), “total life cycle”, “avoidable and problematic” plastics are likely to be part of the legal jargon. There will be liability cases arising out of non-compliance with EPR. Plastic pollution-related issues are already visible in India with the NGT hearing a number of cases, either based on petitioners approaching the court or through exercise of the suo moto powers of the Tribunals and Courts. As it is seen, legal action with regard to plastic pollution is bound to take place both at the domestic as well as international levels with governments as well as civil society groups suing corporate entities for violating the legally binding instrument by their failure to adhere to the provisions of the instrument.

Conclusion

In the era of climate crisis, environmental issues can no longer be dealt with in the narrow confined of domestic jurisdiction. Environmental harms and liability are transnational in nature. Principles such as “polluter pays”, the public trust doctrine and many of the other innovations of the courts are unlikely to provide relief to those impacted due to climate change and environmental harm. There is thus a critical need to reinvent environmental law to meet the present day challenges. Unfortunately, domestic environmental legislation is essentially 1970s vintage, drafted at a time when industrialisation was in its infancy in India and much of South Asia. There is thus a critical need for laws to evolve to reflect the current challenges. The role of lawyers and specialised lawyer groups becomes crucial in giving shape to the new laws and institutions which will help develop an environmental rule of law. It is important to highlight that development in environmental and climate law cannot happen in isolation. Enforceability of environmental laws depends on public participation; public participation depends on the free-

dom of association, freedom of information and primacy of rule of law. The last few years has seen a spurt of SLAPP filed by the state and corporate entities against environmental defenders and environmental organisations. This adds another layer of work for lawyers and law groups in defending the rights of defenders.

Notwithstanding the lack of legal enforceability of many of the international environmental Conventions, there is still scope for creatively interpreting the Conventions and the legal opportunities provided in them in order to ensure environmental justice. It is clear that there exists a close link between environmental and human rights issues and that necessitates a holistic legal strategy to deal with the environmental crisis. The coming years will see a spurt in climate-related litigation as well as litigation related to plastic pollution, hazardous waste and biodiversity loss. These legal disputes will require understanding the legal systems in the countries involved in the dispute as well as understanding the relevant environmental agreements and conventions.



Law and Practice

Contributed by:

David A Röttgen, Andrea Farì, Francesco Fonderico and Ermanno Fonderico
Ambientalex Studio Legale

Contents

1. Regulatory Framework and Law p.244

1.1 Environmental Protection Policies, Principles and Laws p.244

2. Enforcement Authorities and Mechanisms p.244

2.1 Regulatory Authorities p.244

2.2 Co-operation p.245

3. Environmental Protections p.245

3.1 Protection of Environmental Assets p.245

3.2 Breaching Protections p.246

4. Environmental Incidents and Permits p.246

4.1 Investigative and Access Powers p.246

4.2 Environmental Permits/Approvals p.246

4.3 Regulators' Approach to Policy and Enforcement p.247

4.4 Transferring Permits/Approvals p.247

4.5 Consequences of Breaching Permits/Approvals p.247

5. Environmental Liability p.248

5.1 Key Types of Liability p.248

5.2 Disclosure p.248

6. Environmental Incidents and Damage p.248

6.1 Liability for Historical Environmental Incidents or Damage p.248

6.2 Reporting Requirements p.249

6.3 Types of Liability and Key Defences p.249

7. Corporate Liability p.249

7.1 Liability for Environmental Damage or Breaches of Environmental Law p.249

7.2 Environmental Taxes p.249

7.3 Incentives, Exemptions and Penalties p.250

7.4 Shareholder or Parent Company Liability p.251

7.5 ESG Requirements p.251

7.6 Environmental Audits p.252

8. Personal Liability p.252

8.1 Directors and Other Officers p.252

8.2 Insuring Against Liability p.252

9. Insurance p.253

9.1 Environmental Insurance p.253

10. Lender Liability p.253

10.1 Financial Institutions/Lender Liability p.253

10.2 Lender Protection p.253

11. Civil Liability p.254

11.1 Civil Claims p.254

11.2 Exemplary or Punitive Damages p.254

11.3 Class or Group Actions p.254

11.4 Landmark Cases p.255

12. Contractual Agreements p.256

12.1 Transferring or Apportioning Liability p.256

12.2 Environmental Insurance p.257

13. Contaminated Land p.257

13.1 Key Laws Governing Contaminated Land p.257

13.2 Clearing Contaminated Land p.257

13.3 Determining Liability p.257

13.4 Proceedings Against Polluters p.258

13.5 Investigating Environmental Accidents p.258

14. Climate Change and Emissions Trading p.259

14.1 Key Policies, Principles and Laws p.259

14.2 Targets to Reduce Greenhouse Gas Emissions p.259

15. Asbestos and Polychlorinated Biphenyls (PCBs) p.259

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs p.259

16. Waste p.260

16.1 Key Laws and Regulatory Controls p.260

16.2 Retention of Environmental Liability p.260

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods p.260

16.4 Rights and Obligations Applicable to Waste Operators p.260

17. Environmental Disclosure and Information p.261

17.1 Self-Reporting Requirements p.261

17.2 Public Environmental Information p.261

17.3 Corporate Disclosure Requirement p.261

17.4 Green Finance p.262

18. Transactions p.263

18.1 Environmental Due Diligence p.263

18.2 Disclosure of Environmental Information p.263

18.3 Key Issues in Environmental Due Diligence p.263

Contributed by: David A Röttgen, Andrea Farì, Francesco Fonderico and Ermanno Fonderico,
Ambientalex Studio Legale

Ambientalex Studio Legale has offices in Rome, Milan and Florence, and is active in the various sectors of environmental and energy law. The firm also counsels in cutting-edge environmental law issues, including climate change practice, taking into consideration environmental legislation soon to be issued. **Ambientalex** advises Italian and foreign multinational companies, NGOs and trade associations seeking compliance with environmental legislation. Clients also include other law firms. The firm is

structured in teams, consisting of one or two partners, and associates dedicated to each of the various aspects of environmental law. If requested, the respective team may also include, depending on the practice areas concerned (ie, waste, environmental permits, contaminated sites, etc), other experts and/or external technical consultants with proven experience. Business is conducted in Italian, English and German.

Authors



David A Röttgen is a partner of **Ambientalex** and is based in Milan. His areas of expertise are mainly in the field of waste, remediation and environmental permits. Before founding

Ambientalex in 2009, he worked in a leading international law firm and in international private sector companies. He has been a member of the technical secretariat to the Minister of the Environment. From 2012 until 2024, he was a member of the National Committee for the Granting of Integrated Environmental Authorisation (IPPC) of the Italian Ministry for Environment. The author of many publications, he also participates as a speaker at conferences and training courses in environmental law.



Andrea Farì is a partner of **Ambientalex**. He is a cassation lawyer with a PhD in administrative law and is a contract professor of environmental law at the LUMSA

University of Rome. He was deputy head of the legislative office of the Ministry for the Environment and Protection of Land and Sea, legal adviser to the Minister of the Environment in several legislatures, and consultant to the Bicameral Ecomafie Commission. A lecturer in university master's degrees and training courses, he is the author of monographs and publications in journals, specialising in administrative law and environmental law.

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Ambientalex Studio Legale



Francesco Fonderico is a partner of Ambientalex in the Rome office. Francesco has been an administrative lawyer since 1995 and provides legal assistance in environmental

matters, both extra-judicial and judicial (including in the higher courts). In a wide range of projects, Francesco counsels companies on the regulatory aspects related to environmental and climate change matters (the emissions trading system, environmental permits, waste management, etc). His areas of expertise include interacting with public authorities by adopting a multi-disciplinary approach. He has published about 90 contributions and has been a professor of environmental law at the department of law of the LUISS University of Rome since 2017.



Ermanno Fonderico has a degree in economics and law, and is of-counsel in the Rome office. He is qualified as a chartered accountant and auditor and has held corporate

offices as a board member and chairman of companies, including financial companies, as well as an auditor and chairman of the Board of Auditors. Furthermore, Ermanno has been a member of various government commissions. He has published articles and comments on judgments with leading legal journals, and has participated as a speaker at numerous conferences. He has also held teaching positions in courses and master's degrees in his areas of expertise at leading Italian institutions and universities.

Ambientalex Studio Legale

Via di San Sebastianello 9
00187
Rome (RM)
Italy

Tel: +39 06 436 882 09
Fax: +39 06 565 618 46
Email: info@ambientalex.com
Web: www.ambientalex.com

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Studio Legale

1. Regulatory Framework and Law

1.1 Environmental Protection Policies, Principles and Laws

In 2022, Article 9 of the Italian Constitution was amended to include the protection of the environment, biodiversity and the ecosystem within its fundamental principles. In general, the key Italian environmental policies and principles are those provided by EU law:

- sustainable development;
- the integration principle;
- the precautionary and preventative action principle;
- the principle of rectification of environmental damage at source;
- the “polluter pays” principle; and
- the high level of environmental protection principle.

The key principles governing environmental protection are listed in Legislative Decree No 152/2006 (the “Code”). The Code is the key law in Italian environmental legislation. It is composed of eight parts and 64 annexes. However, many areas are excluded from the Code and the source of their regulation lies within separate pieces of legislation. The Code, furthermore, does not encompass many other important pieces of sector-specific legislation, such as those related to renewable energy sources.

2. Enforcement Authorities and Mechanisms

2.1 Regulatory Authorities

Ministry for Environment and Energy Safety

The system of environmental competencies is complex and conferred on a number of authorities and bodies. At central government level, the

body which plays a primary role is the Ministry for Environment and Energy Safety (*Ministero dell’Ambiente e della Sicurezza Energetica*, or MASE). Established in 1986 as the Ministry for the Environment (*Ministero dell’Ambiente*), MASE has progressively increased its functions and delegated them to other ministries. Under the previous Draghi government, it was entrusted with energy-related policies, which were previously conferred to the Ministry for Economic Development (*Ministero dello sviluppo economico*, MISE).

Other Ministries

Some environment-related functions are still conferred to other central authorities, such as the Ministry for Health, the Ministry for Agricultural Policies and the Ministry for Culture. This often causes serious organisational challenges.

Institute for Environmental Research and Protection

The Institute for Environmental Research and Protection (*Istituto superiore per la ricerca e la protezione dell’ambiente*, or ISPRA) assists MASE by providing technical assessments within relevant administrative procedures or issuing monitoring reports on environmental matters. ISPRA also ensures the co-ordination of the Regional Environmental Agencies (*Agenzie regionali di protezione ambientale*, or ARPAs).

Regional and Local Authorities

Important administrative functions are assigned to regional and local authorities, which may participate in environmental proceedings (eg, planning procedures, environmental authorisations, the setting of standards, the provision of economic measures and also the powers of ordinance, sanctions and control).

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Regional authorities are also entrusted with sectoral planning powers, while urban planning is conferred on municipalities. The independent Authority for Energy, Networks and Environment (*Autorità di Regolazione per Energia Reti e Ambiente*, or ARERA) has competencies in certain waste and water sectors. Finally, extended producer responsibility (EPR) legislation entrusts private entities, such as consortiums of producers of certain goods, with the management of the waste deriving from their products.

2.2 Co-operation

Law No 132 of 28 June 2016 established the National Networked System for Environmental Protection (*Sistema Nazionale Protezione Ambiente*, or SNPA), which is the most important co-operation institution provided at the national level and includes ISPRA and ARPAs.

The SNPA performs both environmental monitoring functions as well as scientific and technical support for the activities of national, regional and local bodies with environmental administration tasks.

Through its council, the SNPA expresses its binding opinion of a technical nature on government measures and also advises the Permanent Conference for Relations between the State, the Regions and the Autonomous Provinces of Trento and Bolzano on the necessity of actions, including legislative ones, for the purposes of pursuing sustainable development objectives, reducing land consumption, safeguarding and promoting the quality of the environment and protecting natural resources.

Among the most important co-operation mechanisms in the active environmental administration is the instrument of the Service Conference (*Conferenza di servizi*), where the opinions of the

various administrations involved in the decision-making process are acquired for the authorisation of the project to be implemented.

The general discipline is provided for by Law No 241/1990 (Articles 14 et seq). However, the Code also provides for many environmental proceedings that expressly provide for the Service Conference (eg, remediation, environmental impact assessment, IPPC authorisations, etc).

3. Environmental Protections

3.1 Protection of Environmental Assets

The Constitutional Law of 11 February 2022, No 1 amended the Italian Constitution by giving full constitutional dignity to environmental protection.

The amendment inserts a third paragraph in Article 9 which provides that the Republic shall protect: “the environment, biodiversity and ecosystems, including in the interest of future generations. The law of the State shall regulate the ways and forms of protection of animals” and in Article 41 a reference to “health” and “the environment” is added to the second paragraph as being among the interests to which free economic initiative cannot “cause harm”.

The Constitution is the first source in the legal system that brings substantial protection to environmental matrices. Such matrices do also find a place within the Code, which offers tools for their protection. These tools are mainly plans and programmes that regulate human activity by providing limits and controls. In addition to the Code, the matrices, such as air, fresh as well as sea water, soil, flora and fauna, natural habitats and landscapes, are subject to their own sectoral legislation.

3.2 Breaching Protections

Violation of regulations that offer protection to the environment and ecosystems may result in the adoption of sanctions. The administrative sanctions are mainly listed in the Code. Furthermore, the Criminal Code sanctions conduct damaging the respective environmental legal assets, including the following examples:

- environmental pollution (Article 452 bis);
- death or injury as a consequence of the crime of environmental pollution (Article 452b);
- environmental disaster (Article 452c);
- negligent crimes against the environment (Article 452 quinquies);
- trafficking and abandonment of highly radioactive material (Article 452 sexies);
- homeless remediation (Article 452l); and
- organised activity for the illegal trafficking of waste (Article 452 quaterdecies).

Additional provisions are set forth in Part VI (Articles 299-318) of the Code, which transposed Directive 2004/35/EC.

4. Environmental Incidents and Permits

4.1 Investigative and Access Powers

Environmental regulators, both at national and local level, have a wide range of powers to prevent and sanction administrative or criminal offences affecting the environment. Relevant provisions are mainly found in the Code of Criminal Procedure (inspections, searches, sequestration, etc); in the Administrative Sanctions Act (Law No 689/1981); in the Code; as well in the respective environmental permits. The authorities are permitted to carry out inspections aimed at verifying that the conditions set in the respective environmental permits have been

met, including the power to collect and analyse samples.

4.2 Environmental Permits/Approvals

As a general rule, environmental permits are always required, and are granted after an administrative procedure is carried out. This procedure is regulated by the relevant sectoral environmental legislation, often integrated into the Administrative Procedure Act or APA (Law No 241/1990). This “single authorisation model” is quite common. Some authorisations, for example, IPPC authorisations, are of European origin, while others are derived nationally – for example, the Environmental Single Permit, also known as *Autorizzazione Unica Ambientale* (AUA), and those in respect of renewable energy plants, remediation of brownfields, and the Regional Single Authorisation Provision (*Provvedimento Autorizzatorio Unico Regionale*, or PAUR).

Further, in order to realise projects provided for in the National Recovery and Resilience Plan (NRRP), implementing the Next Generation EU (NGEU), some permitting procedures have been streamlined and simplified.

The request for an environmental permit must be filed by the respective competent authority. Under Italian environmental law, there is a wide variety of competent authorities, both at national and local levels.

The Certified Declaration Scheme

As a general rule, environmental permits are granted expressly after an administrative procedure is completed. However, particularly for projects not subject to an environmental impact assessment (EIA), a simplified model, called a certified declaration scheme, may be applied. In terms of this scheme, an applicant will submit a professionally certified declaration of compli-

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ance with the relevant standards. Such certified declaration allows the applicant to start the activity immediately, or after a period of 30 or 60 days. Thus, the competent authority does not grant a permit in advance, but merely conducts a retrospective conformity check on the truthfulness of the declaration. The certified declaration scheme is applied to smaller plants in the energy sector (*Provvedimento abilitativo semplificato*, or PAS) as well as in the waste sector (known as *Procedura semplificata*).

Filing an Appeal

Without prejudice to the right to ask the competent authority to reconsider its decisions, the plant's manager, or any subjects with legal standing, can file an appeal before the competent regional administrative court within 60 days of notification or publication of the administrative decision taken by the competent authorities. For some sectors, Italian law provides a special shorter term of 30 days within which to take action. However, against many, but not all, types of administrative decisions, it is also possible to file an appeal to the president of the Italian Republic in a longer term of 120 days.

Rulings of the regional administrative courts can be appealed before the Council of State (*Consiglio di Stato*).

4.3 Regulators' Approach to Policy and Enforcement

The regulator is paying increased attention to environmental issues. In particular, rules are being adopted to regulate the various disciplines established at EU level into Italian law. Although the strategic discussion is now predominantly at EU level, the implementation of the NRRP has prompted deep reflection on the opportunities offered by the green economy, triggering numerous changes in laws to simplify procedures

and reduce conflict, eg, territorial, for the construction of infrastructure. However, there has not been a corresponding change to the legal framework related to administrative sanctions or criminal offences affecting the environment.

4.4 Transferring Permits/Approvals

Environmental permits can be transferred. However, due to changes in regulations, this transfer depends on the type of permit and its specific regulations.

Recent corporate changes in many industrial groups have had consequences for the permit process in both administrative and legal terms. Administrations have received many more requests for permit transfer. However, while the transfer is regulated in detail for some permits, such as for the IPPC, for others, such as waste treatment permits, the legal framework is established by the regions or autonomous provinces, which sometimes have slightly different positions on an issue.

4.5 Consequences of Breaching Permits/Approvals

The legal and practical consequences of breaching a permit/approval may be of:

- a criminal nature in more serious situations (eg, in connection with environmental disasters and pollution, waste, environmental permits, and remediation);
- an administrative nature (eg, in connection with an EIA); or
- a remedial nature (eg, in connection with liability for environmental damage).

The measures that should be taken to avoid this type of liability are to obtain a permit and to comply diligently with the relevant conditions. According to the type of liability, ordinary rem-

edies may be sought before the criminal or civil, and/or the administrative judicial authorities.

5. Environmental Liability

5.1 Key Types of Liability

Depending on the respective environmental sectors involved, key types of liability may arise under administrative, criminal and/or civil law. Administrative fines or criminal penalties are imposed according to a classification set forth by law, depending on the seriousness of the offences. Civil liability may arise under specific provisions of the Italian Civil Code (*Codice Civile*), under other special legislation, as well as under contractual law, depending on the type of operation (eg, M&A transactions, purchase contracts, etc). Although Italy recognises the “polluter pays” principle, in practice this principle cannot always be complied with. Therefore, liability may also arise for landowners that do not qualify as operators or polluters. In general, case law is rapidly evolving and therefore case-by-case analysis is always required.

5.2 Disclosure

Italian environmental legislation provides for a wide variety of disclosing obligations related to environmental issues, particularly when contamination and/or environmental damage occurs. The threat of environmental damage or a case of potential contamination is sufficient for the operator to be required to notify the local authorities and to take preventative measures. In the event that the operator omits to immediately notify the authorities about the harmful event and take the necessary preventative measures, financial penalties are established by law for the period of delay in taking measures.

Furthermore, environmental permits often require annual reports to be submitted to the relevant public entities regarding the environmental status of the plant and compliance with the provisions included in the respective permit. Also in this case, financial penalties are provided for by law for failure to comply with the required data disclosure.

6. Environmental Incidents and Damage

6.1 Liability for Historical Environmental Incidents or Damage

Generally, according to the “polluter pays” principle, the responsibility for remedial operations lies with the subject responsible for the contamination. The liability principle also applies to “historic contamination” (ie, contamination existing prior to 29 April 2006). An “innocent” owner is not obliged to carry out remedial works. They are, however, obliged to give notification and to take preventative measures. Some recent case law has set forth further obligations. In addition, the “innocent” owner may be obliged, up to the increase in the value of the land, to reimburse the expenses incurred by the competent authority in carrying out the remediation works, if the subject responsible for the contamination cannot be identified or does not carry out the necessary remediation themselves. Although Italy recognises the “polluter pays” principle, in practice this principle is not always complied with. By way of example, building permits are often only granted after remediation work has been carried out, thus obliging the applicant to carry out remedial works even if they have not caused the contamination. Therefore, the “polluter pays” principle, in practice, does not always offer enough protection.

6.2 Reporting Requirements

Italian legislation allows a wide variety of sources to impose reporting obligations. Environmental permits generally require the operator to comply with specific reporting obligations, both on a regular basis as well as in case of incidents, damage, pollution, etc. In addition, reporting obligations also arise under sector-specific environmental legislation applicable to the activity exercised by the operator (eg, waste management, IPPC activities, Seveso legislation, ETS, extended producer responsibility legislation, etc). Italian brownfield legislation extends, in the case of potential contamination found, to a reporting obligation on the part of owners or entities operating on such land. Reporting orders may also be issued by the competent authorities within investigative actions. Also, civil law agreements (eg, insurance contracts, lease contracts, M&A deals, etc) may establish specific environmental reporting obligations. Further reporting obligations may also arise under legislation regulating social and environmental disclosure (see **5.2 Disclosure**; **7.5 ESG Requirements**; **16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods**; **16.4 Rights and Obligations Applicable to Waste Operators**; **17.1 Self-Reporting Requirements**; and **17.3 Corporate Disclosure Requirement**).

6.3 Types of Liability and Key Defences

For key types of liability in general, see **5.1 Key Types of Liability**, and for a more detailed discussion, see the following: **7. Corporate Liability**, **8. Personal Liability**, **10. Lender Liability**, and **11. Civil Liability**.

The conditions and limits of these types of liability depend not only on the specific regulatory provision applicable at the time, but also on the specific case.

7. Corporate Liability

7.1 Liability for Environmental Damage or Breaches of Environmental Law

Without prejudice to the liability of directors, employees and shareholders, as discussed below, Italy provides for corporate liability under Legislative Decree No 231/2001 with regard to crimes committed or attempted by directors or employees of a corporate entity, in the interest or to the advantage of the entity of which they are a part. The decree includes crimes related to environmental wrongdoings, such as “environmental pollution” (Article 452 bis of the Criminal Code) and “environmental disaster” (Article 452 ter). Under certain conditions, a legal entity may be exempted from liability, for example, if it adopted and implemented an organisational model prior to the commission of the offence. In general, case law is rapidly evolving, and a case-by-case analysis is always required.

7.2 Environmental Taxes

The Italian environmental taxation regime is based upon the “polluter pays” principle as well as on taxation constitutional principles. Italian legislation provides for a wide variety of environmental taxes, both at national level as well as on a local level. At national level, for example, Italy has a carbon tax aimed at reducing CO₂ emissions. Furthermore, Italy also applies taxes on products in an attempt to discourage the production and/or consumption of goods that generate pollution during their life cycle. The 2020 Budget Act recently introduced a plastic tax (ie, tax on the consumption of single-use plastic products). The entry into force of the plastic tax has been repeatedly delayed (currently until 1 July 2026). Some taxation, such as on environmental services, aims to compensate the services for their costs. Such local taxes, often subject to the regulatory powers of the national

independent authority for environmental public utilities, ARERA, are intended to finance the collection and disposal of waste. In particular, taxes for urban waste collection and disposal are going to be converted into tariffs for the public or private entities entrusted with the service. Furthermore, although not classified as taxes, Italian legislation on EPR also provides for a wide variety of environmental fees (see **16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods**).

7.3 Incentives, Exemptions and Penalties

Italy provides economic incentives in order to encourage the community to go green. Below, are the most relevant economic incentives which, however, do undergo frequent changes.

The Eco Bonus, Home Bonus and Superbonus

The Budget Law 2022 financed, until 31 December 2024, tax deductions for the energy efficiency of buildings (“Eco Bonus”) and tax deductions for renovations (“Home Bonus” or *Bonus Casa*), in relation to expenses incurred from 1 January 2022 to 31 December 2024 (see [ENEA's Tax Bonus site](#) and the Revenue Agency's Guides).

The 110% “Superbonus”, aimed at ecological transition (Article 119 of Decree-Law 34/2020, the so-called “Relaunch Decree”), in its original configuration consisted of a tax deduction of 110% of expenses incurred from 1 July 2020 to 30 July 2022 for the implementation of specific interventions aimed at energy efficiency and static/seismic consolidation of buildings. In the last few years this incentive scheme has been downsized and remodelled: 110% for expenses incurred up to 31 December 2023; 70% for expenses incurred in 2024; 65% for expenses incurred in 2025; with subjective and objective limitations compared to the original version. Due

to the high cost of public finances, such incentives are likely to be reduced – if not repealed – by means of the Budget Law 2025.

The Home Bonus includes renovation, redevelopment (eg, installation of systems based on the use of renewable energy sources) and asbestos abatement works. The related tax deductions are as follows: 50% for 2024; 36% from 1 January 2025 to 31 December 2027; 30% from 1 January 2028 to 31 December 2033; with a maximum expenditure limit of EUR48,000 (maximum deduction: EUR14,400). With the Budget Law 2025, the incentive of 50% will be limited to the first home (*prima casa*).

Energy Communities

The Renewable Energy Communities referred to in Decree No 414 of 7 December 2023 encourage the creation of “Energy Communities” with the aim of supporting the production of electricity from renewable sources by recognising a non-repayable contribution of up to 40% of eligible costs as well as a cumulative incentive tariff for the renewable electricity produced. The use of photovoltaics is encouraged by various national sources, for example, the Decree of the Ministry of Agriculture, Food Sovereignty and Forestry of 17 April 2024 related to interventions for photovoltaic systems to be installed on buildings for productive use in the agricultural, livestock and agro-industrial sectors (*parco agrisole*).

Non-polluting Vehicles

As to incentive schemes regarding mobility, the Eco Bonus has so far only been confirmed for 2024, but not for 2025, in relation to the purchase and installation on M1 category vehicles with an environmental class of not less than Euro 4, of LPG or methane fuelling systems equipped with appropriate type-approval codes. Furthermore, it also deals with the purchase of non-

polluting vehicles although the resources set aside for electric cars have been exhausted and are awaiting refinancing, while reservations are still available for certain types of plug-in hybrid cars and hybrids. The incentives also apply to motorbikes and vans. Furthermore, incentives do also exist for the installation of electric car charging stations.

Alternatives to Plastic

Incentives are also granted for the purchase of alternative products and materials to disposable plastic. A tax credit equal to 20% of the expenses incurred in 2022, 2023 and 2024 is granted to companies in order to promote the purchase and use of alternative materials and products to disposable plastic, giving priority to products intended to come into contact with foodstuffs. Since 14 January 2024, balloons, plates and containers made of single-use, non-biodegradable and non-compostable plastic have been outlawed (Legislative Decree No 196 of 8 November 2021).

7.4 Shareholder or Parent Company Liability

The environmental liability of shareholders follows the general principles of Italian company law. Generally, shareholders of limited liability companies are not liable for the actions of the company itself. There are cases where their liability can be assessed (by piercing the corporate veil) if: (i) they have taken on a de facto managerial role in the company; or (ii) they have interfered in individual acts or abused powers of direction and co-ordination, in the case of a majority shareholding. According to case law, anyone managing the company in the absence of investiture is considered an administrator de facto.

As to the environmental liability of a parent company, in general, the holding and the controlled company are two separate legal entities except for limited cases set forth by the law (Article 2497 Civil Code), or if the subsidiary has no autonomy with regard to decision-making. The liability regime of the parent company applies if the parent company plays a controlling and co-ordinating role pursuant to Article 2497 of the Civil Code. If the parent company has instructed its subsidiary to perform acts or transactions that have compromised the integrity of the company's assets in violation of the ordinary principles of proper administration, it will be liable to the creditors and other shareholders for the damage to the assets. Case law is, however, rapidly evolving in this sector.

7.5 ESG Requirements

The Corporate Sustainability Reporting Standard Directive (CSRD), Directive (EU) 2022/2464, amended the previous regulations on the disclosure of non-financial information.

In Italy, Legislative Decree No 125 of 6 September 2024, which implements the CSRD Directive, was published in the Official Journal No 212 (in force as of 25 September 2024). This introduced corporate sustainability reporting to replace non-financial reporting (provided for by former Legislative Decree 254/2016, now repealed by Legislative Decree No 125/2024 (Article 17, paragraph 3).

Legislative Decree No 125/2024 applies to corporations (joint stock companies, limited partnerships, limited liability companies) and some partnerships (general partnerships and limited partnerships). Insurance companies and credit institutions (ie, banks and financial institutions) are also included, as long as they are large enough to meet the criteria set out in the decree.

Excluded are micro-enterprises (ie, companies that do not exceed certain limits in terms of revenues, balance sheet total and number of employees) and the Bank of Italy.

The reporting obligation is intended to provide transparent and comprehensive information on corporate activities and their environmental, social, and governance (ESG) impacts, both for individual companies and groups. Consolidated reporting requires analysis at the group level, whereas individual reporting focuses on individual companies.

According to Article 17 of Legislative Decree No 125/2024, the sustainability reporting requirement (CSRD) varies according to the size and type of company, as follows:

- From 1 January 2024, the obligation applies to large companies that are public interest entities (eg, listed companies) and that exceed an average of 500 employees employed during the financial year, as well as to public interest entities that are parent companies of large groups that, on a consolidated basis, exceed the average of 500 employees.
- From 1 January 2025, the obligation extends to all other large companies, even if they are not among those exceeding 500 employees.
- From 1 January 2026, the obligation applies to small and medium-sized listed companies (except micro-enterprises) and other entities, such as small and non-complex entities and captive insurance companies.
- From 1 January 2028, reporting requirements will also apply to branches of non-European parent companies that exceed certain revenue limits in the EU.

7.6 Environmental Audits

The Environmental Audit is essentially a voluntary instrument. As yet, the national legislator has not made this activity mandatory. However, the law supports companies that undertake environmental audits by granting them economic benefits through significant reductions in the amounts of their surety policies and the duration of their environmental authorisations.

As an example, Article 29-octies co. 8 of the Code, applicable to IPPC plants, extends the duration of the IPPC permit:

- from ten to 16 years for EMAS registered installations (Regulation (EC) No 1221/2009); and
- from ten to 12 years for IPPC plants certified according to UNI EN ISO 14001.

8. Personal Liability

8.1 Directors and Other Officers

When representing the governing body of the company, directors have direct environmental liability, unless they have properly delegated environmental liability by proxy (*delega ambientale*). The criteria and formalities for a valid *delega ambientale* are set forth by case law. The contents of a *delega ambientale* need to be evaluated case by case for each respective business.

8.2 Insuring Against Liability

Insurance products covering damage by pollution are available on the Italian market (eg, Pool Ambiente, an association of insurers and reinsurers). However, insurance products are also offered by companies that are not part of Pool Ambiente. The insurance products depend on the type of activity to be insured as well as on

the “price” the party requesting coverage is willing to pay (and, last but not least, the respective negotiation positions). It is advisable to evaluate the content and extent of the respective insurance products (eg, remediation costs, environmental damage, legal and technical consulting, current or future legislations, etc) case by case. The request for environmental insurances is increasing. Businesses obtaining ISO14001 Certification or EMAS registration pay reduced insurance fees.

In certain cases, national and regional laws require certain enterprises that are likely to have an environmental impact, to provide guarantees for an amount calculated on the basis of pre-set criteria (eg, waste management companies, IPPC activities).

9. Insurance

9.1 Environmental Insurance

Environmental insurance is available in the Italian market, including those policies targeted at directors and managers who may attract personal liability for environmental misdemeanours committed in the company’s interests (see also 8.2 Insuring Against Liability).

There is no obligation to have general environmental insurance.

The extent to which effective coverage is offered by environmental insurance requires particular attention. Professional insurance may cover all financial aspects, including the cost of legal proceedings, with the exception of criminal sanctions that restrict personal liberty.

However, Italian Budget Law 2024 (Law 213/2023) introduced the obligation to take out

specific insurance coverage against damage caused by natural disasters and catastrophic events. Although not equivalent to general environmental insurance, such obligation is set forth for all companies with a registered office in Italy, or with a permanent establishment in Italy and registered in the Companies Register. The aim is to protect national production sites from risks arising from catastrophic events.

10. Lender Liability

10.1 Financial Institutions/Lender Liability

Lenders in Italy are not usually liable for violations of environmental laws by borrowers. Liability may arise, however, if lenders have interfered in the decisions of borrowers, by actions or omissions of due conduct, such as to cause environmental violation, damage or pollution. In the event that, due to securities granted, lenders were to become the owners of the respective plot of land or business, special liabilities may arise (see also 5.1 Key Types of Liability, 6.1 Liability for Historical Environmental Incidents or Damage and 11.4 Landmark Cases).

10.2 Lender Protection

Before investing or taking action, lenders should, in the first instance, carry out accurate legal and technical due diligence. In the second instance, lenders should seek appropriate contractual guarantees. In the third instance, lenders should refrain from any actions which could be classified as the direct involvement of the lender in the misconduct. In general, it is recommended to carry out a case-by-case analysis, also due to the fact that case law is rapidly evolving.

11. Civil Liability

11.1 Civil Claims

Italian civil law differentiates between remedies under tort law and under contractual law. Under tort law, also applying to environmental damage, the relevant provisions are set forth by Articles 2043 and follow the Italian Civil Code. Contractual remedies depend on the type of contract entered into by the parties. However, given that remedies provided by law are not always satisfactory, it is common to provide specific contractual clauses. If properly drafted, environmental indemnities (which are increasingly being used in Italy) do represent an effective way to reduce the buyer's financial exposure by allowing the buyer to claim from the seller costs and damages incurred, or even to govern the procedures relating to the clearing of environmental liabilities. Depending on the type of transaction chosen under Italian law, in general terms and except for very limited cases, the payment – between the parties to an M&A transaction – of an agreed environmental indemnity does not limit potential environment-related liabilities arising under public law vis-à-vis the competent public authorities.

Furthermore, a civil liability system is also outlined in Part VI of the Code providing for various instruments to guarantee its effectiveness, such as the prevention and restoration measures contained in Articles 304 and 305 of the Code, the ministerial order pursuant to Articles 312 and 313 of the Code, and the action for damages in a specific form before the civil or criminal court (where MASE is a civil party) pursuant to Article 312 of the Code. On 7 October 2021, ISPRA published Guidelines No 33/2021 concerning the methodologies and reference criteria for the assessment of environmental damage pursuant to Part VI of the Code.

11.2 Exemplary or Punitive Damages

Italian legislation does not foresee punitive damages as known in other jurisdictions. Under Italian tort law, the payment of damages has a compensatory nature. Damage has to be proven by the claimant without prejudice to the court's right to liquidate the damage on an equitable basis. Recently, the Supreme Court (*Corte di Cassazione*) stated that punitive damages are not per se incompatible with the Italian legal system (*Sezioni Unite*, No 16601/2017).

11.3 Class or Group Actions

Law No 31/2019 (former legislation has not proved to be effective) regulates the instrument of class actions. Entities entitled to bring a class action are non-profit organisations or associations whose statutory objectives include the protection of the respective rights forming part of a class action. Only entities registered with a public list kept by the Ministry of Justice may bring a class action. A class action may be brought against companies or bodies that manage public services or public utilities, in relation to acts and behaviour carried out in the performance of their respective activities.

Furthermore, Legislative Decree No 198/2009 makes it possible to bring an action with regard to the efficiency of public administrations and public service providers. The aforesaid “public” collective actions, however, exclude the possibility of obtaining compensation for damages, without prejudice to the right to seek ordinary compensatory remedies.

Action for compensation for environmental damage, understood as public interest, may only be brought by the State Administration (Article 311 of the Code). Other public or private subjects are only entitled to act in the event of damage of a different nature (ie, affecting their personal

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legal position – their health, property, economic activities, etc – as a result of actions or facts which have caused damage to the environment).

Bearing in mind that, under Italian law, criminal action for conduct which constitutes a crime can only be exercised by the judicial authority, it is possible – for a subject who has suffered damage or injury as a result of an offence – to bring a civil action before the criminal court. The same right is also granted to bodies and associations representing those damaged or injured as a result of a crime. Such compensation for damages would aim at restoring the assets of the damaged/injured party, eliminating the consequences of the damage suffered, but would not include punitive damages.

11.4 Landmark Cases

Rulings on reclamation often involve profiles relating to protection against environmental damage.

Council of State, Judgment No 1630/2022

The Council of State announced that the provisions on environmental damage within the Code prove that liability for environmental damage is classified as a subjective non-contractual liability (pursuant to Article 2043 of the Civil Code). Thus, according to the principles that regulate civil liability, it is of central importance to ascertain the causal relationship between the conduct and the damage. Consequently, a person to whom the damaging event cannot be attributed, even from an objective point of view, cannot be liable in tort. It is therefore not possible for a subject to be called upon to adopt specific form remedies (reclamation and emergency safety measures) regardless of both the subjective element (wilful misconduct or negligence) and the objective element (aetiological link).

Council of State, Judgment No 4965/2024

In this ruling, the Council of State ruled that MASE has the power to order the owner and user of an area to provide information to determine whether there is an imminent threat of environmental damage, regardless of its responsibility as an operator. According to the Council of State, the power to ask operators for such information is part of a regulation that has a clear preventative function regarding environmental damage, and is aimed at setting the conditions for the effectiveness of subsequent prevention measures.

Plenary Meeting of the Council of State, Judgment No 3/2021

The Council of State clarified the question of the receiver's passive entitlement to the obligations set forth in Article 192 of the Code, thus settling the contrasts on the subject. The judgment declared the principle of law according to which the bankruptcy receiver bears the burden of restoring and disposing of the waste pursuant to Article 192 of the Code. The related costs fall on the bankruptcy estate. Moreover, the judgment stated that the abandonment of waste and, in general, pollution should be qualified as “external diseconomies” generated by the business activity. Therefore, the costs arising from such externalities must be borne by the mass of the entrepreneur's creditors, who benefit from the effects of the receivership in terms of the distribution of any bankruptcy profits. The opposite solution, in the view of the Plenary Assembly, would end up placing the costs of the clean-up on the community, in violation of the “polluter pays” principle and in antithesis with the continuity, in economic terms, between the assets of the entrepreneur and the bankruptcy estate.

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Court of Cassation, Civil Section, United Sections, Judgment No 3077/2023

In recent years, a jurisprudential orientation has emerged in Italy, which has affirmed the possibility of imposing emergency clean-up measures on an owner who is not responsible for contamination. Although judges have previously held that imposing clean-up measures on an owner who is not responsible for the contamination is not justified in light of the sanctioning nature of this measure, emergency safety measures (like preventative measures) do not have such a sanctioning nature. They instead constitute damage prevention and are imposed by the precautionary principle and preventative action. Therefore, such measures are incumbent on the owner or holder of the site from which the environmental damage may arise, without the need to establish fault or negligence.

The Supreme Court recently intervened on this issue. The ruling of the United Sections No 3077/2023 clarified that the identification of the obligations of the blameless owner cannot be based on the substantive scope of the intervention measure. Thus, the court identified the “typifying” elements of the measures and concluded that preventative interventions must also be carried out, in the presence of the regulatory prerequisites, by the blameless owner, while emergency safety interventions are the responsibility of the person responsible for the contamination alone.

Constitutional Court, Rulings No 160/2023 and No 5/2024

The Constitutional Court found that it was not in accordance with the Italian Constitution to change the division of competencies in waste and remediation matters established by the Environmental Code through a regional law.

The matter was then subsequently regulated by a state regulation, namely Article 22 of Decree Law No 10 of 10 August 2023, which governed the cases in which the regions conferred administrative functions regarding reclamation and waste to local authorities.

Council of State, Judgment No 1110/2024

Council of State Ruling No 1110/2024 applied the institution of unrepresentative business management in a case where the owner not responsible for the contamination had submitted the characterisation plan and risk analysis to the administration, obtaining a request from the authority to submit a remediation project. The company had complained that it had expressly indicated to the administration that it did not want to carry out the remediation. In that case, however, the Council of State held that the activity begun should have been completed or otherwise continued until the responsible party took over.

12. Contractual Agreements

12.1 Transferring or Apportioning Liability

It is possible to negotiate instruments capable of transferring to the purchaser – merely on an economic level – the relative consequences arising from any liability for incidental damage or breaches of law. However, such contractual clauses have fully binding effects only between the parties, and are not binding on the authorities or third parties. Hence, said contractual agreements will not influence any obligations under public law. Therefore, environmental indemnities agreed for example within M&A transactions cannot limit, vis-à-vis the competent public authorities, the environmental liabilities of the target company. However, environmen-

tal indemnities, if properly drafted, may represent an effective means for reducing the buyer's financial exposure by allowing the buyer to claim from the seller costs and damages incurred, or even to govern the procedures relating to the clearing of environmental liabilities. Generally, except for in very limited cases, the payment of an environmental indemnity, agreed between the parties of an M&A transaction, does not limit environmental liabilities under public law.

12.2 Environmental Insurance

See 8.2 Insuring Against Liability.

13. Contaminated Land

13.1 Key Laws Governing Contaminated Land

The “core” of Italy's brownfields legislation is set out in Part IV of the Code.

Additional provisions on the remediation of contaminated sites are contained in regulatory frameworks and differ from the Code. By way of example, in Ministerial Decree No 46 of 1 March 2019, on the remediation of areas used for agricultural production and livestock farming; in Ministerial Decree No 31 of 12 February 2015, on simplified criteria for the characterisation, securing and remediation of fuel sales outlets; in Ministerial Decree of 22 October 2009, on the remediation of sites and infrastructure directly intended for military defence and national security; and in Title VI-bis of the Penal Code, which introduces crimes against the environment into the Code.

Additional legislation exists at national and local levels. Under some local legislation, a subject planning to develop a site might be required to investigate potential soil and groundwater con-

tamination prior to developing that site. In the case of an industrial installation subject to IPPC legislation, Italian legislation requires a baseline report to be carried out in order to investigate the status of the soil and groundwater.

The Italian legal system on remediation is inspired by the “polluter pays” principle, according to which the responsibility for remedial operations lies with the subject responsible for the contamination.

Italy also has a body of legislation dedicated to the protection of compensation against environmental damage.

13.2 Clearing Contaminated Land

According to the Italian regulations (inspired by the “polluter pays” principle) the “polluter” (ie, the subject to whom the pollution is attributable – at least from an objective point of view) has to carry out the remediation/rehabilitation actions if and to the extent that they are attributable to their own conduct/omission.

An owner who is “innocent” is not obliged to carry out remedial works. Nevertheless, they are obliged to give notification and to take preventative measures. They have a patrimonial liability limited to the value of the site after remediation.

Obligations may otherwise be regulated by the parties through the instrument of contract (eg, in the case of land sales). However, contractual agreements are not always suitable for public effect.

13.3 Determining Liability

When assessing liability, common practice applies the principle “more likely than not” (*più probabile che non*). This principle allows the competent authority to require decontamination

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by the party which, according to the competent authority, is “more likely (than not)” to have caused the contamination.

Italian legislation does not expressly regulate the liability regime applicable in cases of contamination determined by multiple causal contributions.

In the case of multiple causal contributions to contamination, in application of the “polluter pays” principle, remedial burdens are placed on operators in an amount corresponding to their contribution to the event.

The need to allocate environmental costs on the basis of the actual consistency of the causal link and the consequent exclusion of a “generic” attribution of responsibility has also been confirmed by Italian case law.

However, national jurisprudence has also held that when the actions of multiple parties have generated unitary environmental pollution and it is not possible to assign specific clean-up actions to individual parties, the obligation of environmental reclamation constitutes a joint and several obligation.

13.4 Proceedings Against Polluters

Firstly, the discipline on compensation for environmental damage, actionable with MASE, can be invoked.

Other entities (eg, territorial public bodies, environmental agencies, etc) may also take action under civil law to obtain compensation for the damage suffered by property belonging to the community, provided that it does not fall under the notion of environmental damage understood as “public interest”, in which case, compensatory protection can only be enforced by the State.

Under certain conditions established by law, it is possible to invoke the non-contractual liability of the previous owner or operator who caused the contamination.

In the event of an asset deal, the purchaser may bring an action under the provisions of civil law.

13.5 Investigating Environmental Accidents

Upon the occurrence of an event (including an accident) that has the potential to contaminate a site, the polluter is obliged to perform a preliminary investigation in the area.

The results of such environmental investigations, which will influence subsequent actions, must be reported to the authorities.

The Code sets attention values (Contamination Threshold Concentrations or “CSCs”), the exceeding of which does not automatically determine the legal qualification of the site as contaminated – it only obliges the carrying out of a site-characterisation as well as a site-specific risk analysis. Only the latter makes it possible to determine the Threshold Risk Concentrations (“CSRs”). Only if the CSRs are exceeded will a site legally qualified as a contaminated site have the consequent obligation of remediation.

Under national law, persons who are not responsible for the contamination are not obliged to carry out investigations. However, they are entitled to carry out investigations and/or remediation operations on their own initiative in order to avoid financial liability and to establish a situation of legal uncertainty regarding any future criminal or compensation liability. Furthermore, some local building regulations may require the execution of investigations where a building permit is sought.

14. Climate Change and Emissions Trading

14.1 Key Policies, Principles and Laws

Italy, being part of the EU, implements the main topics regulated by EU Directives.

Concrete measures to combat climate change include the implementation of EU regulations on ETS and the “Effort Sharing” Directive applying to non-ETS sectors (eg, transport, agriculture, etc).

The National Integrated Energy and Climate Plan (“PNIEC”) sets out the guidelines to be followed and the objectives to be achieved in the field of energy and environmental protection, for the period 2021–2030.

Further to incentive schemes for energy efficiency, a multitude of mechanisms provide incentives for the installation of plants for the production of renewable energy. These incentive mechanisms depend, among other things, on the type of renewable energy source, the size of the plant, the date of construction, etc. Details of such incentive schemes are often set forth by ministerial decrees as well as by guidelines issued by the GSE, the publicly owned company promoting and supporting renewable energy sources.

Last but not least, Italian legislation also considers the reduction of CO₂ levels when operating motor cars, buses or trucks for the transportation of people and goods.

14.2 Targets to Reduce Greenhouse Gas Emissions

The ETS, set out in Directive (EU) 2018/410 (transposed by Legislative Decree No 47/2020), introduces important changes relative to the

previous Directive 2003/87/EC and accelerates the withdrawal of emission allowances available on the market. Under the cap-and-trade mechanism, emission limits are allocated to each installation or aircraft (CO₂ allowances in tonnes). If actual emissions exceed the allocated allowances, the operator must buy allowances to surrender to cover its emissions.

15. Asbestos and Polychlorinated Biphenyls (PCBs)

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs

The key provisions relating to asbestos are set forth by Law No 257/1992, Ministerial Decree dated 6 September 1994, Legislative Decree No 81/2008, integrated by regional laws and plans dealing with orientation and monitoring, as well as municipal regulations. In principle, the obligations set forth by asbestos legislation depend on the qualification of the legal entities involved (owner, lessee, employer) and on the state of conservation, which is assessed by applying a so-called Degradation Index to the asbestos-containing materials.

The key provisions relating to PCBs are set forth by Legislative Decree No 209/1999, transposing Directive 96/59/EC, and Ministerial Decree 11 October 2011, integrated by regional legislation. Such legislation regulates the maximum time for decontamination and disposal of fluids and equipment containing PCBs, lays down bans, defines the labelling to be affixed to equipment containing PCBs, establishes an inventory and sanctions, and obliges the regions to draw up decontamination and disposal programmes. PCBs are, however, also addressed by sectoral legislation (eg, regeneration of waste oils, incineration, water and waste legislation, etc).

16. Waste

16.1 Key Laws and Regulatory Controls

Italy has enacted a large amount of waste legislation. The Code entails the central regulations (Articles 179–238 (Part IV)). Most of the details are, however, set forth in specific ministerial decrees that vary depending on the type of waste (eg, packaging, electrical waste and electronic equipment recycling, batteries and accumulators, edible waste oils, mineral waste oils, ships, vehicles, and end-of-life tyres). Further, the set of obligations also depends on the type of single-treatment operations (recovery or recycling, landfilling, etc). As for end-of-waste and by-products, Italy has enacted very detailed legislation. Despite the existence of national legislation, however, Italy lacks a nationwide level playing field regarding waste.

16.2 Retention of Environmental Liability

Circumstances under which producers or consignors of waste may retain liability for waste even after it has been disposed of by a third party need to be carefully assessed.

Article 188 of the Code governs this liability, as well as trans-boundary shipments, without always providing precise boundaries, especially in light of the respective case law.

Article 188 has been interpreted extensively by criminal court decisions, sometimes far beyond the literal wording of the article.

In general, waste producers or holders are obliged to hand over such waste to duly authorised third parties, including municipal waste management operators. In some cases, however, these waste producers or holders may be entitled to directly manage such waste. If waste is handed over to duly authorised third parties

other than the municipal waste management operators, liability only ends when the waste producer or holder receives the duly completed certificate (confirming the receipt of such waste by the authorised third parties) within three months after such consignment.

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

Extended producer responsibility (EPR) is widely known and regulated under Italian national legislation, and includes the likes of packaging, electrical and electronic equipment, batteries, end-of-life vehicles, mineral waste oils, edible waste oils, tyres and PVC. In the near future, further products are likely to fall under EPR regulations. EPR legislation not only entails take-back obligations, but also payment of environmental fees and reporting obligations. Although Italian EPR schemes differ considerably, common standards have been required from all of them since 2023 (according to Directive (EU) 851/2018). Non-compliance with obligations set out under the respective regulation governing the related EPR scheme may be sanctioned, depending on the EPR regulation specifically applicable to the respective consumer good. Over the past few years, the Italian Antitrust Authority has become increasingly active in evaluating the implementation of EPR, including on online marketplaces.

16.4 Rights and Obligations Applicable to Waste Operators

Waste operators are fully subject to brownfields (Part IV of the Code) and environmental damage legislation (Part VI of the Code). Waste management plants such as incineration and co-incineration plants (Article 237-ter, lit. b)–c) Code) or IPPC plants are expressly subject to brownfields legislation upon definitive cessation of activities. Furthermore, waste plants subject to IPPC legis-

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lation are required to carry out a baseline report, set forth by European IPPC legislation, in order to investigate the status of the soil and groundwater. Reclamation obligations may also arise from the applicable “best available techniques” (BAT) conclusions. Furthermore, environmental permits do generally require the operator of a waste management plant to investigate the soil and groundwater upon incidents and damage occurring. Breach of the above obligations implies administrative and criminal sanctions.

17. Environmental Disclosure and Information

17.1 Self-Reporting Requirements

Italian environmental legislation provides for a wide variety of reporting obligations (eg, contaminated land (see **13.5 Investigating Environmental Accidents**), industrial plant management (see **6.2 Reporting Requirements**), waste management, EPR (see **16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods**), etc). Furthermore, reporting obligations may also arise under the respective environmental authorisation regimes. Recent legislation regulating social and environmental disclosure also imposes disclosure obligations on the subjects indicated therein (see also **17.3 Corporate Disclosure Requirement**).

17.2 Public Environmental Information

According to Legislative Decree No 195/2005, transposing Directive 2003/4/EC, public entities (referred to in a broad sense) are required to make environmental information available to the public. Further obligations arise under Article 40 of Legislative Decree No 33/2013.

The right of access is very broad.

From a subjective point of view, anyone who requests documents entailing environmental information, has a right to be granted access, without the subject having to demonstrate an interest in them.

From an objective point of view, the notion of environmental information is broad, as such information may be contained in any material.

Anyone who wants to obtain access can file a request to the public administration, which must make the documentation available within 30 days from the date of receipt of the request, or within 60 days in the case of a complex or particularly wide request.

Cases of exclusion of the right of access are exhaustively listed, and the administration is required to justify its refusal. In the case of illegitimate refusal to grant access, it is possible to request access to administrative remedies through the ombudsman and the administrative judge.

Specific sector-related legislation exists requiring certain information to be made public (eg, EIAs, environmental strategic assessments (ESAs) and integrated pollution prevention and control (IPPC) – see the MASE website, register of contaminated sites, national electronic register for the traceability of waste, managed directly by MASE, or the national register of producers, within the framework of EPR).

17.3 Corporate Disclosure Requirement

As a general rule, companies are not required to disclose environmental information in their annual reports under the Italian Civil Code. However, environmental permits often require annual reports to be submitted to the relevant public entities regarding the environmental status of

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the plants and compliance with the provisions included in the permit. Corporations entrusted with environmental-related public utilities (waste management, water services, energy services) may also be subject to the obligation laid down by Legislative Decree No 195/2005 (see **17.2 Public Environmental Information**), in so far as access to relevant environmental information is requested by the public. Further environmental information disclosing duties on corporations are set forth in Legislative Decree No 125/2024 that has transposed into Italian legislation the Directive (EU) No 2022/2464 on Corporate Sustainability Reporting (CSRD). The Decree No 125/2024 repeals the previous Legislative Decree 254/2016 (the “NFR Decree”) and introduces the sustainability reporting that replaces non-financial reporting. It must be highlighted that Legislative Decree No 125/2024 provides that sustainability reporting must now be included in a separate section of the annual report.

17.4 Green Finance

Legislative Decree No 125/2024 has transposed into national law the Directive (EU) No 2022/2464 on Corporate Sustainability Reporting (CSRD) which amends, by expanding its scope, the Non-Financial Reporting Directive (EU) 2014/95 (NFRD). Pursuant to Article 2(1) of Decree No 125/2024, it applies to corporations (joint stock companies, limited partnerships, limited liability companies) and some partnerships (general partnerships and limited partnerships) if public limited companies, limited partnerships or limited liability companies (in the forms listed in Annex I to Directive 2013/34/EU, or comparable to those listed in said Annex I) are shareholders. Insurance companies and credit institutions (ie, banks and financial institutions) are also included, as long as they are large enough to meet the criteria set out in the decree.

Micro-enterprises (ie, companies that do not exceed certain limits in terms of revenues, balance sheet total and number of employees) and the Bank of Italy are excluded.

Article 3 sets forth that large enterprises, as well as small and medium-sized listed enterprises, include in a special section of the management report the information necessary for understanding the impact of the enterprise on sustainability issues, as well as the information necessary for understanding how sustainability issues affect the enterprise’s performance, results and situation.

Article 3(2) lists the issues to be included in the sustainability reporting.

Article 4 provides a similar provision for parent companies of a large group.

Even though the provision includes just some of the components related to climate change, Articles 2, 3 and 4 should be read in the light of Regulation (EU) 2020/852 (the “Taxonomy Regulation”) and the related delegated acts progressively issued by the European Commission.

As to monitoring and enforcing tasks, the ordinary competencies apply. Thus, the main enforcing tasks lie, with the judiciary. Nonetheless, a crucial role is also played by independent authorities (eg, the National Commission for Companies and the Stock Exchange (*Commissione nazionale per le società e la borsa*, or CONSOB) and the Italian Antitrust Authority (*Autorità garante della concorrenza e del mercato*, or AGCM).

Furthermore, the National Institute for the Supervision of Insurance (*Istituto per la vigilanza sulle assicurazioni*, or IVASS) issued Regulation No

38/2018 on the system of governance of insurance undertakings and groups, which sets forth important obligations.

18. Transactions

18.1 Environmental Due Diligence

The exercise of environmental due diligences has become commonplace in Italy, starting at least from the late 1990s. Currently, due diligences are widely accepted and conducted in Italy in relation to environmental matters. The extent of the due diligence to be carried out by technicians as well as by lawyers, depends not only on the nature of the asset being sold, but also on the type of transaction. In environmental matters, it is highly recommended to set aside enough time for the due diligence exercise. In order to provide proper safeguards, the due diligence should not be limited to documentary aspects, but should also involve on-site visits and access to publicly existing information (data access).

18.2 Disclosure of Environmental Information

In general, disclosing all environmental information to a purchaser is not required by specific statutory provisions (under public law). However, failure to notify situations that do not meet environmental standards may give rise, depending on the nature of the asset being sold, to pre-contractual and contractual liability under the general principle of good faith (under civil law). Disclosure obligations towards a purchaser should be evaluated on a case-by-case basis, depending on the concrete circumstances (eg,

the agreements signed between the parties and the type of environmental information) in order to minimise the risk of subsequent claims for damages.

18.3 Key Issues in Environmental Due Diligence

In Italy, most environmental obligations are based on EU law (as transposed into Italian legislation) and consequently, environmental due diligence in Italy is widely aligned with due diligence exercises carried out in other European countries. This is also because due diligences are often carried out by consultants acting at international level and using standard forms. The extent of environmental due diligence may vary in practice, however, on the basis of the environmental and economic understanding of the parties involved. The key issues depend on whether an asset or a share deal is carried out. In the case of asset deals, the extent of the due diligence depends on the type of asset and the activity carried out therein, presently, in the past and also with a view to the future. In the case of real estate deals, compliance regards all environmentally relevant assets to be part of the real estate (eg, storage tanks, asbestos, combustion units, waste units, etc). A key issue is always compliance with Italian brownfields legislation. Another key issue, in the case of activities subject to environmental permits, is a detailed analysis of permit compliance and the carrying out of site visits. In the case of share deals, due diligence is far more complex, aimed at identifying, as a key issue, the potential existence of environmental liabilities arising from the past.

Trends and Developments

Contributed by:

David A Röttgen, Andrea Farì and Francesco Fonderico
Ambientalex Studio Legale

Ambientalex Studio Legale has offices in Rome, Milan and Florence, and is active in the various sectors of environmental and energy law. The firm also counsels in cutting-edge environmental law issues, including climate change practice, taking into consideration environmental legislation soon to be issued. Ambientalex advises Italian and foreign multinational companies, NGOs and trade associations seeking compliance with environmental legislation. Clients also include other law firms. The firm is

structured in teams, consisting of one or two partners, and associates dedicated to each of the various aspects of environmental law. If requested, the respective team may also include, depending on the practice areas concerned (ie, waste, environmental permits, contaminated sites, etc), other experts and/or external technical consultants with proven experience. Business is conducted in Italian, English and German.

Authors



David A Röttgen is a partner of Ambientalex and is based in Milan. His areas of expertise are mainly in the field of waste, remediation and environmental permits. Before founding

Ambientalex in 2009, he worked in a leading international law firm and in international private sector companies. He has been a member of the technical secretariat to the Minister of the Environment. From 2012 until 2024, he was a member of the National Committee for the Granting of Integrated Environmental Authorisation (IPPC) of the Italian Ministry for Environment. The author of many publications, he also participates as a speaker at conferences and training courses in environmental law.



Andrea Farì is a partner of Ambientalex. He is a cassation lawyer with a PhD in administrative law and is a contract professor of environmental law at the LUMSA

University of Rome. He was deputy head of the legislative office of the Ministry for the Environment and Protection of Land and Sea, legal adviser to the Minister of the Environment in several legislatures, and consultant to the Bicameral Ecomafie Commission. A lecturer in university master's degrees and training courses, he is the author of monographs and publications in journals, specialising in administrative law and environmental law.



Francesco Fonderico is a partner of Ambientalex in the Rome office. Francesco has been an administrative lawyer since 1995 and provides legal assistance in environmental

matters, both extra-judicial and judicial (including in the higher courts). In a wide range of projects, Francesco counsels companies on the regulatory aspects related to environmental and climate change matters (the emissions trading system, environmental permits, waste management, etc). His areas of expertise include interacting with public authorities by adopting a multi-disciplinary approach. He has published about 90 contributions and has been a professor of environmental law at the department of law of the LUISS University of Rome since 2017.

Ambientalex Studio Legale

Via di San Sebastianello 9
00187
Rome (RM)
Italy

Tel: +39 06 436 882 09
Fax: +39 06 565 618 46
Email: info@ambientalex.com
Web: www.ambientalex.com



The Six-Strand Reform of Environmental Legislation

In Italy, environmental law is constantly evolving.

Among the main objectives of the current legislature are the simplification and streamlining of Italian environmental legislation. Moreover, in 2022, a constitutional reform included the protection of the environment, ecosystems and biodiversity among the fundamental principles of the Italian Constitution. Thus, the objective of aligning ordinary legislation with the new constitutional provisions was also added.

There are six main strands to the reform of environmental legislation in Italy.

The first strand

The first strand is characterised by the type of regulatory source, namely decree-laws. These are regulatory acts with the force of law, adopted by the government in extraordinary cases of necessity and urgency pursuant to Article 77 of the Italian Constitution and Article 15 of Law 400 of 23 August 1988. As a rule, decree-laws come into force immediately upon publication in the Official Gazette of the Italian Republic. In order not to lose their effectiveness, decree-laws must be converted into law by the Italian parliament within 60 days of their publication. In the past, given the slowness of the ordinary legislative procedure, governments have often resorted to this form of legislation, even outside a strict reading of the constitutional requirements of necessity and urgency.

In office since October 2022, the Meloni government has so far made single, surgical changes in environmental matters. On 10 October 2024, however, the government approved an outline of a decree-law on “Urgent provisions for the environmental protection of the country, the

streamlining of environmental assessment and authorisation procedures, the promotion of the circular economy, and the implementation of measures on the reclamation of contaminated sites and hydrogeological instability”. The regulatory scheme consists of articles concerning issues such as:

- the simplification and acceleration of environmental assessments and authorisations (Article 1);
- rules “to combine the needs of environmental protection with the needs of security of supply” (Article 2);
- “urgent measures for the management of the water crisis” (Article 3);
- “urgent provisions for the circular economy” (Article 5);
- “urgent measures for the promotion of sustainability policies and [the] circular economy in the context of the implementation of infrastructure projects” (Article 6);
- “urgent measures on land reclamation” (Article 7);
- the “establishment of the support structure for the extraordinary Commissioner for the site of national interest of Crotona – Cassano and Cerchiara” (Article 8);
- rules on “programming and financing of the interventions entrusted to the Government Commissioners for the fight against hydrogeological instability” (Article 10); and finally
- “urgent provisions for the functionality of public administrations operating in the environmental and energy security sectors” (Article 11).

It is to be expected that, during the parliamentary debate on the conversion law, numerous requests for amendments and additions will be made by stakeholders, including extended producer responsibility (EPR) for marketplaces.

The legislative process in parliament will be concluded in the course of the current year, 2024.

The aforementioned decree-law originally also included a provision on “Urgent measures on extended producer liability for e-commerce”. This was subsequently expunged and will therefore be the subject of a forthcoming legislative initiative.

The second strand

The second strand relates to the transposition of EU directives into Italian law. Unlike the previous one, this second regulatory strand is more predictable, as the discipline standards and the deadlines for transposition are set by the European regulatory source.

The following are currently being adopted:

- an outline of a legislative decree regulating administrative regimes for the production of energy from renewable sources;
- a bill delegating to the government the transposition of European directives and the implementation of other acts of the EU (European Delegation Act 2024), which, in environmental matters, are as follows –
 - (a) Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources and repealing Council Directive (EU) 2015/652;
 - (b) Directive (EU) 2023/1791 of the European Parliament and of the Council of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955;
 - (c) Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition by improving protection against unfair practices and information (“greenwashing”);
 - (d) Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law, replacing Directives 2008/99/EC and 2009/123/EC;
 - (e) Directive (EU) 2024/884 amending Directive 2012/19/EU on waste electrical and electronic equipment – WEEE;
 - (f) Regulation (EU) 2023/2859 on the establishment of a single European access point providing centralised access to publicly available information relevant to financial services, capital markets and sustainability;
 - (g) Regulation (EU) 2023/2631 on European Green Bonds and Voluntary Disclosure for Bonds Marketed as Green Bonds and Sustainability-Related Bonds;
 - (h) Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 (EUDR Regulation) concerning the making available on the EU market and the export from the EU of certain commodities and products associated with deforestation and forest degradation, and repealing Regulation (EU) No 995/2010 (EUTR Regulation);
 - (i) Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 on batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC; and
 - (j) Commission Regulation (EU) 2022/1616 on recycled plastic materials and articles intended to come into contact with food and repealing Regulation (EC) No

282/2008 and determining the fees provided for the official control activities of materials and articles intended to come into contact with food (MOCAs) referred to in EU Regulation 2017/625.

The third strand

The third strand concerns government or parliamentary initiative bills. At present, the main bills include:

- the draft law containing provisions for the construction of new nuclear power plants;
- the bill amending Article 142 of the Code of Cultural Heritage and Landscape, pursuant to Legislative Decree No 4 of 22 January 2004, concerning landscape constraints for municipalities with a population of less than 10,000 inhabitants; and
- the draft law on measures to raise consumer awareness for the adoption of virtuous behaviour aimed at reducing food waste.

The fourth strand

A fourth regulatory strand comprises ministerial decrees implementing legislative environmental standards, either set out in the so-called “Environmental Code” (Legislative Decree No 152 of 2006, also referred to as the “Code”) or in other legislative or regulatory provisions. This regulatory strand, too, is characterised by a certain degree of predictability and planning, as the contents and terms of adoption are indicated by legislative provisions. The issuance of such decrees is usually the responsibility of the Minister of the Environment and Energy Security, possibly in concert with other ministers responsible for related matters.

Among the most recent schemes being adopted are:

- a draft ministerial decree on the mechanisms of downward auctions for plants fuelled by renewable energy sources (the so-called “Fer X decree”);
- a draft ministerial decree approving the technical regulation for the design, construction and operation of CO₂ transport networks to the geological storage site;
- various draft ministerial decrees establishing end-of-waste criteria for individual waste categories; and
- a draft decree revising Presidential Decree No 120 of 2017 on simplified rules for the management of excavated earth and rocks.

The fifth strand

The fifth strand concerns what has been referred to by some as the “construction site” of the Code.

As is well known, Italy is one of the few European countries that has an environmental codification (the others are France and Sweden; Germany has been studying the model for years, without success). The Code is the most important source of environmental legislation in Italy, even though some sectors are excluded from its scope and are regulated in separate regulatory acts. It is made up of eight parts and 64 annexes, the content of which is often uneven.

However, this standardised model has not yielded the desired results in terms of legal certainty and regulatory stability. In the approximately 18 years in which it has been in force, the legislature has intervened several times to amend the Code, with often divergent or contradictory outcomes depending on the orientation of the parliamentary political majority at the time. Less numerous, however, have been the interventions of the constitutional court.

In this context, in November 2023, the Minister of the Environment and Energy Security and the Minister of Reforms and Regulatory Simplification appointed an inter-ministerial commission of 33 experts to “draft a draft enabling act for the reorganisation and codification of the regulations in force in the field of the environment, in order to bring them together in a single regulatory text consistent with the constitutional law of 11 February 2022, No 1 and with the Euro-Union and international principles” as well as an “outline of one or more legislative decrees implementing the guiding principles and criteria of the aforementioned enabling act”. By 31 January 2024, the Commission should have prepared an outline of the enabling act. By 31 December 2024, it should prepare the outlines of the legislative decrees implementing the enabling act. However, work has slowed down and no outline has yet been published.

The codification (or, rather, “re-codification”) is part of a broader programme of regulatory simplification. A Prime Ministerial Decree of 18 January 2023 established, at the Presidency of the Council of Ministers, the Mission Structure for Regulatory Simplification, reporting directly to the Minister for Institutional Reforms and Regulatory Simplification. In the preamble, the decree establishing the Inter-Ministerial Commission notes that “the aforementioned Legislative Decree No 152 of 2006 needs to be thoroughly revised, also in light of the recent amendments made to the Constitution and the Euro-Union and international principles, without prejudice to coordination with the extra-environmental code”. The Commission, set up at the cabinet office of the Minister of the Environment and Energy Security, will be able to “split into possible Sub-Commissions” where, as the appointment decree states, “the work of the Commission is particularly broad and complex”.

The “construction site” of environmental codification, therefore, is still open and will probably remain so for a long time.

The sixth strand

The sixth strand is the annual budget law, currently under discussion and to be passed by the end of 2024. With it, the government submits to parliament for approval the public expenditure and revenue forecast for the following year. Although it is a law with financial content, it also often contains substantive provisions on environmental issues. The draft Budget Law 2025 provides for reductions in some eco-incentives, including the “Superbonus” and the “Home Bonus” (*Bonus Casa*).

The 110% the Superbonus, aimed at the ecological transition (Article 119 of Decree-Law 34/2020, the so-called “Relaunch Decree”), in its original configuration consisted of a tax deduction of 110% of the expenses incurred from 1 July 2020 to 30 July 2022 for the implementation of specific interventions aimed at energy efficiency and static/seismic consolidation of buildings. In the last few years, this incentive scheme has been downsized and remodelled to: 110% for expenses incurred up to 31 December 2023; 70% for expenses incurred in 2024; and 65% for expenses incurred in 2025, with subjective and objective limitations compared to the original version. Due to the high cost of public finances, according to press reports, it will be further reduced if not repealed by means of the Budget Law 2025, to be approved by parliament before 31 December 2024.

The *Bonus Casa* includes renovation, redevelopment (eg, installation of systems based on the use of renewable energy sources) and asbestos abatement works. The related tax deductions are as follows: 50% for 2024, 36% from 1 Janu-

ary 2025 to 31 December 2027; and 30% from 1 January 2028 to 31 December 2033, with a maximum expenditure limit of EUR48,000 (maximum deduction: EUR14,400). With the Budget Law 2025, the incentive should be maintained at 50% for 2025 only for the first home.

In spite of the reforms under way, it is in any case unlikely that it will be possible in the short term to simplify the competencies and subjects involved in environmental procedures, since the complexity of the decision-making process depends mainly on the number of public bodies called upon to express their opinion in authorisation processes which, moreover, may vary significantly in the individual regions and autonomous provinces.

JAPAN

Trends and Developments

Contributed by:

Akira Nagasaki

City-Yuwa Partners



City-Yuwa Partners was formed on 1 February 2003, upon the merger of Yuwa Partners and the Law Department of Tokyo City Law & Tax Partners. City-Yuwa is now one of Japan's preeminent law firms capable of providing a full range of diversified legal services. City-Yuwa Partners routinely counsels its clients in areas ranging from general corporate matters, mergers and acquisitions, international transactions, and financial transactions to intellectual property, civil and commercial litigation, and bankruptcy. City-Yuwa's attorneys are knowl-

edgeable in a wide range of legal areas, with particular expertise in corporate law, international banking and finance, securities, mergers and acquisitions, investments, real estate, intellectual property, litigation and alternative dispute resolution, bankruptcy and virtually all aspects of international and domestic business transactions. Many City-Yuwa attorneys are fluent in English and advise foreign clients in complex transactions in both Japanese and English. The firm has grown to about 200 attorneys and is one of the largest firms in Japan.

Author



Akira Nagasaki of City-Yuwa Partners frequently assists numerous foreign clients in the areas of employment law, international transactions, international trade law, and

environmental law. He has represented clients in Japan and overseas in numerous M&A deals, cross-border transactions, and

environmental law issues. He was one of the examiners of the National Bar Examination in the area of environmental law, and was also chair of the Environmental Conservation Committee at the Dai-Ni Tokyo Bar Association. Having spent his childhood in the US, Akira is fluent in both English and Japanese, and holds an LLM degree from the University of Berkeley, California.

City-Yuwa Partners

Marunouchi Mitsui
Bldg 7F
2-2-2 Marunouchi
Tokyo
100-0005
Japan

Tel: +81 3 6212 5500
Fax: +81 3 6212 5700
Email: akira.nagasaki@city-yuwa.com
Web: www.city-yuwa.com/english



Recent Regulatory Revisions Affecting Environmental Law

Revision of the Act on Special Measures for Renewable Energy (enforced from 1 April 2024)

On 1 April 2024, the amendment of the Act on Special Measures for Renewable Energy (the “2024 Renewable Energy Act”) came into effect. The revision was introduced to deal with the rising tensions between renewable energy producers and residents in the area where renewable energy projects such as wind turbines and solar panels are located. The amendment aims to strengthen the “business discipline” of renewable energy producers, and (i) has made it a legal requirement for renewable energy producers to hold briefing sessions for residents in the surrounding area (holding such sessions will be a requirement for obtaining feed-in-tariff/feed-in-premium (FIT/FIP) certification from the government); and (ii) the relevant government agency (ie, the Ministry of Economy, Trade and Industry, or METI) may suspend the payment of FIT/FIP grants to encourage renewable energy producers to rectify their violation of applicable laws and regulations more promptly.

The details of each of the measures are as follows:

The requirement to brief residents on the project

As noted, under the 2024 Renewable Energy Act, holding briefing sessions for residents in the surrounding area has become a prerequisite for obtaining FIT/FIP certification. Specifically, the 2024 Renewable Energy Act requires producers planning to construct a power source above a certain size threshold to hold a briefing session for residents in the surrounding area to provide the following information:

- the contents of the business plan;
- the status of compliance with relevant laws and regulations; and
- the impact of the project on the environment, and measures to be taken to prevent such impact.

In addition, a regulator may, when approving the change of status in an existing (and already approved) renewable energy power project (eg, in the event of a change of ownership of a renewable energy producer), request that the new business owner conduct briefing sessions for local residents.

Temporary suspension of FIT/FIP grants

Under the 2024 Renewable Energy Act, the regulatory body will have the power to suspend FIT/FIP grants to a renewable energy producer if it is confirmed to have violated relevant laws and regulations. This is to encourage a renewable energy producer to rectify its violation as soon as possible. Once it is confirmed that the violations are corrected, then the renewable energy producer will be able to receive the suspended FIT/FIP grant. On the other hand, if the violation is not resolved and the FIT/FIP certification is revoked, the regulatory body may order the return of the FIT/FIP grant received by the renewable energy producer from the time the violation occurred up to the time its certification was revoked.

According to a government report, the following instances of FIT/FIP grant suspension occurred in 2024 after the enforcement of the 2024 Renewable Energy Act, showing that the government is actively enforcing this newly introduced rule:

- On 2 April 2024, the government took temporary measures to suspend solar power

generation projects (nine projects in total) that violate the Forestry Act. The cases likely involved illegal forestry logging when establishing or expanding renewable energy production sites.

- On 5 August 2024, the government took temporary measures against a total of 342 “farming-type” solar power production projects (ie, projects that purport to engage in both agriculture and solar power production) that it found to be inappropriate, namely in violation of the Agricultural Land Act (eg, projects that did not receive the necessary permissions to convert farmland to solar power units, or those that failed to keep the 80% of their agricultural yield required to register as farmland).

According to the government, it will continue to take strict measures against businesses that violate relevant laws and regulations, as needed.

Other measures taken by the government in relation to the 2024 Renewable Energy Act

The government has announced that it will take the following measures to enforce the 2024 Renewable Energy Act effectively:

- Establish a new enforcement system to strengthen on-site investigations of non-compliant renewable projects.
- In order to conduct on-site inspections and enforce the law against non-compliant renewable projects more efficiently and effectively, the regulatory body will expand its reach by co-operating with relevant ministries and local governments, such as by utilising map information from the Ministry of the Environment’s database (“EADAS”) and focusing on non-compliant projects that should be prioritised based on the amount of risk such projects pose to the environment.

Further, the government will strengthen its on-site investigations of non-compliant renewable projects by doing the following:

- Allocating a new budget for conducting on-site surveys for non-compliant cases suspected of violating business discipline and related laws and regulations. Site investigations started nationwide from the end of June 2024. The investigation is presently focusing on solar panel sites because these sites were facing the most opposition and complaints from local residents.
- If a violation is confirmed through on-site investigations, the information will be provided to the local offices of the regulatory body and actively shared with other relevant regulatory bodies. The government has announced that it intends to take strict measures against non-compliance, including issuing instructions, suspending FIT/FIP grants, and revoking FIT/FIP certification based on the 2024 Renewable Energy Act.

In particular, the government will strengthen enforcement against “farming-type” solar power production facilities because, according to the report by the Ministry of Agriculture, Forestry and Fisheries (MAFF), about 20% of solar power production sites on farmland face issues with adjacent farmland, such as rendering farmland unusable, and resolution of such issues is urgently needed. MAFF usually takes up such issues, but METI will also use its authority under the 2024 Renewable Energy Act, in co-operation with MAFF, to impose measures such as issuing instructions, suspending FIT/FIP grants, and revoking FIT/FIP certification.

Amendment of the Clean Wood Act (effective from 1 April 2025)

Introduction

Laws and regulations such as the EU's Corporate Sustainability Reporting Directive (CSRD) and Corporate Sustainability Due Diligence (CSDDD) have not been introduced in Japan, with the exception of the Green Purchasing Act, which applies to government contracts, and the Act on Promoting the Distribution and Use of Legally Harvested Wood and Wood Products (also known as the "Clean Wood Act"). The Clean Wood Act was amended in 2023 and will come into effect on 1 April 2025.

Background of the 2023 amendment

The Clean Wood Act was enacted in May 2016 (enforced from 20 May 2017) to protect forests from illegal logging and the subsequent trading of illegally logged wood. The Clean Wood Act was a move by Japan in response to similar laws being enacted in the US (the Lacey Act, December 2008), the EU (rules against illegal logging, March 2013), and Australia (the Illegal Logging Prohibition Act, November 2012). Japan's Clean Wood Act was designed to promote the distribution and use of legally harvested wood by:

- imposing an effort-based obligation on businesses to use legally harvested wood; and
- creating a system where a third-party organisation would register compliant wood-related businesses (ie, businesses that handle legally harvested wood).

However, this "effort-based obligation" and "third-party registration" were not effective enough, and according to a government survey, only covered about 40% of the total demand for wood in Japan, meaning about 60% of wood circulating in Japan came from sources that could not be tracked back to legal logging. This was

highlighted by international government meetings attended by Japan, such as G7-related meetings and the APEC Ministerial Meeting on Forestry, and it was pointed out that Japan needed to adopt more effective measures to co-operate in international efforts to stop illegal logging. In addition, when the Clean Wood Act was enacted, it was to be reviewed five years after its enforcement, and the 2023 amendment matches this schedule.

Amendment of 2023

The amendment of 2023 consists of mainly four parts:

- (1) Confirmation of legality was elevated (to become a legal obligation rather than an "effort-based" obligation)

The amendment of 2023 has made it obligatory for a "wood-related business" (meaning a business engaged in the manufacture, processing, import, or sale of wooden products; a business that uses wood for construction; and a business that uses wood and wooden products, among others) to do the following when purchasing from logging companies (ie, the source of the wood) or importing wood into Japan:

- collect information regarding the raw materials and confirm the legality of the wood;
- create and store records regarding the information it has collected; and
- share the recorded information when transferring wood to someone else (Articles 6 – 8 of the amended Clean Wood Act).

- (2) Obligation for log producers and sellers to provide information

To ensure that confirmation of the legality of the wood required in (1) above is carried out seam-

lessly, log producers and sellers are, if requested by wood-related businesses, obliged to provide information regarding the legality of the logs, such as information on whether the necessary permits were obtained (Article 9 of the amended Clean Wood Act).

(3) Addition of retailers to the list of “wood-related businesses”

To make sure that information regarding the confirmation of the legality of wood is also shared with consumers, retailers of wood products have also been included in the definition of “wood-related businesses” (Article 2(4) of the amended Clean Wood Act).

(4) Other amendments

Other notable amendments to the Clean Wood Act are as follows:

- With regard to (1) and (2) above, the amendment of 2023 makes it possible for the regulatory body to take measures such as instructions and recommendations, warnings, public announcements, and enforcement orders in the event of violations of the Clean Wood Act, as well as imposing penalties on those who do not comply with issued orders (Articles 10, 11 and 45 of the amended Clean Wood Act).
- In addition to the obligations under (1) above, “wood-related businesses” are required to take specific measures to ensure that they are handling legally logged wood, with MAFF setting out the details of the measures that need to be taken (Article 13 of the amended Clean Wood Act).
- A “wood-related business” that meets a certain threshold of size must file annual reports to MAFF regarding the total amount of timber it has handled and the amount it has con-

firmed to be legal (Article 12 of the amended Clean Wood Act).

Judicial cases and other ongoing disputes

Niigata Minamata disease court case

On 19 April 2024, the Niigata District Court passed a judgment in which it recognised that 26 out of a total of 47 plaintiffs were suffering from Niigata Minamata disease and ordered the originator of the pollution, Showa Denko (now Resonac Holdings) to compensate for damages in the amount of approximately JPY4 million per victim (the claimed amount was approximately JPY8.8 million per plaintiff). The plaintiffs also sued the Japanese government for damages, but the court rejected this claim. The plaintiff (on 1 May 2024) and the defendant (on 19 April 2024) have appealed the case to the Tokyo District Court.

“Minamata disease” is a neurological disease caused by organic mercury poisoning. The name “Minamata” comes from Minamata Bay in Kumamoto Prefecture, Japan, where the disease was first reported. The disease is caused by methyl mercury being ingested by humans via the consumption of fish contaminated with mercury due to discharge in the water system. At first, the mechanism of bioconcentration was little understood in Japan, and even though the first cases of mercury poisoning were reported in the 1950s, it took until 1968 for the government to officially acknowledge the connection between mercury discharge and Minamata disease.

“Niigata” Minamata disease is Minamata disease that occurred in Niigata Prefecture and was caused by mercury discharge into the local Agano River by the Showa Denko plant that was using methyl mercury as a catalyst for producing acetaldehyde (which is an ingredient of acetic acid). The plant was producing acet-

aldehyde from 1936 to 1965, but the first official confirmation of Niigata Minamata disease was in June 1965. The local Niigata Prefecture made the confirmation in response to a report submitted by Niigata University, and while a team of experts at the then-Ministry of Health (MOH, currently the Ministry of Health, Labour and Welfare, or MHLW) reported in March 1966 that the cause of the mercury poisoning was the mercury discharge by the Showa Denko plant, the then-Ministry of International Trade and Industry (MITI, currently METI) was reluctant to accept the connection, leading to a delay in the Japanese government providing aid to those affected. This delay led to the first lawsuit concerning Minamata disease in Japan (including the original one in Kumamoto) only being filed on 12 June 1967, marking the beginning of the so-called “Four Major Pollution Lawsuits” (the other three are (i) the Itai-itai disease lawsuit, (ii) the Yokkaichi asthma lawsuit, and (iii) the Kumamoto Minamata disease lawsuit), all resulting in the plaintiffs/victims prevailing.

The 19 April 2024, judgment by the Niigata District Court was for a case filed with the court for the plaintiffs who were denied status as Minamata disease patients under the Act on Compensation for Pollution-Related Health Damage (the “Pollution Compensation Act”, enacted on 5 October 1973) and who were consequently denied compensation from the pollution source

(ie, Showa Denko). As noted, the Niigata District Court went beyond the constraints of the Pollution Compensation Act and accepted that 26 persons were sufferers of Niigata Minamata disease. The court also denied the application of the 20-year statute of limitation clause under Japan’s Civil Code, judging that the patients could not have made claims within the 20-year period.

Other disputes

There have been cases where facilities above ground have possibly been affected by deep underground tunnels (Maglev, Ken-o Expressway, etc). Tunnel construction might also have caused the disruption of water drainage, and it also generates unwanted construction debris (which is sometimes harmful due to heavy metal content). These factors led to construction delays and lawsuits seeking to halt the construction and/or claim damages.

These issues are yet to be decisively resolved. However, the Act on Special Measures Concerning Public Use of Deep Underground, which is the law that allows deep underground tunnelling without obtaining consent from the landowners above ground may need to be revisited, because the prerequisite for allowing such construction work – that such work will have little impact above ground – is being challenged.

KAZAKHSTAN



Law and Practice

Contributed by:

Arman Bigazin, Mikhail Abdulov, Olzhas Abubakirov and Dauren Sadykov
Haller Lomax LLP

Contents

1. Regulatory Framework and Law p.281

1.1 Environmental Protection Policies, Principles and Laws p.281

2. Enforcement Authorities and Mechanisms p.282

2.1 Regulatory Authorities p.282

2.2 Co-operation p.282

3. Environmental Protections p.283

3.1 Protection of Environmental Assets p.283

3.2 Breaching Protections p.283

4. Environmental Incidents and Permits p.283

4.1 Investigative and Access Powers p.283

4.2 Environmental Permits/Approvals p.284

4.3 Regulators' Approach to Policy and Enforcement p.285

4.4 Transferring Permits/Approvals p.287

4.5 Consequences of Breaching Permits/Approvals p.287

5. Environmental Liability p.288

5.1 Key Types of Liability p.288

5.2 Disclosure p.288

6. Environmental Incidents and Damage p.289

6.1 Liability for Historical Environmental Incidents or Damage p.289

6.2 Reporting Requirements p.289

6.3 Types of Liability and Key Defences p.289

7. Corporate Liability p.290

7.1 Liability for Environmental Damage or Breaches of Environmental Law p.290

7.2 Environmental Taxes p.290

7.3 Incentives, Exemptions and Penalties p.290

7.4 Shareholder or Parent Company Liability p.290

7.5 ESG Requirements p.291

7.6 Environmental Audits p.291

8. Personal Liability p.291

8.1 Directors and Other Officers p.291

8.2 Insuring Against Liability p.292

9. Insurance p.292

9.1 Environmental Insurance p.292

10. Lender Liability p.292

10.1 Financial Institutions/Lender Liability p.292

10.2 Lender Protection p.292

11. Civil Liability p.292

11.1 Civil Claims p.292

11.2 Exemplary or Punitive Damages p.292

11.3 Class or Group Actions p.293

11.4 Landmark Cases p.293

12. Contractual Agreements p.293

12.1 Transferring or Apportioning Liability p.293

12.2 Environmental Insurance p.293

13. Contaminated Land p.294

13.1 Key Laws Governing Contaminated Land p.294

13.2 Clearing Contaminated Land p.294

13.3 Determining Liability p.294

13.4 Proceedings Against Polluters p.294

13.5 Investigating Environmental Accidents p.294

14. Climate Change and Emissions Trading p.295

14.1 Key Policies, Principles and Laws p.295

14.2 Targets to Reduce Greenhouse Gas Emissions p.296

15. Asbestos and Polychlorinated Biphenyls (PCBs) p.296

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs p.296

16. Waste p.297

16.1 Key Laws and Regulatory Controls p.297

16.2 Retention of Environmental Liability p.297

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods p.297

16.4 Rights and Obligations Applicable to Waste Operators p.297

17. Environmental Disclosure and Information p.298

17.1 Self-Reporting Requirements p.298

17.2 Public Environmental Information p.298

17.3 Corporate Disclosure Requirement p.298

17.4 Green Finance p.298

18. Transactions p.299

18.1 Environmental Due Diligence p.299

18.2 Disclosure of Environmental Information p.299

18.3 Key Issues in Environmental Due Diligence p.299

Haller Lomax LLP was established in October 2017, with teams located in Astana and Almaty. Haller Lomax's partners and associates practise in the fields of construction, environmental protection, PPP, energy and natural resources, corporate and M&A, banking and finance, as well as drafting and revising legislation. Since 2018, the firm has assisted the Ministry of Environment and Natural Resources of the Republic of Kazakhstan (MENR) in reforming the environmental regulation system in Kazakhstan, including the drafting of the new Environmental Code adopted in 2021, as well as related laws

and subsidiary legislation. The firm has also advised the MENR on the amendments to the environmental regulations (since 2022) and advised Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH (GIZ) and the MENR on the Strategy for Achieving Carbon Neutrality by 2060. Other clients include the Asian Development Bank, Eurasian Resources Group, Kazchrome, Kazzinc, Kazakhstan Aluminium Smelter, ALS Limited, Central Asia Metals, Karachaganak Petroleum Operating, North Caspian Operating Company, and Shubarkol Komir.

Authors



Arman Bigazin is a founding partner of Haller Lomax, who has previously worked for White and Case, Deloitte and Grata International. He specialises in energy, environmental

protection, construction and PPPs, and has been advising large local and international companies in those sectors for about 20 years. Arman also has solid experience in law-making – he was the lead drafter of the new Environmental Code of the Republic of Kazakhstan and related legislation, and has participated in the development of the new Subsoil Use Code, the legislation on venture financing, the Entrepreneurial (Business) Code, the Law on Public-Private Partnership, and the Constitutional Law on the Astana International Financial Centre.



Mikhail Abdulov is a senior associate at Haller Lomax, specialising in energy and natural resources, environmental protection, corporate and M&A, commercial agreements, and procurement. He has solid experience advising both major international and local clients on issues related to subsoil use (including transactions for the acquisition of mining and oil and gas assets in Kazakhstan), commercial agreements, and regulated procurements. Mikhail's recent experience includes advising on joint ventures, mining rights and licensing, environmental issues, infrastructure projects and investments, among other things.



Olzhas Abubakirov is an associate at Haller Lomax, specialising in energy and natural resources, environmental protection, commercial agreements, and corporate and

M&A practices. Previous employers include Grata International, Integrites Kazakhstan and a Turkish multinational hospitality company. Olzhas's recent experience includes participation in environmental unscheduled inspection as a company representative, as well as appearing before administrative courts on environmental violation disputes.



Dauren Sadykov is an associate at Haller Lomax, practising in the fields of energy and natural resources, environmental protection, and data protection. His previous experience

includes being associated with one of the Big Four companies and a subordinate organisation of the Ministry of Environment and Natural Resources. Dauren has experience of advising large local and international companies on various complexities and, in particular, conducting legal due diligence, handling transactions for the acquisition of companies with state share interests, and providing legal support in commercial agreements.

Haller Lomax LLP

Office 163
6/1 Kabanbai Batyr Ave
Kaskad Business Centre
Floor 16
Astana City
Kazakhstan

Tel: +7 701 555 38 21
Email: info@hallerlomax.com
Web: www.hallerlomax.com



1. Regulatory Framework and Law

1.1 Environmental Protection Policies, Principles and Laws

The Constitution of the Republic of Kazakhstan

The environmental policy and law in Kazakhstan is based on the constitution, which specifies that the state shall aim to protect the environment in favour of human life and health (Article 31) and that every citizen is obliged to safeguard nature and protect natural resources (Article 38). Unlike those of many European jurisdictions, the Constitution of Kazakhstan does not contain any greater detail in terms of environmental protection or sustainable development - although the preamble refers to “realising our high responsibility before the present and future generations”.

Key Environmental Laws

The main legal act for the protection of the environment in Kazakhstan is the Environmental Code of the Republic of Kazakhstan (the “Environmental Code”), which was adopted on 2 January 2021 and became effective on 1 July 2021. The Environmental Code consists of three parts:

- the General Part - containing goals, principles, key definitions and other general provisions, as well provisions on the main regulatory tools (such as environmental impact assessments, environmental permits, environmental damage, public monitoring and control, etc);
- the Particular Part - regulating specific subject matter, such as the protection of ambient air, land, forests, wildlife, climate, greenhouse gases, and waste; and
- the Special Part - containing basic provisions on international co-operation and environmental liability, final and transitional provisions, as well as four annexes.

The Environmental Code is the cornerstone of environmental policy and law, but certain specific environmental regulations are also dispersed in other laws. By way of example, certain issues related to the use of natural resources (if not conflicting with the Environmental Code) are regulated by the Law on Specially Protected Natural Areas, the Water Code, the Land Code, the Forest Code, the Subsoil Use Code, the Law on the Protection of Wildlife and other laws. The administrative procedures in relation to environmental protection are also regulated by the Entrepreneurial (Business) Code and the Administrative Procedural and Process-Related Code.

Kazakhstan is also a party to and has ratified many international treaties in the environmental field, including:

- the Stockholm Convention on Persistent Organic Pollutants;
- the Basel Convention on the Control of Transboundary Transportation of Hazardous Wastes and their Disposal;
- the Rio Convention on Biological Diversity;
- the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters;
- the Montreal Protocol on Substances that Deplete the Ozone Layer;
- the Paris Agreement; and
- the Kyoto Protocol to the UN Framework Convention on Climate Change.

Ratified international treaties take precedence over national laws.

Environmental Law Principles

In Kazakhstan, environmental law is based on the following ten key principles (as listed and

explained in more detail in Article 5 of the Environmental Code):

- the prevention principle;
- the remediation principle;
- the precautionary principle;
- the proportionality principle;
- the “polluter pays” principle;
- the sustainable development principle;
- the integration principle;
- the access to information principle;
- the public participation principle; and
- the principle of the ecosystem approach.

Environmental Policy

The country’s environmental goals, priorities and target indicators can be set in policy papers as approved by the president or the government from time to time. By way of example, the following strategic documents are in effect:

- the Concept of Transition of the Republic of Kazakhstan to the Green Economy (approved by the president in 2013);
- the Republic of Kazakhstan National Development Plan until 2025 (approved by the president in 2018);
- the National Project “Green Kazakhstan” (approved by the government in 2021);
- the Strategy for Achieving Carbon Neutrality in the Republic of Kazakhstan by 2060 (approved by the president in 2023); and
- the National Development Plan of the Republic of Kazakhstan until 2029 (approved by the president in 2024).

2. Enforcement Authorities and Mechanisms

2.1 Regulatory Authorities

In Kazakhstan, environmental policy-making and regulatory competencies are mostly centralised at national level, while enforcement competencies are divided between the central and municipal authorities. At the national level, the primary “policymaker” is the government of Kazakhstan; its powers include the development of the main directions of the state environmental policy and approval of certain principal regulatory legal acts in the field of environmental protection. Such environmental regulatory acts, however, are commonly drafted by the Ministry of Environment and Natural Resources of the Republic of Kazakhstan (MENR). Municipal executive authorities (*akimats*) also act as local enforcement agents in the respective territorial units - for example, by issuing local environmental permits and regulating municipal waste management.

2.2 Co-operation

The MENR is the central executive authority responsible for enforcing the state environmental policy and providing leadership and intersectoral co-ordination in the field of environmental protection, meteorological and hydrological monitoring. The MENR adopts a multi-pronged approach to co-operation, both on a national and international scale, particularly:

- national stakeholder collaboration;
- public engagement and participation;
- international co-operation;
- co-operation with international organisations;
- research and knowledge sharing; and
- engagement in regional initiatives.

3. Environmental Protections

3.1 Protection of Environmental Assets

Given its vast geographical spread, Kazakhstan has a diverse range of environmental assets. The protection of these environmental assets is paramount, not just for environmental balance but also for the overall well-being of its inhabitants.

The primary legal instrument is the Environmental Code, which outlines the regulatory and legal framework for environmental protection and use of natural resources. It encompasses multiple aspects such as air protection, water conservation, waste management, flora and fauna conservation, and more.

Additionally, in Kazakhstan there is a network of protected areas, including nature reserves, national parks, and wildlife sanctuaries to conserve biodiversity, natural habitats, and landscapes. These areas restrict certain human activities that might be detrimental to the environment, including subsoil-use activities.

3.2 Breaching Protections

The consequences of breaching environmental protections depend on the act committed – although Kazakh legislation more often provides for liability in the form of a fixed fine for acts committed against the environment. However, Kazakh legislation also provides for criminal liability for violation of environmental safety. Today, there is a growing trend in the development of Kazakhstan's legislation towards an increase in fines and the amount of punishment for violation of natural conditions in Kazakhstan.

4. Environmental Incidents and Permits

4.1 Investigative and Access Powers The Committee for Environmental Regulation and Control (CERC)

The MENR has subordinate entities, such as the Committee for Environmental Regulation and Control (CERC), which is the key enforcement body that issues environmental permits and monitors and supervises environmental compliance. The CERC has departments in all regions of Kazakhstan. The CERC's specific investigative and access powers depend on the type of environmental incident or offence.

The Environmental Code does not specifically regulate the investigative powers of the regulatory authorities with regard to environmental incidents when the assumed infringer is unknown. However, in practice, the CERC would respond to such incidents and its officers would visit the public place where the environmental incident occurred to collect evidence (instrumental measurements, laboratory samples, photo and video materials, witnesses' interviews, etc). Such investigations would be initiated when the CERC reveals environmental incidents it has uncovered on its own or from publications in the mass media or on social networks, from a written or electronic complaint from individuals or legal entities, or when instructed by the prosecutor's office.

Investigative powers in respect of a specific person, as well as access powers either in the case of environmental incidents or breaches of law/environmental permits are strictly regulated under the Entrepreneurial (Business) Code, which applies to any type of state supervision of business - although certain specific provisions may be found in the sectoral statutes (eg, in the

Environmental Code with regard to environmental compliance, or in the Tax Code with regard to tax obligations).

CERC investigations

There are three types of state supervision that the CERC can use to investigate a specific person.

- Preventative control without accessing the site – this is conducted by analysing data obtained from the mass media, social networks, an automated system for monitoring emissions, documentation and reporting submitted to the CERC/the MENR. This type of supervision does not require registration with the prosecutor's office or the sending of a notice to the person concerned. No liability can be imposed on the person concerned even if the CERC reveals breaches. The CERC will issue an information notice specifying the revealed breaches of law/environmental permits (if any) and the person concerned will propose their/its plan as to how and when such breaches will be eliminated.
- Preventative control with site access – this includes the right to visit the site and premises. This form of supervision is conducted according to the risk assessment system (target persons are divided into four levels of risk) and based on the schedule approved by the prosecutor's office. The CERC will issue an administrative order prescribing that the person concerned must eliminate the revealed breaches and giving the deadlines for doing so. As a general rule, the CERC would not be allowed to impose fines or other administrative sanctions in this case (the only exception are Category I objects, ie, the major polluting facilities, see **4.2 Environmental Permits/Approvals**).

- Unscheduled inspection – this is conducted in a limited number of cases, including based on complaints received from individuals or legal entities, or when instructed by the prosecutor's office. As a general rule, unscheduled inspections must be preliminarily registered with the prosecutor's office.

There are special instances when the CERC would be allowed to conduct a “surprise” inspection or preventative control with site access with post factum registration with the prosecutor's office.

Access powers include the right to:

- interrogate experts and specialists;
- demand the provision of documents relevant to the case;
- demand audits and checks;
- collect material evidence;
- use audio and video recordings;
- make measurements;
- take samples; and
- other procedural actions.

4.2 Environmental Permits/Approvals

Legal entities will be required to obtain an environmental permit if their activities fall under Section 1 or 2 of Annex II to the Environmental Code (“Annex II”). Annex II contains the lists of activities and quantitative criteria, according to which a facility is allocated to Category I, II or III (ie, facilities that could have either a significant, or moderate, or insignificant negative impact on the environment, respectively). An environmental permit must be obtained for the construction and/or operation of Category I or II facilities. Category III facilities can be built and operated based on a notification sent to the relevant permitting authority (“Declaration”).

There are two types of environmental permits: an integrated environmental permit and an environmental impact permit. The environmental permits for Category I facilities are issued by the CERC or its territorial departments (for Category II – by local executive authorities) in electronic form through the e-government web portal (the “Portal”). To obtain a permit, a person must submit an application to the permitting authority with supporting documents such as project documentation for the construction and/or operation of facilities, draft emission limits, a draft waste management programme, a draft programme of industrial environmental control and other documents. As part of issuing an environmental permit, the permitting authority conducts a state environmental expert review of the project documentation for the construction and/or operation of the facility concerned. The public can express their opinions and comment on the proposed application and the project documentation in the process of the state environmental expert review.

Integrated Environmental Permit

As a rule, an integrated environmental permit must be obtained for facilities that could have a significant negative impact on the environment, to ensure integrated pollution prevention using the best available techniques (Category I). Operators of Category II facilities are also allowed to apply for an integrated environmental permit if there are approved Best Available Techniques Conclusions applicable to the relevant facility.

An application with documents is also sent to the other state bodies concerned for their comments and proposals regarding the necessary environmental conditions. Such interested bodies may include the Committee for Sanitary and Epidemiological Control of the Ministry of Health of the Republic of Kazakhstan, the local execu-

tive body of the region on whose territory the facility is located, the line ministry/department, and other state bodies.

The integrated environmental permit is issued by the CERC or its relevant territorial department. The issuance of a permit is free of charge and takes no more than 55 business days.

Environmental Impact Permit

An environmental impact permit must be obtained for facilities that could have a moderate negative impact on the environment (Category II). Category I facilities that existed when the Environmental Code became effective (1 July 2021) are also allowed to obtain an environmental impact permit, instead of the integrated environmental permit.

An environmental impact permit is issued by the local executive authority (for Category II) or by the CERC (for Category I), based on an application with supporting documents attached. The issuance of a permit is free of charge and takes no more than 30 business days. The conditions of an environmental impact permit are less extensive compared with those of an integrated environmental permit.

4.3 Regulators’ Approach to Policy and Enforcement

The system of legislation is based on human rights and freedoms, as well as the protection of the environment. Among other things, the basic principles of environmental legislation and the approach to its enforcement are as follows.

- Prevention - any activity that causes or may cause environmental pollution or degradation of the natural environment that results in environmental damage and harm to human life and/or health is only allowed within the

framework established by the Environmental Code if all necessary measures are provided at the source of environmental impact to prevent the occurrence of these consequences.

- **Correction** - environmental damage must be eliminated in full. If it is impossible to completely eliminate the environmental damage caused, its consequences should be minimised as far as possible at the current level of scientific and technological development. To the extent that the consequences of the environmental damage caused have not been eliminated or minimised, replacement is ensured by alternative remediation in accordance with the Environmental Code.
- **Precautions** - if there is a risk of environmental damage due to any activity that could have significant and irreversible consequences for the natural environment and/or its individual components, or if there is a risk of harm to human life and/or health, then effective and proportionate measures should be taken to prevent the occurrence of such consequences at economically acceptable costs, despite the current lack of scientific and technical knowledge or the ability to accurately assess the probability of the occurrence of these negative consequences.
- **Proportionality** - environmental protection measures are provided to the extent that they are sufficient to implement the goals and objectives of the environmental legislation of Kazakhstan. As such, preference is given to the option that is the least burdensome.
- **"Polluter pays"** - a person whose activity causes or may cause environmental pollution or degradation of the natural environment, resulting in environmental damage in any form or harm to human life and/or health, bears all the costs for fulfilling the requirements established by the environmental legislation of Kazakhstan for the prevention and control of the negative consequences of their activities, including the elimination of environmental damage caused (in accordance with the principle of correction).
- **Sustainable development** - nature and its resources constitute the wealth of Kazakhstan, and their use should be sustainable. The state ensures balanced and rational management of natural resources in the interests of present and future generations. When making decisions on environmental protection, priority is given to preserving natural environmental systems and ensuring their sustainable functioning, water conservation, energy conservation and energy efficiency, reducing consumption of non-renewable energy and raw materials, using renewable energy sources, minimising waste generation, as well as using such natural environmental systems as secondary resources.
- **Integration** - the state policy of Kazakhstan in all spheres of economic and social activity is formed and implemented subject to a balance between the objectives of socio-economic development and the need to ensure the environmental foundations of the sustainable development of Kazakhstan, including a high level of environmental protection and improvement of environmental quality.
- **Accessibility of environmental information** - the state, based on international treaties signed by Kazakhstan, ensures compliance with the right of the public to access environmental information on the grounds and conditions and within the limits established by law.
- **Public participation** - the public has the right to participate in decision-making involving issues of environmental protection and sustainable development in Kazakhstan, on the terms of, and in accordance with, the procedure established by the Environmental Code. Public participation in decision-making

concerning these issues is enabled at an early stage, when various options are open to consideration and when effective public participation can be ensured. State bodies and officials ensure the publication of decisions planned for adoption that may have an impact on the environment, on the condition that the public are allowed to express their opinion, which is taken into account when making these decisions.

- The ecosystem approach - when state bodies and officials plan and make decisions which may lead to negative consequences for the environment, the integrity and natural inter-relationships of natural environmental systems, living organisms, natural landscapes, other natural, natural-anthropogenic and anthropogenic objects, the need for conservation should be taken into account, along with the natural balance of the natural environment. At the same time, priority should be given to the preservation of natural landscapes, natural complexes and biodiversity, as well as the preservation and sustainable functioning of natural environmental systems, and the prevention of negative impacts on the services provided by such environmental systems.

4.4 Transferring Permits/Approvals

The transfer of an environmental permit can be carried out in the event of a change of the operator of an object that has a negative impact on the environment, as well as in the case of reorganisation of the legal entity of the operator of the object. The new operator is obliged to submit an application to the MENR for the renewal of an environmental permit within ten business days.

4.5 Consequences of Breaching Permits/Approvals

Violation of the terms of environmental permits may lead to administrative liability, as provided by the Code on Administrative Violations. The violator may also bear criminal liability, depending on the reason for the violation of the permit conditions - although criminal liability is rarely involved in practice.

Administrative Liability

The Code on Administrative Violations contains several types of environmental administrative liabilities:

- fixed fines;
- fines based on the amount of the pollutant;
- suspension or prohibition of activities; and
- revocation of a permit or suspension of its validity.

Fines

The Code on Administrative Violations defines the fines for violation of environmental laws. In certain cases, fines are fixed and set based on the monthly calculation index (MCI) (1 MCI equals approximately USD7.60). In others, the fine is calculated as a percentage of the applicable rate for environmental damage due to excess pollutants, or a percentage of the economic gains resulting from the violation, among other methods.

Revocation and suspension of activities

In specific situations, violating environmental rules can lead to the suspension or revocation of an environmental permit or can potentially halt the operations of the company involved. Typically, these consequences apply when there are multiple violations within a year.

Criminal Liability

For more on criminal liability, refer to **5.1. Key Types of Liability**.

5. Environmental Liability

5.1 Key Types of Liability

Causing environmental damage or committing a violation of environmental legislation may entail civil, administrative and/or criminal liability, depending on the circumstances.

Civil Liability

In the environmental sphere, civil liability arises in connection with civil claims, which can be divided into three categories:

- a claim submitted by the MENR for remediation of environmental damage (either to make the infringer remediate the environmental damage at their own cost or to compensate the cost of remediation performed by the state);
- a claim submitted by individuals to compensate for death or personal injuries caused by environmental damage or other violation of environmental legislation; and
- a claim submitted by individuals or legal entities to compensate for property damage caused by environmental damage or other violation of environmental legislation.

Persons subject to administrative or criminal liability are not exempt from civil liability and the obligation to eliminate the breach.

Administrative Liability

Administrative liability mainly entails warnings, fines, the recall of environmental permits, or suspension of activities. The Code on Administrative Violations prescribes administrative liability

for a number of violations in the environmental field, including operation of a facility without an environmental permit, exceeding the emissions limits, unauthorised waste dumping, failure to remediate environmental damage, and other violations. Both individuals and legal entities can be subject to administrative liability.

Criminal Liability

The Criminal Code specifies a number of criminal acts that involve a violation of environmental requirements and are associated with certain serious consequences (death, personal injuries, mass disease, environmental catastrophe, mass wildlife deaths, other environmental damage and so on). Criminal liability may entail the imposition of a fine, community service, imprisonment, restraint, or deprivation of the right to hold certain positions or engage in certain activities. Only individuals can be held criminally liable in Kazakhstan.

5.2 Disclosure

Kazakhstan's environmental legislation is based on the principle of transparency of the entire environmental sphere. The public has the right to make certain decisions concerning objects that have a negative impact on the environment.

The Environmental Code contains the obligation that the draft report on possible impacts is submitted to public hearings. The draft report on possible impacts should be available for review on the official website of territorial local executive bodies for at least 30 calendar days following the date of publication.

Public hearings are accessible to any person, regardless of their place of residence. During public hearings, any person participating in them has the right to voice their comments and suggestions on the draft report on possible impacts.

Concealment of the facts of environmental impact is something of a rarity in environmental practice in Kazakhstan. As a rule, all environmental proceedings related to violations of environmental protection requirements are accompanied by full disclosure of the facts, in compliance with the procedure for resolving legal disputes.

6. Environmental Incidents and Damage

6.1 Liability for Historical Environmental Incidents or Damage

The Environmental Code specifically regulates cases of historical environmental pollution or damage. The civil liability for remediation of environmental damage will be borne by the infringer or its legal successor(s). If the infringer or its legal successors cannot be identified or have ceased to exist, the civil liability will be shifted to the person who was the landowner at the time the wrongdoing was committed, or stopped being committed. The current landowner can bear civil liability if the MENR can prove in court that, at the time of acquiring the rights to the specified land plot, such landowner was aware of the presence of environmental damage caused by actions or activities previously carried out on this land plot. Criminal and administrative liability cannot be shifted to other persons.

6.2 Reporting Requirements

The submission of the following reports in the environmental field is required where necessary to obtain an environmental permit:

- report on the environmental action plan;
- report on the results of industrial environmental control;
- waste inventory report;

- report on the protection of atmospheric air; and
- report on the costs of environmental protection.

6.3 Types of Liability and Key Defences

Types of liability applicable to environmental incidents or damage are described in **5.1 Key Types of Liability**. The defences, limits and conditions to such liability may include the following.

Statutes of limitation apply as follows:

- civil liability (remediation of environmental damage) – 30 years;
- civil liability (death, personal injury, property damage) – three years;
- administrative liability – one year for individuals, three years for legal entities; and
- criminal liability – depends on the gravity of the offence.

In civil, administrative and criminal cases, the main defence would be proving that:

- the act or failure to act was not unlawful;
- there is no harm; or
- there is no cause-effect relation between the act (or omission) and the harm.

In civil cases, the main defence would be:

- proving that the liability must be shared with third parties;
- proving that the environmental incident or damage was due to an unlawful act (or omission) by a public authority; and
- proving contributory guilt or negligence in cases of death, personal injury or property damage.

In terms of administrative and criminal liability, the following applies:

- a person cannot be subject to administrative or criminal liability if they prove that the offence was committed in circumstances of extreme necessity; and
- a person can be released from administrative liability if they prove that the offence was “insignificant”.

7. Corporate Liability

7.1 Liability for Environmental Damage or Breaches of Environmental Law

Refer to **5.1 Key Types of Liability**. Legislation does not provide special rules for bringing legal entities to liability, except that legal entities cannot be subject to criminal liability.

7.2 Environmental Taxes

A fee for negative impact on the environment is charged for emissions and discharges of pollutants (emissions into the environment), the placement of sulphur in open form on sulphur maps, and waste disposal carried out with an appropriate environmental permit and environmental impact declaration. The payers of the fee are operators of objects belonging to Categories I, II and III provided in Annex II of the Environmental Code.

Under the Environmental Code, emission taxes are calculated using the base levies for various emissions (including those from flaring) provided in the Tax Code, which was adopted on 27 December 2017. Basic tax rates for emissions are determined per ton and range from 0.01 MCI (approximately USD0.076) to 13,402 MCI (approximately USD101,855), depending on the type of pollutant. The local governing bodies

(*maslikhats*) have the authority to increase the tax rates by up to 200% of the base rate, except for in the case of emissions from flares.

From 1 January 2025, the tax rates for all types of negative impact will double. Increasing coefficients will be applied to tax rates for all types of negative pollutant, except where payments are for emissions of pollutants into the air from mobile sources.

Moreover, on 1 April 2022, the government of Kazakhstan approved a list of 50 Category I objects (the “List of 50”) - the largest in terms of total pollutant emissions as of 1 January 2021. Objects included in the List of 50 will be required to apply an appropriate increasing factor when calculating the amount of payment, which will increase by two times every three years until 1 January 2034. For businesses that have been granted integrated environmental permits as per the Environmental Code, there are no charges for the negative impact.

The Tax Code also has taxes for the use of water resources, for animal hunting, for forest use, and for the use of specially protected natural areas.

7.3 Incentives, Exemptions and Penalties

There are no such mechanisms in Kazakhstan. The principle applied is the “polluter pays”.

7.4 Shareholder or Parent Company Liability

Civil Liability

Under Kazakhstan law, as a general rule, a shareholder or parent company is not liable for environmental damage or breaches of environmental law committed by a legal entity they own or control. The exemptions to this rule are where:

- the owned/controlled legal entity is a full partnership, an additional liability partnership or a limited partnership (although these organisational forms are almost never used in Kazakhstan);
- the shareholder/parent company of a legal entity organised as a limited liability partnership has not contributed to the charter capital in full (in which case, they will be jointly liable within the value of the share they have failed to contribute);
- the subsidiary company became bankrupt owing to a fault on the part of the parent company (in which case, the parent company may be held liable);
- a founder or a shareholder was found guilty of deliberately bankrupting the company they own/control; or
- the shareholder or the parent company provided a corporate or personal guarantee towards the subsidiary company's debts and obligations.

Administrative and Criminal Liability

Criminal and administrative liability cannot be shifted to other persons, including the shareholder or the parent company.

7.5 ESG Requirements

ESG requirements in Kazakhstan differ from their representation in other regions. Kazakhstan's legislative framework addresses ESG requirements through separate channels for environmental aspects, social aspects and government aspects, thereby lacking a unified structure to consolidate them.

Specifically, the Environmental Code and associated regulations set out requirements concerning environmental protection, including standards for emissions, waste management, water usage, and biodiversity protection. Companies,

especially those in sectors with significant environmental footprints (eg, mining and energy), must comply with these regulations.

Labour and employment laws in Kazakhstan address several social issues, such as workers' rights, safety standards, and non-discrimination. Additionally, there are laws and programmes aimed at promoting social welfare, health and community development.

Governance in the ESG context typically refers to the system of rules, practices and processes by which a company is directed and controlled. Kazakhstan's corporate law outlines basic governance structures for businesses operating in the country. These include rules about shareholder meetings, board compositions, audit requirements, and disclosure norms.

7.6 Environmental Audits

In Kazakhstan, the legislation does not provide mechanisms for mandatory environmental audits for companies. However, a technical audit is possible if the best available techniques are implemented. Moreover, an audit can be understood as an environmental impact assessment – ie, a permit document, which refers to the process of identifying, studying, describing and evaluating possible significant environmental impacts during the implementation of the planned activities, based on relevant studies.

8. Personal Liability

8.1 Directors and Other Officers

Directors and other officers can personally be jointly and/or severally liable for environmental damage or breaches of environmental law committed by the company if:

- such a violation is caused by their actions and/or inaction, as well as being a result of the provision of information that is misleading or known to be false;
- there has been a violation of the procedure for providing information;
- the company incurred losses on a transaction concluded as a result of dishonest actions and/or the inaction of an official; or
- the violation is caused by an improper management of officials, leading to bankruptcy.

8.2 Insuring Against Liability

Officials can voluntarily insure against liability for violations of environmental legislation by the company and associated penalties. However, this type of insurance is not common in Kazakhstan.

9. Insurance

9.1 Environmental Insurance

Environmental insurance is a type of economic regulation of environmental protection. The order of the Ministry of Environment approved a list of environmentally hazardous activities, which provides for the mandatory availability of environmental insurance.

This list includes activities related to:

- the use of land and subsoil;
- the use of water resources;
- the implementation of oil operations;
- metallurgical production;
- the use of nuclear and thermal energy;
- the impact on atmospheric air, climate, and the ozone layer; and
- the handling of hazardous waste.

10. Lender Liability

10.1 Financial Institutions/Lender Liability

Kazakhstan legislation does not provide for the liability of financial institutions/lenders for environmental damage or breaches of environmental law committed by their debtors.

10.2 Lender Protection

Lenders do not face legal risks arising from violations of environmental legislation by the debtor.

11. Civil Liability

11.1 Civil Claims

The types of civil claims in the case of environmental incidents or damage are described in **5.1 Key Types of Liability**.

To file a civil claim for environmental remediation, the CERC must prove all of the following conditions:

- the existence of a violation and the possibility of identifying a specific person(s) whose actions caused the violation;
- clearly determined and measurable damage; and
- a causal link between the violation and the occurrence of the damage.

The Civil Code provides for the option of filing a civil lawsuit to suspend or terminate the activities of persons that cause or threaten to cause damage to the environment or human life and health.

11.2 Exemplary or Punitive Damages

Civil law in Kazakhstan does not provide for exemplary or punitive damages in civil cases.

The defendant is liable only for the damage they cause. The punitive function is implemented through administrative sanctions. However, it is worth noting that the court may oblige the defendant to compensate the plaintiff for lost profits – that is, lost income that the plaintiff would have received under normal conditions of turnover if the defendant had not violated their rights – as well as legal and other associated fees of the claimant, in addition to direct losses.

In the case of claims to suspend activities that have a harmful effect on the environment, the court may additionally oblige the defendant to take actions aimed at eliminating the source of harmful influence – for example, repair, reconstruction, installation of new treatment facilities, the introduction of new production technologies, and a change in environmental management conditions.

11.3 Class or Group Actions

The law allows group actions for environment-related civil claims, but only provides for the possibility of class actions in environmental disputes where all the claimants are personally identified. Environmental NGOs have the right to submit claims to protect the rights and interests of the public at large, although this excludes any compensation for personal harm or environmental damage.

11.4 Landmark Cases

The most high-profile case of compensation for environmental damage so far was that of the North Caspian Operating Company. The MENR claimed approximately KZT2.5 trillion (approximately USD5.1 billion) against the giant Kashagan oil venture for keeping more than double the amount of sulphur permitted on the site. This was the largest environmental protection fine claimed by the state so far.

In Kazakhstan, the activities of 31 enterprises have been suspended for violating environmental laws, including Kazphosphate LLP and Kazakhmys LLP. In 2023, inspections revealed 1,679 violations, leading to fines totalling KZT322.9 billion (approximately USD666.5 million).

12. Contractual Agreements

12.1 Transferring or Apportioning Liability

Private parties may use contractual agreements to apportion liability for incidental damage or breaches of law, although only between themselves and by way of recourse. Such contractual arrangements do not have any binding effect or influence on the regulator. It should also be considered that Kazakhstan law does not provide for the concept of indemnities or warranties, as in many common-law countries.

12.2 Environmental Insurance

Kazakhstan legislation provides for mandatory and voluntary environmental insurance. Mandatory environmental insurance is regulated by the Law on Mandatory Environmental Insurance. Individuals and/or legal entities engaged in “environmentally hazardous activities” (as per the list approved by the MENR, see 9.1 Environmental Insurance) must have environmental insurance coverage against civil liability to remediate environmental damage caused by an accident. Insured events under a voluntary environmental insurance contract are determined by the parties independently. In practice, voluntary insurance covers third parties’ property claims.

13. Contaminated Land

13.1 Key Laws Governing Contaminated Land

Contaminated land is regulated by the Environmental Code and the Land Code. Land pollution, which creates a significant risk of harm to public health, is considered environmental damage. Causing the destruction of soils is also recognised as a form of causing environmental damage to land, along with other actions that lead to the degradation or depletion of soils.

13.2 Clearing Contaminated Land

Remediation and the “polluter pays” principle require that a person who causes environmental damage to land is obliged to fully and at their own expense remediate the components of the natural environment that suffered environmental damage. According to the Environmental Code, the person responsible must carry out direct remediation of the damage caused to the land by restoring the land to its basic condition, or instead carry out alternative remediation by protecting and improving the land. In addition to direct and/or alternative remediation, the guilty person is also obliged to take additional compensatory measures to improve the territory of the land that has suffered environmental damage.

The person responsible is required to discuss and approve the remediation programme with the MENR. Following the completion of the remediation programme by the achievement of the goals set, the person responsible must perform periodic monitoring of the state of the restored land. If the results of such monitoring reveal that the targets of the remediation programme have not been fully achieved, an additional remediation programme will be required.

13.3 Determining Liability

As described in **13.2 Clearing Contaminated Land**, the person who caused the contamination is responsible for environmental damage. In cases where more than one party contributed to the contamination, each party responsible for the contamination is jointly and severally liable.

13.4 Proceedings Against Polluters Civil Liability

See **11.1 Civil Claims**.

Administrative Liability

See **4.1 Investigative and Access Powers**. The Code on Administrative Violations provides that the CERC and its territorial departments have the authority to consider cases of administrative offences.

The following officials (generally, CERC employees) are authorised to review administrative violations and impose administrative fines:

- state environmental inspectors;
- lead state environmental inspectors;
- head state environmental inspectors of regions, significant cities, and the capital; and
- head state environmental inspectors of the Republic of Kazakhstan (and their deputies).

13.5 Investigating Environmental Accidents

As described in **4.1 Investigative and Access Powers**, the investigation of environmental accidents is regulated under the Entrepreneurial (Business) Code.

Preventative Control With Site Access

The CERC must notify the subject (eg, the head of a legal entity or their representative) in writing about an upcoming inspection at least 30 days in advance.

Inspection durations are set based on workload and assigned tasks. Micro-businesses are inspected for up to five business days, with a possible five-day extension. For other businesses, inspections can last up to 15 business days, with a possible 15-day extension.

During inspections, the CERC typically conducts sample analysis, measures emissions, and monitors adherence to operational guidelines and industrial environmental control. Based on the results of the inspection, the CERC issues a report on the results of preventative control with site access and – where violations are identified – issues an administrative order.

Unscheduled Inspection

The CERC must notify the subject in writing about the unscheduled inspection at least one day before its start, indicating the subject of the inspection. Unscheduled inspections are undertaken for up to ten business days, with a possible ten-day extension. The inspection method and results are consistent with the inspection conducted under preventative control with site access.

14. Climate Change and Emissions Trading

14.1 Key Policies, Principles and Laws

General provisions regarding climate change are contained in the Environmental Code. Additionally, in response to the tangible threats of climate change, the government is working on the adoption of the Strategy for Achieving Hydrocarbon Neutrality in the Republic of Kazakhstan by 2060.

International Treaties

Kazakhstan has also ratified the following international treaties in the field of climate change:

- the Paris Climate Agreement;
- the Convention on Long-Range Transboundary Air Pollution;
- the Vienna Convention for the Protection of the Ozone Layer; and
- the Kyoto Protocol to the United Nations Framework Convention on Climate Change.

Environmental Legislation

One of the main tasks of Kazakhstan's environmental legislation is ensuring the contribution of Kazakhstan to strengthening the global response to the threat of climate change, through the implementation of international, regional and trans-boundary programmes for environmental protection, the adaptation to climate change and transition to a "green" economy, as well as the protection of the ozone layer of the Earth's atmosphere. In accordance with the Environmental Code, the sectors of agriculture, water and forestry – as well as the area of civil protection – are priorities for the adaptation to climate change.

Principles of Adaptation

At the same time, adaptation to climate change is based on the following principles:

- the obligation to consider the impacts of climate change in medium and long-term development plans;
- the phased implementation of the process of adaptation to climate change;
- the intersectoral approach of local executive bodies to adaptation to climate change; and
- the existence of a link between the measures taken to adapt to climate change and the

reduction of the adverse impacts of climate change.

The state also takes measures to ensure public access to environmental information on climate change, trains specialists in the field of adaptation to climate change, and conducts environmental scientific research.

14.2 Targets to Reduce Greenhouse Gas Emissions

By 31 December 2030, Kazakhstan aims to reduce its carbon balance by at least 15% from the 1990 level. As described in **14.1 Key Policies, Principles and Laws**, Kazakhstan is also committed to achieving hydrocarbon neutrality by 2060. According to the draft strategy, target indicators for emissions and absorption of greenhouse gases by types of emissions have been set.

In addition, in order to reduce greenhouse gas emissions, the Environmental Code establishes carbon quotas for carbon dioxide emissions. In simple terms, hydrocarbon quotas mean the volume of free carbon units distributed by the MENR based on the benchmarking methodology. Installations in the sectors of electricity, oil and gas, mining, metallurgical and chemical industries, as well as manufacturing industries in terms of the production of cement, lime, gypsum and bricks, are subject to carbon quotas if they emit more than 20,000 tons of carbon dioxide per year.

15. Asbestos and Polychlorinated Biphenyls (PCBs)

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs

There are no separate legislative acts that regulate the use of asbestos and PCBs. Separate provisions regarding asbestos and organic pollutants are contained in the Environmental Code.

Asbestos

The Environmental Code stipulates that the production and/or use of asbestos or organic pollutants is an activity that has a significant negative impact on the environment. Therefore, it requires an environmental impact assessment (or screening).

Kazakhstan has also ratified the International Labour Organization Asbestos Convention of 1986. In addition to this convention, the Sanitary Rules for Working with Asbestos No 1.07.085-97 and Methodological Recommendations for the Implementation of State Sanitary Supervision at Enterprises Producing and Using Asbestos No 10.7.065/P-94 have been adopted.

PCBs

In relation to PCBs, rules for handling persistent organic pollutants and waste containing them were developed in accordance with the requirements of the Stockholm Convention on Persistent Organic Pollutants and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.

Moreover, according to the Decision of the Board of the Eurasian Economic Commission of 2015 No 30, PCBs were included in the list of goods for which import into the EAEU territory (of which Kazakhstan is a part) and export from the country's customs territory is prohibited.

16. Waste

16.1 Key Laws and Regulatory Controls

The Environmental Code contains an entire section on waste management, including hazardous waste, mining waste, municipal waste, and radioactive waste. Separate aspects of waste management are addressed in the Subsoil Code (in terms of waste during subsoil use operations) and in the Water Code (regarding the protection of water objects from clogging).

16.2 Retention of Environmental Liability

The owner or shipper of waste is obliged to ensure the safe disposal of waste by third parties in a manner that does not pose a risk of environmental damage or a risk of harm to human life and/or health and, in particular, is without:

- risk for waters (including underground water), atmospheric air, soils, flora and fauna; and
- negative impacts on landscapes and specially protected natural areas.

The owner or the shipper of waste retains liability for waste until it has been transferred to a third party carrying out waste recovery or disposal operations with an appropriate licence issued by the MENR. This rule does not extend to household waste.

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

Individuals and legal entities engaged in production in Kazakhstan and/or importation into Kazakhstan of certain types of goods are obliged to ensure the collection, transportation, preparation for reuse, sorting, processing, neutralisation and/or disposal of waste generated following the loss of consumer properties of such goods.

Legally, such goods are referred to as “goods subject to extended producer obligations”.

The list of goods subject to the extended obligations of manufacturers is established by order of the authorised body and includes land transport vehicles (apart from railway or tram rolling stock), rubber (and products made from it), electric accumulators, oil and oil products (except crude oil) obtained from bituminous rocks, anti-freezes and other chemical products, polymer, glass, paper, cardboard, metal packaging, large electrical and electronic equipment, and other goods.

The extended producer obligations are fulfilled either by creating their own waste collection and management system (although this option is not available for motor transport). The entire extended producer responsibility system in Kazakhstan is currently under extensive review.

16.4 Rights and Obligations Applicable to Waste Operators

Waste operators must conduct their activities in accordance with the waste management programme and the environmental permit obtained.

In accordance with the Environmental Code, waste operators are required to ensure environmental protection and favourable conditions for human life and health by reducing the amount of waste to be disposed of and encouraging preparation for reuse, recycling, and proper disposal. This includes adherence to:

- waste accumulation limits;
- waste disposal limits.

Operators of Category I and II facilities must justify the waste accumulation and disposal limits

in their waste management programme when applying for an environmental permit.

Violations of these obligations can result in administrative fines, including the suspension of the operator's activities. The harm caused by unauthorised discharge of specific contaminants (or types of waste) is assessed based on the amount of the pollutant released beyond the allowed limit, along with the corresponding fee rate for that pollutant.

17. Environmental Disclosure and Information

17.1 Self-Reporting Requirements

The following persons are required to notify the MENR on their own behalf:

- a person who causes environmental damage is obliged to notify the MENR about having potentially caused environmental damage, along with a preliminary assessment of its nature and scale; and
- the operator of the waste storage facility is obliged to notify the MENR about the occurrence of a major environmental incident.

17.2 Public Environmental Information

The public has the right to request environmental information from any state body and other (public or private) owners of environmental information at any time without providing any justification. The public may be denied environmental information only in cases strictly defined by law – for example, if this entails a violation of IP rights or the confidentiality of primary statistical data.

The owners of environmental information in the public sector are:

- bodies and institutions of the legislative, executive and judicial branches of government;
- local government and self-government (eg, courts, local executive bodies, and the MENR);
- government institutions that are not government bodies and whose activities or services are related to the environment (eg, the Information and Analytical Centre for Environmental Protection); and
- entities of the quasi-public sector that take part in activities or services related to the environment (eg, government-owned Zhasyl Damu JSC).

17.3 Corporate Disclosure Requirement

Kazakhstan ratified the Kyiv Protocol on Pollutant Release and Transfer Registers, which requires certain corporations to publicly disclose information on their emissions and waste on an annual basis.

17.4 Green Finance

Kazakhstan has been working with international organisations, including the United Nations Development Programme (UNDP) and the European Bank for Reconstruction and Development (EBRD), to develop green finance initiatives and access expertise and funding. Kazakhstan is also focused on aligning its financial sector with the United Nations Sustainable Development Goals. This includes promoting investments that contribute to these goals, such as reducing poverty, protecting the environment, and supporting clean energy.

The Environmental Code includes a taxonomy of green projects, as well as providing a legislative definition for green financing and specific instruments. Green bonds and green loans are used in Kazakhstan. Currently, some green

bonds (including ESG bonds) are listed at Astana International Exchange and Kazakhstan Stock Exchange.

The government of Kazakhstan approves the classification (taxonomy) of green projects, as well as the rules for the recognition of technologies as green technologies.

18. Transactions

18.1 Environmental Due Diligence

Environmental due diligence is a common practice in M&A, finance and property transactions in Kazakhstan. Often, such due diligence is carried out in relation to the conclusions of environmental expertise, compliance with the conditions of environmental permits, analysis of waste management programmes, verification of environmental insurance and so on. In rare cases, environmental due diligence includes site visits.

18.2 Disclosure of Environmental Information

In Kazakhstan, the principle applies that a person who has environmental information is obliged to provide it at the request of the interested person, except in cases where the provision of information should be refused (eg, if it may violate IP rights). Therefore, a company seller may potentially be required to disclose any environmental information it has about the company to a purchaser.

18.3 Key Issues in Environmental Due Diligence

Today, representatives of the business community who have a negative impact on the environment are increasingly willing to take on responsibilities in the field of environmental protection. However, there are still instances where large companies fail to meet their obligations, either for profit or due to oversight.

Environmental due diligence for Kazakhstan-based assets must include a review of the following aspects:

- availability and validity of mandatory permits;
- reports on permitted and actual emissions into the environment;
- compliance with obligations related to industrial environmental control;
- adherence to waste management obligations and compliance with the waste management programme;
- compliance with industrial safety regulations; and
- adherence to carbon administration and quota requirements.

Trends and Developments

Contributed by:

Arman Bigazin, Mikhail Abdulov, Olzhas Abubakirov and Dauren Sadykov

Haller Lomax LLP

Haller Lomax LLP was established in October 2017, with teams located in Astana and Almaty. Haller Lomax's partners and associates practise in the fields of construction, environmental protection, PPP, energy and natural resources, corporate and M&A, banking and finance, as well as drafting and revising legislation. Since 2018, the firm has assisted the Ministry of Environment and Natural Resources of the Republic of Kazakhstan (MENR) in reforming the environmental regulation system in Kazakhstan, including the drafting of the new Environmental Code adopted in 2021, as well as related laws

and subsidiary legislation. The firm has also advised the MENR on the amendments to the environmental regulations (since 2022) and advised Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH (GIZ) and the MENR on the Strategy for Achieving Carbon Neutrality by 2060. Other clients include the Asian Development Bank, Eurasian Resources Group, Kazchrome, Kazzinc, Kazakhstan Aluminium Smelter, ALS Limited, Central Asia Metals, Karachaganak Petroleum Operating, North Caspian Operating Company, and Shubarkol Komir.

Authors



Arman Bigazin is a founding partner of Haller Lomax, who has previously worked for White and Case, Deloitte and Grata International. He specialises in energy, environmental

protection, construction and PPPs, and has been advising large local and international companies in those sectors for about 20 years. Arman also has solid experience in law-making – he was the lead drafter of the new Environmental Code of the Republic of Kazakhstan and related legislation, and has participated in the development of the new Subsoil Use Code, the legislation on venture financing, the Entrepreneurial (Business) Code, the Law on Public-Private Partnership, and the Constitutional Law on the Astana International Financial Centre.



Mikhail Abdulov is a senior associate at Haller Lomax, specialising in energy and natural resources, environmental protection, corporate and M&A, commercial agreements, and procurement. He has solid experience advising both major international and local clients on issues related to subsoil use (including transactions for the acquisition of mining and oil and gas assets in Kazakhstan), commercial agreements, and regulated procurements. Mikhail's recent experience includes advising on joint ventures, mining rights and licensing, environmental issues, infrastructure projects and investments, among other things.



Olzhas Abubakirov is an associate at Haller Lomax, specialising in energy and natural resources, environmental protection, commercial agreements, and corporate and

M&A practices. Previous employers include Grata International, Integrites Kazakhstan and a Turkish multinational hospitality company. Olzhas's recent experience includes participation in environmental unscheduled inspection as a company representative, as well as appearing before administrative courts on environmental violation disputes.



Dauren Sadykov is an associate at Haller Lomax, practising in the fields of energy and natural resources, environmental protection, and data protection. His previous experience

includes being associated with one of the Big Four companies and a subordinate organisation of the Ministry of Environment and Natural Resources. Dauren has experience of advising large local and international companies on various complexities and, in particular, conducting legal due diligence, handling transactions for the acquisition of companies with state share interests, and providing legal support in commercial agreements.

Haller Lomax LLP

Office 163
6/1 Kabanbai Batyr Ave
Kaskad Business Centre
Floor 16
Astana City
Kazakhstan

Tel: +7 701 555 38 21
Email: info@hallerlomax.com
Web: www.hallerlomax.com



New Environmental Policy

In 2021, a new Environmental Code was adopted in Kazakhstan, which introduced significant changes in the regulation of the country's environmental situation. The development of the new code drew on the experiences of OECD and EU countries. Key changes included:

- The introduction of the “polluter pays” principle – this replaced the old “pay and pollute” principle, to reduce emissions from industrial enterprises.
- Mandatory integrated permits – these permits require a transition to the best available techniques (BAT). The government has developed BAT reference books (BREFs) based on EU BREFs for the key polluting sectors, with reasonable adjustment to the climatic, environmental and economic conditions of the country. The introduction of integrated permits and BAT requirements will take place from 1 January 2025.
- New EIA procedure – there will be a fundamental change in the regulations on environmental impact assessment.
- Pollution monitoring – an automated emission monitoring system will be introduced.
- Waste – the principles of a 5R waste management hierarchy will be introduced.

More than three years after the Environmental Code came into effect, certain problems have emerged in practice, primarily related to inconsistencies in the provisions of subordinate legislation, much of which has not been properly adapted to meet the requirements of the new Environmental Code. As a result, conflicts often arise between enterprises and regulatory authorities regarding the interpretation of environmental requirements.

Moreover, the regulatory body is attempting to revert to some questionable regulatory tools that were abolished during the environmental reform in 2021. For example, there are efforts to reintroduce indirect assessments of air pollution damage and mandatory environmental audits conducted by private auditors. Such attempts threaten the effectiveness of the reform, as this approach reflects a desire to return to previous practices of replenishing the state treasury through environmental fees and fines (the “pay and pollute” principle), rather than focusing on preventing violations and ensuring environmental compliance.

In the first half of 2024, the Ministry of Ecology conducted 489 environmental inspections, identifying 1,331 violations of environmental legislation and issuing 860 directives. As a result, 1,022 administrative fines were imposed, totalling over KZT40 billion (approximately USD80.8 million), with 884 fines amounting to KZT13.3 billion (approximately USD26.86 million) collected.

Nuclear and Alternative Energy

The authorities in Kazakhstan are actively promoting the agenda for the construction of nuclear power plants (NPPs). At the initiative of the country's president, a nationwide referendum was held on 6 October 2024, to determine whether the public supports the construction of NPPs in the country. According to official data, about 70% of the voters who participated in the referendum voted in favour of this decision. However, the results also indicate significant concerns among a large section of the population regarding the safety and justification of the country's transition to nuclear energy.

According to official statements from the government of Kazakhstan, a decision on conducting a tender to select contractors for the con-

struction of the NPP is expected to be made in 2025. The government is leaning towards the idea that such a project should be implemented by a consortium of experienced companies from up to five different countries.

In addition, the agenda concerning the development of green hydrogen projects, hydropower, and energy storage systems is highly relevant in the country.

Renewable Energy Projects

The government aims to achieve a 50% share of alternative and renewable electricity by 2050. Since 2014, the number of renewable energy facilities has consistently increased.

Currently, there are around 150 operating renewable energy facilities (over 100 kW) in Kazakhstan with a total capacity of 2.9 GW. This includes wind power plants, solar power plants, small hydro plants, and biogas plants. In 2023, investments in renewable energy amounted to KZT200 billion (approximately USD404.04 million), marking the first growth in four years.

The share of renewable energy in Kazakhstan's electricity generation reached nearly 6% by the end of 2023, reflecting a 30% increase compared to 2022. If this growth rate persists, the government's ambitious target of achieving 15% of electricity generation from renewable sources by 2030 may be within reach.

The Law on Support for the Use of Renewable Energy Sources provides for such types of support as:

- a fixed tariff for 15 years;
- a guaranteed purchase of electricity by a settlement and financial centre; and

- the exemption of renewable energy producers from fees for the transmission of electricity services by transmission organisations.

Recent legislative changes in June 2024 now permit individuals, small and medium-sized enterprises (SMEs), and farms to generate and sell electricity from renewable sources with capacities of up to 200 kW, without requiring business registration. This development aims to promote the economic viability of small-scale renewable energy projects, enabling citizens to offset costs and potentially earn from surplus energy sales. The economic impact of this measure is particularly significant in regions with high electricity tariffs.

Funding for renewable projects in Kazakhstan is predominantly provided by development banks. The largest lender is the European Bank for Reconstruction and Development (EBRD), which has issued loans totalling KZT162 billion (approximately USD327.27 million). The Kazakhstan Development Bank followed with KZT67 billion (approximately USD135.35 million), and the China Development Bank has contributed KZT29 billion (approximately USD58.58 million).

To stimulate the use of renewable energy projects, Kazakhstan provides state support for green financing. Green finance refers to investments aimed at the implementation of green projects and attracted through green bonds, green loans and other financial instruments. In 2020, Kazakhstan used green bonds for the first time with the help of the Damu Fund, together with the United Nations Development Programme (UNDP) partnership.

Trends in Waste Management in Kazakhstan

The Industrial Development Fund of Kazakhstan has approved financing for four waste recycling

projects as part of its commitment to sustainable development and reducing the country's carbon footprint. In 2024, the fund launched a programme focused on recycling, sorting, and waste disposal in collaboration with the Ministry of Ecology and government-owned environmental entity, Zhasyl Damu JSC.

The programme includes 94 investment projects with a total funding of KZT185 billion (approximately USD373.73 million) from 2024 to 2026. The approved projects aim to reduce waste, mitigate environmental impact, and promote recycling. Notable initiatives include sorting solid waste, acquiring specialised equipment for waste collection, and modernising tyre recycling processes.

The implementation of these projects will enhance waste management practices and create new jobs while fostering innovative technologies in the region.

The fund is also accepting applications for financing under favourable conditions, including a 3% annual interest rate and a financing term of three to 15 years.

Water Reform

Kazakhstan is facing a significant water resource deficit, worsened by the impacts of climate change, which led to widespread flooding in 2024. This crisis has affected numerous communities and displaced many people. Reports indicate that these floods caused extensive damage to infrastructure and homes, highlighting the urgent need for effective water management strategies.

In response to these challenges, the Kazakh government has implemented several key measures. One of the most significant steps was the

establishment of a separate Ministry of Water Resources and Irrigation, emphasising the importance of water management in the country's development agenda. Additionally, the government has drafted a new Water Code, which is currently under parliamentary review. This legislation aims to modernise water resource management and address the pressing issues of water scarcity and quality.

Moreover, in 2024 the government adopted the "Concept for the Development of Water Resource Management System of the Republic of Kazakhstan for 2024–2030". This document includes analysis of the current situation regarding water resources in Kazakhstan, the vision for the development of the water sector, target indicators and expected outcomes, and an action plan for implementing the water management system concept from 2024 to 2030.

Strengthening Climate Change Policy

At the Summit on Climate Ambition 2020, the President of the Republic of Kazakhstan, Kassym-Jomart Tokayev, announced the goal of achieving net zero greenhouse gas emissions by 2060. On 2 February 2023 the Strategy for Achieving Carbon Neutrality Until 2060 (the "Strategy") was signed by the president.

The Strategy has been developed considering global climate trends and in compliance with relevant international obligations.

The Strategy considers the need to adapt the economy of Kazakhstan to global climate trends, such as the introduction of mechanisms for cross-border carbon regulation, the dissemination of ESG principles, the promotion and attraction of "green" investments, energy-efficient production, electrification and others.

Priority of Industrial Development Until 2029

Under the National Development Plan of the Republic of Kazakhstan Until 2029 (approved by the president in 2024), the state policy set a goal to increase environmental sustainability in the field of ecology. The development of the industry will be aimed at achieving carbon neutrality, improving air quality, focusing on the rational use and conservation of water resources, preserving biodiversity and increasing the level of waste recycling.

Public Awareness and Participation

There is a growing movement towards increasing public awareness of environmental issues and encouraging community involvement in sustainability efforts in Kazakhstan.

MEXICO



Law and Practice

Contributed by:

Federico Ruanova Guinea

Baker McKenzie

Contents

1. Regulatory Framework and Law p.309

1.1 Environmental Protection Policies, Principles and Laws p.309

2. Enforcement Authorities and Mechanisms p.309

2.1 Regulatory Authorities p.309

2.2 Co-operation p.309

3. Environmental Protections p.310

3.1 Protection of Environmental Assets p.310

3.2 Breaching Protections p.310

4. Environmental Incidents and Permits p.310

4.1 Investigative and Access Powers p.310

4.2 Environmental Permits/Approvals p.311

4.3 Regulators' Approach to Policy and Enforcement p.311

4.4 Transferring Permits/Approvals p.311

4.5 Consequences of Breaching Permits/Approvals p.311

5. Environmental Liability p.312

5.1 Key Types of Liability p.312

5.2 Disclosure p.312

6. Environmental Incidents and Damage p.313

6.1 Liability for Historical Environmental Incidents or Damage p.313

6.2 Reporting Requirements p.313

6.3 Types of Liability and Key Defences p.314

7. Corporate Liability p.314

7.1 Liability for Environmental Damage or Breaches of Environmental Law p.314

7.2 Environmental Taxes p.314

7.3 Incentives, Exemptions and Penalties p.315

7.4 Shareholder or Parent Company Liability p.315

7.5 ESG Requirements p.315

7.6 Environmental Audits p.315

8. Personal Liability p.315

8.1 Directors and Other Officers p.315

8.2 Insuring Against Liability p.316

9. Insurance p.316

9.1 Environmental Insurance p.316

10. Lender Liability p.316

10.1 Financial Institutions/Lender Liability p.316

10.2 Lender Protection p.317

11. Civil Liability p.317

11.1 Civil Claims p.317

11.2 Exemplary or Punitive Damages p.317

11.3 Class or Group Actions p.317

11.4 Landmark Cases p.318

12. Contractual Agreements p.319

12.1 Transferring or Apportioning Liability p.319

12.2 Environmental Insurance p.319

13. Contaminated Land p.319

13.1 Key Laws Governing Contaminated Land p.319

13.2 Clearing Contaminated Land p.320

13.3 Determining Liability p.320

13.4 Proceedings Against Polluters p.320

13.5 Investigating Environmental Accidents p.321

14. Climate Change and Emissions Trading p.321

14.1 Key Policies, Principles and Laws p.321

14.2 Targets to Reduce Greenhouse Gas Emissions p.322

15. Asbestos and Polychlorinated Biphenyls (PCBs) p.322

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs p.322

16. Waste p.323

16.1 Key Laws and Regulatory Controls p.323

16.2 Retention of Environmental Liability p.323

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods p.323

16.4 Rights and Obligations Applicable to Waste Operators p.324

17. Environmental Disclosure and Information p.324

17.1 Self-Reporting Requirements p.324

17.2 Public Environmental Information p.325

17.3 Corporate Disclosure Requirement p.325

17.4 Green Finance p.325

18. Transactions p.325

18.1 Environmental Due Diligence p.325

18.2 Disclosure of Environmental Information p.325

18.3 Key Issues in Environmental Due Diligence p.326

Baker McKenzie has an environmental practice group in Mexico comprised of five practitioners: one in Mexico City, three in Guadalajara and one in Tijuana. The practice chair is Federico Ruanova Guinea. The Mexico team works closely with other offices within the firm. Baker McKenzie's global environmental practice spans several key areas and jurisdictions, including the United States, Canada, Colom-

bia, Argentina, Brazil, the European Union, the United Kingdom, Australia, Japan and China. Key areas of expertise include ESG compliance advice; environmental impact permitting; water and waste water regulation; air emissions and climate law; circular economy; waste management, soil and groundwater remediation, land use and administrative and/or criminal litigation.

Author



Federico Ruanova Guinea is senior counsel at Baker McKenzie. He has been with the firm for 36 years and was principal partner from 2003 to 2017. Practising environmental law since 1990, his areas of expertise include ESG advice, environmental impact permitting, water and waste water regulation, occupational health and safety, air emissions and climate

law, the circular economy, waste management, soil and groundwater remediation, land use, and administrative and/or criminal litigation. Mr Ruanova is an active member of the National Association of Corporate Attorneys (ANADE). He has written many articles and papers on environmental law and sustainability and frequently participates in seminars and conferences hosted by universities and industrial chambers.

Baker McKenzie

Edificio Virreyes, Piso 12
Pedregal 24
Lomas Virreyes
Colonia Molino del Rey
11040 Ciudad de México
Mexico

Tel: +52 55 5279 2900 / +52 664 628 9185
Fax: +52 55 5279 2999
Email: federico.ruanova@bakermckenzie.com
Web: www.bakermckenzie.com

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1. Regulatory Framework and Law

1.1 Environmental Protection Policies, Principles and Laws

The Constitution of Mexico states that persons have a right to a healthy environment for their development and well-being. The government has both the responsibility and the mandate to ensure that this right is afforded and protected.

Environmental liability is defined in Mexico as “adverse and measurable loss, change, deterioration, detriment, an effect on or modification of habitats, ecosystems, natural resources and elements, their chemical, physical or biological conditions, of their interaction as well as of the environmental services they provide”.

Mexico has enacted many federal and laws, as well as regulations and technical standards. The most important ones are the following:

- the General Ecological Balance and Environmental Protection Law (the “General Law”);
- the General Climate Change Law (the “Climate Change Law”);
- the National Water Law;
- the Federal Environmental Liability Law (the “Liability Law”);
- the Waste Prevention and Integral Management Law (the “Waste Law”);
- the General Wildlife Law; and
- the General Sustainable Forestry Development Law.

The country’s 32 states have enacted their own environmental laws and regulations. These tend to cover areas that are not subject to the federal government’s oversight.

Mexico has also developed and enacted regulations, directives and more than 100 technical

standards covering a number of areas and topics, such as those that set maximum allowable limits for waste water and the emission of pollutants into the atmosphere, standards that establish remediation action limits, and also those that set criteria to determine whether waste is hazardous.

2. Enforcement Authorities and Mechanisms

2.1 Regulatory Authorities

The federal environmental authority is the Ministry of Environment and Natural Resources (SEMARNAT).

SEMARNAT has three decentralised agencies:

- the Industrial Safety and Environmental Agency for the Hydrocarbons Sector (ASEA);
- the National Water Commission (CONAGUA); and
- the Federal Bureau of Environmental Protection (PROFEPA).

All of Mexico’s states have their own environmental agencies that regulate all matters that do not fall under the control or oversight of federal environmental authorities, such as waste water discharge into urban sewerage systems, stationary air emission sources under state control, non-hazardous waste-handling and disposal, as well as land use and zoning matters.

2.2 Co-operation

In the area of international environmental co-operation, Mexico is a party to a number of international treaties and conventions. The most important ones are the following:

- the Paris Climate Agreement;

- the North American Agreement on Environmental Cooperation with the United States and Canada, the Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area (also known as the “La Paz Agreement”);
- the Montreal Protocol on Substances that Deplete the Ozone Layer;
- the Marpol Protocols to Prevent Pollution from Ships; and
- the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

The United States-Canada-Mexico Agreement (USMCA), although not an environmental agreement in the strict sense, also contains important provisions requiring the three parties to take all necessary actions to ensure that their domestic environmental laws are complied with and enforced.

Domestically, federal, state and municipal authorities regularly enter into co-ordination agreements in order to ensure proper enforcement of existing environmental laws.

3. Environmental Protections

3.1 Protection of Environmental Assets

The General Law contains several provisions requiring the federal government to enact regulations and standards designed to protect environmental assets. The General Wildlife Law states that it is the duty of all inhabitants to preserve wildlife, and that any act that implies its destruction or harm in detriment to the nation's interest is prohibited.

National goods such as water, soil, flora and fauna are protected by federal laws, such as

the General Law, the National Water Law and the General Sustainable Forestry Development Law. There are many regulations and standards that are designed to protect water resources as well as natural habitats and landscapes, such as the Regulations to the General Law in the area of Natural Protected Lands and standards that list the natural species that have protected or endangered status.

It is a federal crime to carry out any act or omission that harms, captures or kills an endangered or protected species, as well as to undertake any act that causes harm to wildlife or fragile ecosystems. Further, causing environmental damage may generate liability and an obligation to restore any damage caused to affected ecosystems.

3.2 Breaching Protections

Any individual or entity that causes environmental damage or breaches environmental laws may be subject to citations, fines, temporary partial or total shutdowns, the seizure of hazardous materials or of illegally obtained flora and fauna species, remediation or compensation obligations and, in some cases, prison terms.

4. Environmental Incidents and Permits

4.1 Investigative and Access Powers

Federal and state environmental agencies have broad investigative powers. Agencies may carry out inspections on a regular basis intended to verify compliance with environmental laws. There is no need for a complaint to be submitted for an inspection to be carried out. Nevertheless, any person that suspects that an activity is being carried out in breach of environmental law may file a public complaint before federal or state

agencies. These complaints may be in writing, by telephone or by electronic means and may be done anonymously. Regulators are required by law to conduct an investigation whenever a complaint is submitted, by carrying out inspections. Inspected parties are afforded the right to defend themselves.

4.2 Environmental Permits/Approvals

A wide range of environmental permits must be secured prior to carrying out any activity that has adverse environmental effects. The following are the most important ones.

- Prior to construction or start-up of any project that may cause environmental harm:
 - (a) environmental impact permit;
 - (b) civil protection certification;
 - (c) risk assessment (in some cases);
 - (d) forestry land use change permit (in some cases); and
 - (e) water concession (in some cases).
- During operation:
 - (a) air emissions licence;
 - (b) waste water discharge permit or registration; and
 - (c) hazardous and non-hazardous waste generator registration.

During an environmental impact permitting process, third parties are allowed the right to review and comment on the content of an environmental impact study; indigenous communities that may be affected by a project to be carried out on their land must also be consulted and social impact studies are required. In the case of energy projects that may affect vulnerable communities, permitting decisions may be appealed by any person or entity that may be adversely affected by a work or activity.

4.3 Regulators' Approach to Policy and Enforcement

Regulators are required by law to review and authorise any activity that may cause environmental harm or adversely affect ecosystems. This is done through the environmental impact permitting process and through other permitting processes like the ones described in 4.2 Environmental Permits/Approvals.

Federal and state regulators may enforce laws and regulations through inspection visits, summons to respond and administrative resolutions which may contain penalties such as fines, if there are elements proving that laws have been breached. In some extreme cases, environmental regulators may file criminal complaints before federal or state prosecutors' offices if there are elements to suggest that environmental crimes have been committed.

4.4 Transferring Permits/Approvals

Some environmental permits may be transferred by providing a written notice to regulators, stating the name of the transferee. This is the case with environmental impact permits issued by SEMARNAT or ASEA. Water concessions or waste water discharge permits may be transferred, but the transfer requires the prior approval of CONAGUA. In the case of air emission licences, these are generally not transferable; however, regulators may approve their transfers in certain cases, such as when an industrial site has been transferred to a new company and its operation will not suffer any changes. This is also true of companies that have secured environmental permits from state agencies.

4.5 Consequences of Breaching Permits/Approvals

Failure to comply with the requirements and conditions contained in an environmental approval

or permit may bring about penalties such as fines and an order from regulators to fully comply with the permit. If there is a repeat offence, regulators may order a temporary shutdown or may issue a suspension order that may remain standing until all legal violations or deficiencies have been corrected.

5. Environmental Liability

5.1 Key Types of Liability

Operators or polluters may be subject to any of the following types of environmental liability.

Administrative

This is the most common and widespread form of liability and generally involves fines, temporary shutdowns, the seizure of pollutant sources and the revocation of environmental permits. Administrative penalties may be imposed by federal enforcement agencies, such as PROFEPA, ASEA and/or state or municipal agencies. Under the Liability Law, judges may impose monetary penalties that may be substantial (up to USD3 million in some cases) aside from ordering remediation or compensation.

Civil

Civil liability may stem from civil lawsuits, either in the form of collective actions or those that are based on the Liability Law, and generally result in judicial rulings ordering polluters to carry out restoration, compensation or remediation requirements and in some cases to compensate plaintiffs in a collective action.

Criminal

This form of liability may be generated as a result of carrying out acts that are considered environmental crimes. Criminal liability involves prison sentences that may range from three months

to 12 years, as well as fines that are calculated taking into account the yearly earnings of a person convicted of a crime. There is an entire chapter in the Federal Criminal Code devoted to environmental crimes. In instances of repeated serious crimes, judges may order the dissolution or liquidation of companies that have been involved in environmental crimes committed by their employees or legal representatives. However, this is rare.

5.2 Disclosure

Accidental releases of waste water, as well as of hazardous materials or waste, must be reported to regulators, and all actions designed to reduce or minimise environmental damage must be implemented. In the case of an accidental hazardous waste spill covering an area not exceeding 1 m³, generators or transporters must immediately carry out the necessary actions to minimise and limit its dispersion and clean up the affected area. If the spill covers a large area, PROFEPA or ASEA must be notified immediately so that they may adopt the necessary actions to prevent damage from being caused, in coordination with the parties causing the spill.

Failure to disclose may bring about administrative penalties such as fines or shutdowns or in some cases civil liability and orders to compensate for environmental damage.

According to the General Law, and the Law of Access to Public Information, any person has the right to have SEMARNAT, ASEA, as well as other federal or state environmental agencies, put at their disposal any environmental information requested. Any petition must be in writing, specifying the type of information being requested and the reasons behind the request. In some cases, regulatory agencies may deny access to information if it is deemed of a con-

fidential nature or if its disclosure may damage third-party rights.

It should be noted that companies are not required by law to disclose environmental information in their annual reports. However, many companies do provide reports on their sustainability initiatives and on how they are contributing to the fight against climate change. This is becoming more common and widespread.

6. Environmental Incidents and Damage

6.1 Liability for Historical Environmental Incidents or Damage

According to the Waste Law, owners or occupants of a contaminated site are jointly liable for remediation regardless of fault, and irrespective of historic environmental contamination. They, in turn, can bring a legal action against the party that caused contamination. Prior to transferring title over a contaminated site, seller and buyer must agree on who will carry out remediation if the site is contaminated. Agreeing on who will remediate involves having actual knowledge of the existence of contamination and this may also involve conducting characterisation studies and finding out whether there is a remediation obligation.

The federal government has published two standards in the area of soil contamination. Standard NOM-138-SEMARNAT/SSA1-2012 establishes maximum allowable limits for hydrocarbons in soils; standard NOM-147-SEMARNAT/SSA1-2004 sets limits for heavy metals. In the absence of clear regulatory guidelines, however, human health and risk studies may have to be performed to determine if remediation must be carried out.

SEMARNAT and/or ASEA must approve the transfer of a contaminated site. However, failing to secure this authorisation may not prevent the transfer from taking effect. If a seller failed to inform a buyer that a site was contaminated and the buyer later discovers that it was, the seller will be liable for remediation.

The statute of limitations for making a claim of environmental liability is 12 years as of the moment when contamination occurs or its effects cease.

6.2 Reporting Requirements

Any establishment, whether industrial, commercial or of any other nature, is required to report its greenhouse gas (GHG) emissions to SEMARNAT on a yearly basis. The report must cover direct or indirect GHG emissions. The idea behind this reporting requirement is for the federal government to keep track of Mexico's GHG output in compliance with the Paris Agreement.

Industrial establishments are also required to submit yearly reports disclosing their air emissions, waste water discharges and waste generation.

Also, accidental releases of waste water, as well as of hazardous materials or waste, must be reported to regulators, and all actions designed to reduce or minimise environmental damage must be implemented. In the case of an accidental hazardous waste spill covering an area not exceeding 1 m³, generators or transporters must immediately carry out the necessary actions to minimise and limit its dispersion and clean up the affected area. If the spill covers a large area, PROFEPA or ASEA must be notified immediately so that they may take the necessary measures to prevent damage from being caused, in coordination with the parties causing the spill.

6.3 Types of Liability and Key Defences

As mentioned in 5.1 **Key Types of Liability**, environmental liability may be administrative, civil or criminal. Liability in most cases is subjective, except when handling hazardous materials or waste, when carrying out high-risk activities, when operating vessels in coral reefs or when operating machinery or equipment that may cause environmental damage. In these cases, liability is objective.

Liability for environmental incidents or damage is generally limited to carrying out restoration, remediation or compensatory activities and ordering, in some cases, the payment of fines or economic penalties.

Economic penalties may be substantially reduced by a court order, if the party at fault:

- has purchased environmental insurance;
- has been audited by PROFEPA and has secured a “clean industry” certificate; and
- has implemented an environmental management programme.

In the case of a resolution imposing administrative liability (such as a fine), it may be contested through a recourse or an annulment complaint (at federal level) filed before an administrative court. A final defence may be in the form of an “amparo” lawsuit filed before a federal circuit court, particularly if there may be constitutional violations incurred by a regulatory agency.

A civil judgment (requiring the remediation of a contaminated site, for example) may be contested through an appeal before a superior court and also through an amparo lawsuit. A criminal judgment imposing a prison sentence may be contested through an appeal heard before a

state or federal superior court and through the submittal of an amparo lawsuit.

7. Corporate Liability

7.1 Liability for Environmental Damage or Breaches of Environmental Law

The Liability Law states that legal entities are liable for environmental damage caused by their legal representatives, directors, administrators, managers, directors, employees and by any party having functional control over their operations, including whether such persons are either careless or acting in accordance with their functions.

Officers, employees and agents are generally liable for:

- negligence or misconduct when discharging their duties;
- breaches of instructions received from management;
- actions that exceed their authority; and
- allowing, within the scope of their functions, violations to the Federal Criminal Code, solely in the case of officers, legal representatives, managers or employees.

7.2 Environmental Taxes

States in Mexico have begun enacting laws that impose “green taxes” over air emissions, solid waste disposal activities as well as waste water discharges. These taxes vary because they are based on the annual volume of emissions (including GHGs) that are generated by stationary air emission sources, on the quantity of waste being sent to landfill or on the chemicals and particles contained in waste water discharges. There are currently 13 states in Mexico that require the payment of environmental taxes.

It should be noted that, as a result of a legal challenge to the state of Zacatecas Green Tax Law in 2018, the Supreme Court ruled that environmental taxes do not violate the tax proportionality principle enshrined in the Constitution and therefore such taxes are legal.

7.3 Incentives, Exemptions and Penalties

Even though the General Law and all state laws establish the legal possibility of awarding financial incentives for being a good environmental citizen, these are generally not awarded. As discussed in **5.1 Key Types of Liability**, bad environmental behaviour is punishable by fines, shutdowns, orders to restore and remediate and, in some cases, by prison sentences.

7.4 Shareholder or Parent Company Liability

There is no piercing of the corporate veil for environmental violations; therefore, shareholders cannot be liable. Only the legal entity (a corporation) may be found liable, along with its legal representatives, directors, administrators, managers or employees. However, environmental agencies may summon shareholders of a particular company to the administrative procedure or judicial trial in order to negotiate an agreement on behalf of a company found to be causing environmental damage.

It is rare for parent companies to be accused of playing a role in environmental damage caused by their subsidiaries. However, collective actions on environmental matters could target parent companies if there is evidence that they may have been complicit in any action or omission that causes environmental damage.

7.5 ESG Requirements

There is yet to be a law or regulation defining what ESG is, or what the ESG disclosure

requirements should be. However, the Mexican Senate has approved an amendment to the Stock Exchange Law that allows the Ministry of Finance and Public Credit to seek sustainability information from publicly traded companies. As of 1 September 2024, this amendment has yet to be discussed and approved by the Chamber of Deputies, which is Mexico's Lower Chamber.

7.6 Environmental Audits

The federal government enacted a voluntary environmental auditing regulation in 2010 that allows companies that do not comply with environmental laws the opportunity to correct this failing and thus avoid liability. "Clean Industry Certificates" are issued by PROFEPA in favour of companies that fully implement the corrective actions derived from the auditing process.

8. Personal Liability

8.1 Directors and Other Officers

Corporate officers, employees and agents are generally liable for:

- negligence or misconduct when discharging their duties;
- breaches of instructions received from management;
- actions that exceed their authority; and
- allowing, within the scope of their functions, violations to the Federal Criminal Code, solely in the case of officers, legal representatives, managers or employees.

Under the Liability Law, directors and other officers may be ordered to pay fines of up to 50,000 times the Mexican Unit of Measurement and Actualisation (UMA) for each violation (equivalent to around USD271,000). The UMA is a measurement used to calculate fines, penalties,

and other obligations owed to the government and is updated annually. In addition to the fines, they may face criminal liability if they wilfully caused contamination or were grossly negligent.

Criminal law also contemplates the possibility of directly penalising directors, officers or any person that ordered an action that caused environmental damage. As mentioned in **5.1 Key Types of Liability**, there is also a possibility that a criminal court may order the dissolution of a company if it has been proven that its directors, employees or legal representatives committed serious crimes against the environment.

8.2 Insuring Against Liability

Individuals or companies may purchase environmental liability insurance or in some cases may acquire surety bonds to cover against environmental damage that may be caused due to breaching a legal obligation or an environmental permit.

In the case of large projects, such as petrochemical installations, infrastructure projects, power plants or industrial facilities that may be deemed “high-risk”, regulators will order the project owners or developers to purchase insurance to cover any type of environmental damage that may be caused. If an entity has caused contamination, penalties against it may be reduced if it is able to show that it has acquired insurance.

9. Insurance

9.1 Environmental Insurance

Individuals or companies may purchase environmental liability insurance or in some cases may acquire surety bonds to cover the risk of environmental damage that may be caused due to

breaching a legal obligation or an environmental permit.

If an activity subject to evaluation in the area of environmental impact may cause serious environmental damage, SEMARNAT may require the purchase of environmental insurance or other types of surety guarantees.

In the case of large projects, such as petrochemical installations, infrastructure projects, power plants or industrial facilities that may be deemed “high-risk”, regulators will order the project owners or developers to purchase insurance to cover any type of environmental damage that may be caused. If an entity has caused contamination, penalties against it may be reduced if it is able to show that it has acquired insurance.

10. Lender Liability

10.1 Financial Institutions/Lender Liability

Employees, directors or representatives of financial institutions may be liable for environmental damage or for breaching environmental law if they have been instructed to carry out actions that are detrimental to the environment or public health. Financial institutions or lenders could be ordered to undertake site remediation activities if they own or occupy a contaminated site as a result of a financial arrangement, lien or other type of agreement.

Also, if a financial institution holds title over a contaminated site as a result of a mortgage guarantee or any other type of guarantee, it may be liable for carrying out remediation activities because of the strict liability provisions established by the Waste Law.

10.2 Lender Protection

Lenders may legally protect themselves by incorporating adequate indemnity and release language in credit or loan agreements, making the debtor or actual occupier of a site liable for carrying out site remediation or compensation activities and securing a release from any and all liability associated with contamination or environmental damage.

In Mexico, financial institutions are not legally required to adopt the “Equator Principles” or ESG policies. However, many of these institutions consider such regulations as a good practice when authorising different transactions. Among other things, the Equator Principles require financial institutions to comply with local environmental regulations within their activities.

11. Civil Liability

11.1 Civil Claims

Any action or omission that causes environmental damage may generate civil liability. The Liability Law allows any person the right to file a civil action against an individual or entity that causes environmental damage. This action may be brought by an individual or by a group of 15 or more individuals through a collective action. A judge must “qualify” the complaint to make sure that the group has proper standing or, if it is being represented by a non-governmental organisation (NGO), that it has been formed and registered to deal with environmental protection matters.

Civil liability in most cases is subjective, except when handling hazardous materials or waste, when carrying out high-risk activities, when operating vessels in coral reefs or when oper-

ating machinery or equipment that may cause environmental damage.

The general rule is that if it is proved that environmental damage was caused, a judge should order either restoration or compensation activities. “Restoration” implies returning a site to the state it was in prior to the damage being caused, but if this is not possible then compensation may be required.

11.2 Exemplary or Punitive Damages

Traditionally, Mexican environmental laws have not contemplated exemplary or punitive damages. These were introduced into the Mexican legal system in 2011 through a constitutional amendment. In 2016, the Supreme Court ruled that in certain cases it is permissible to award punitive damages, particularly when there is gross negligence involved. Even though this ruling was not properly an environmental case, it opened the door for civil courts to award large sums to plaintiffs that are successful in demonstrating that certain acts or omissions incurred by defendants have caused serious environmental damage.

Courts have the prerogative of awarding punitive (or moral harm) damages at their discretion and these damages may run to millions of US dollars, particularly if it is shown that environmental damage was the result of gross negligence or a wilful disregard for the environment or public health.

11.3 Class or Group Actions

Under the National Civil and Family Procedure Code, collective actions may be brought in the case of environmental claims. A group of 15 or more individuals, NGOs duly registered as well as federal environmental agencies such as PROFEPA, may file a collective action against a

party accused of causing environmental damage. The main purpose of a collective action is for the damage caused to the environment to be restored and, if this is not possible, for compensation activities to be ordered.

Collective actions may be brought to safeguard:

- diffuse and collective interests, defined as those that are of an indivisible nature, held by a specific or unspecified group of persons, all of them related by common factual or legal circumstances; and
- individual rights and interests, but with a collective incidence, defined as those of a divisible nature, held by individuals that are identifiable members of a group of persons, all related by legal circumstances.

The statute of limitations for filing collective actions is 5 years from the moment when damage or injury was caused. However, in the case of damage or injury having continuous or ongoing effects, the term will run as of the last day (or more recent day) in which the damage has been caused.

This contradicts the term contained in the Liability Law, which provides that the statute of limitations for demonstrating environmental damage is 12 years as of the moment contamination took place or when its effects cease. Since the Liability Law expressly deals with environmental liability as opposed to the Federal Civil Procedure Code, the 12-year statute of limitations would apply in the case of environmental collective actions.

A federal judge may issue any of the following rulings once the procedural and probative phases have concluded in a collective action:

- in diffuse actions, a judge may only condemn a defendant to repair the damage caused to the group, consisting in restoration to the state existing prior to the damage having been caused, if at all possible – if this is not possible, a judge may impose substitute compliance (monetary compensation), taking into account the rights and interests of the group; or
- in collective actions in a strict sense, as well as in homogeneous actions, a judge may order that the defendant repair the damage, by carrying out one or more actions or by requiring that each individual be compensated.

11.4 Landmark Cases

Most cases in Mexico have focused on the area of consumer protection. However, by the end of 2015, an explosion in an oil platform of PEMEX (the state-owned oil company) caused an NGO to file a collective claim against the entity, seeking that PEMEX undertake remediation or at least compensation and that fisheries be compensated for harm caused to their livelihood.

Several NGOs have announced their intention of filing public actions against the Dos Bocas Refinery that the Mexican government has constructed in the State of Veracruz, alleging that this project, worth billions of US dollars, has caused widespread environmental damage, and is adversely affecting flora and fauna and will degrade air quality. NGOs have also filed actions against the Maya Train project, which spans the Yucatán Peninsula. Judicial resolutions on these two cases are pending.

In 2015, a company operating a copper mine in the State of Sonora, Mexico, was fined by PROFEPA in an amount equivalent to USD1.1 million for discharging cyanide into a river. The com-

pany was also required to create a trust worth approximately USD105 million to help in environmental restoration activities and to assist the population affected by the environmental damage that was caused.

12. Contractual Agreements

12.1 Transferring or Apportioning Liability

Indemnities and suchlike may be used to transfer or apportion liability. However, these may have very little binding effect or influence over regulators or even civil judges. For example, regulators or judges may require an owner or occupier of a contaminated site to remediate it, irrespective of a contractual arrangement with a third party. It will be up to the parties entering into the agreement – and not regulators or judges – to ensure that the contractual obligations are properly met.

For example, in the case of an environmental permit granted to an oil company for offshore drilling, that company may hire a third party to conduct the drilling and may enter into a service agreement containing a number of environmental indemnity provisions, making the contractor liable for remediation in case of an oil spill. However, in the eyes of regulators such as ASEA, if there is an oil spill the permit-holder will be the liable party and may face civil or even criminal liability in the case of serious environmental harm, notwithstanding any contractual arrangement that may be in place.

When hiring a company to transport and dispose of hazardous waste, it is very important to have a contract in place making the transporter liable for any damage caused when the waste is being transported to a final destination facility (which could be a landfill, a recycling yard area or a

transfer station). This is because the Waste Law provides that, in the absence of a contract that defines the role of the generator, the transporter and the disposal company, the waste generator would be liable if the waste is not sent to a licensed disposal facility.

Authorising hazardous waste to be sent to an unlicensed disposal facility is also a federal crime, punishable with prison terms that may be as high as four years.

12.2 Environmental Insurance

Please see 9.1 Environmental Insurance.

13. Contaminated Land

13.1 Key Laws Governing Contaminated Land

The main law governing contaminated land is the Waste Law and its regulations, along with standards that establish maximum allowable pollutant limits in soils.

Regulators generally pursue owners or occupiers of a contaminated site when requiring remediation activities to be carried out because the law makes them liable for remediation regardless of fault. In some cases, they will also impose penalties against parties that are known to have caused soil or groundwater contamination.

The Waste Law defines a contaminated site as “a place, space, soil, water body, installation or any combination thereof that has been contaminated with hazardous materials or waste that, because of their quantities and characteristics, may represent a risk to human health, living organisms and the use of personal goods or properties”. The authority in particular keeps a record of contaminated lands.

A legal requirement for remediation may be ordered when a site characterisation study reveals that there are pollutants in the soil in quantities or concentrations exceeding the maximum allowable limits established by applicable standards or in the absence of a standard, if the conclusions contained in a human health and risk study make remediation necessary to protect the environment or human health.

As mentioned in **6.1 Liability for Historical Environmental Incidents or Damage**, there are two standards that establish maximum allowable limits for pollutants in soils. One is NOM-138, which establishes maximum limits for hydrocarbons in soils; the other is NOM-147, which establishes maximum allowable limits for heavy metals. If there are other pollutants in soils that may pose a risk to human health or the environment, a human health and risk assessment may have to be carried out.

13.2 Clearing Contaminated Land

Parties liable for remediating contaminated land include:

- any party that causes soil contamination whether wilfully or by negligence – this party may also incur administrative, civil or even criminal liability if environmental damage is caused;
- owners or occupiers – if they did not cause contamination then their obligation is solely limited to remediating the site; and
- holders of a concession over federal land.

In order to be able to get a regulator or a court to force an original polluter, former landowner or any other person to remediate, the liable person will have to demonstrate that any of them caused contamination or environmental damage; in the case of the former owner, if it failed to disclose

the environmental conditions of the site, prior to its transfer of ownership, it may be liable for remediation in accordance with the regulations of the Waste Law.

13.3 Determining Liability

Determining liability for contamination is not a simple endeavour for environmental authorities. This is why the Waste Law makes an owner or occupier of contaminated site liable for remediation regardless of fault or intent. This rule forces an owner or occupier to file a legal action against the party or parties that actually caused contamination. More often than not, it is difficult to demonstrate a party's culpability, let alone multiple parties, even when there is objective environmental liability that stems from the use of hazardous substances. If multiple parties handle or use such substances and contamination is caused, regulators may attempt to make each party liable, but this may prove to be difficult, particularly if there is no clarity on what action or omission caused contamination. Again, this is why making an owner or occupier liable for remediation is an easier path for environmental authorities.

13.4 Proceedings Against Polluters

From an administrative law standpoint, proceeding against polluters is not difficult for regulators. An owner or occupier of contaminated private land – or a concession-holder over public land – are required by law to remediate if there is soil or groundwater contamination, and environmental authorities do not need to demonstrate intent or fault.

From a civil liability perspective, the requirements to bring a legal action for environmental damage are more demanding. There have to be sufficient elements to infer that a party has caused environmental damage. If a party uses

hazardous substances and damage to a third party is caused, determining civil liability may not be legally difficult because of the objective liability principle discussed in **6.1 Liability for Historical Environmental Incidents or Damage**.

To determine criminal liability, there has to be an element of gross negligence or intent. The Federal Criminal Code provides that any person that orders or allows the discharge or deposit of hazardous substances into soils or water bodies may face up to 12 years of prison and stiff fines. There are also “environmental management crimes”, such as:

- allowing or authorising hazardous waste to be sent to a site that lacks permits or licences to store or dispose of them;
- failing to keep environmental authorisations or documents; and
- providing false statements to inspectors or misleading regulators when preparing environmental permit applications.

Crimes are investigated by the National Prosecutor’s Office and any private citizen or authority may file a criminal complaint.

Because Mexico’s new president, Claudia Sheinbaum, has a background in environmental and climate science, Mexico may expect the new federal administration to step up criminal enforcement actions against those parties that cause environmental harm or that fail to comply with the most important environmental permitting requirements.

13.5 Investigating Environmental Accidents

Federal and state environmental laws provide a mandate to authorities to conduct investigations and inspections if there are any incidents

that cause or may cause environmental damage, including accidents. Authorities have to be diligent in how they conduct investigations, because the Mexican Constitution requires all acts of authority to be properly supported by law and no person be deprived of their possessions or rights without a proper order signed by an authority having a mandate to carry out an investigation or inspection. In case of environmental emergencies or accidents, federal or state regulators may order that safety measures be applied immediately. Such measures are designed to protect public health or the environment and may consist of temporary shutdowns, the seizure of hazardous materials and any other action that may be warranted to protect the environment or third parties.

Public complaints for environmental violations – or accidents and emergencies – may be submitted without having to meet complicated formalities; as discussed above, these can even be anonymous or by telephone. Regulators may carry out investigative acts based solely on these types of complaints.

PROFEPA may act in co-ordination with Mexico’s General Prosecutor’s Office in investigating crimes against the environment.

14. Climate Change and Emissions Trading

14.1 Key Policies, Principles and Laws

The Climate Change Law states that it is in Mexico’s strategic interest to carry out actions designed to mitigate or compensate for climate change and to develop the corresponding technical, as well as economic, instruments. Also, as a signatory to the Paris Climate Agreement, Mexico has agreed to contribute to fighting cli-

mate change and reduce GHG emissions within the country and to implement mitigation and compensation policies.

14.2 Targets to Reduce Greenhouse Gas Emissions

The Climate Change Law set an aspirational 30% greenhouse gas reduction target by 2020, increasing to 50% by 2050 with regard to the year 2000 emissions. However, this target was not been achieved and the current government does not seem to be inclined to adopt actions to meet GHG reduction targets, focusing more on projects that consume fossil fuels. The Climate Change Law also provides that GHG reduction targets may be achieved if an international regime is in place that provides for financial and technological support afforded by developed countries. Currently, the government has a target for 35% of the nation's energy output to come from renewable or "clean" sources by the year 2024. It is highly unlikely that this target will be met.

The government requires that emitters of a minimum of 50,000 MT of GHGs a year report their output. This is widely seen as a prelude to a future emissions trading scheme which has not yet materialised.

There are currently no laws establishing a mandatory emissions trading scheme in Mexico. In 2016, the Mexican Stock Exchange and SEMARNAT unveiled a pilot programme to develop a carbon market in Mexico so that the private sector could reduce its GHG emissions and remain competitive in a global environment. However, although that pilot programme began in a very limited manner, it was only a virtual exercise among the parties involved. There is, however, a voluntary market of emissions enacted which is administered by MéxiCO₂, a company created

by the Mexican stock market. This company also has a market specific for the renewable energy sector.

Mexico's new president has made it clear that fighting climate change will be a priority for the government and this may mean among other things, establishing a mandatory GHG trading scheme.

According to Mexico's REDD+ 2017–2030 Strategy published by the federal government, as well as a Bill of Law that intends to amend the Forestry Law – which has yet to be discussed by Congress – rights over carbon credits should be bestowed exclusively on the government and not on the owners of the land where the credits are generated. This has created some controversy within indigenous communities and farming towns. It is likely that this claim by the government will be challenged in the courts.

15. Asbestos and Polychlorinated Biphenyls (PCBs)

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs

Asbestos

Asbestos fibres are considered hazardous waste once they are free from the areas or places where asbestos is affixed, present or found and must be handled, contained, transported and disposed of in compliance with federal regulations. There are no asbestos abatement regulations in Mexico. Occupational health and safety laws require workers that are exposed to asbestos fibres to wear protective equipment and to undergo medical examinations if exposed to certain quantities.

There is one Mexican Official Standard that regulates the sanitary requirements for the processing and use of asbestos: NOM-125-SSA1-2016. It is important to add that, since 2011, the government of Mexico City has promoted preventative actions to reduce diseases caused by the use of asbestos. There are no specific asbestos removal requirements in Mexico except when it becomes a hazardous waste, or in an emergency situation where the levels of asbestos are surpassed in specific areas.

Asbestos litigation cases are not common in Mexico. However, under Mexican employment laws, employees may terminate a labour agreement if an employer fails to provide a safe and hygienic working environment or fails to comply with applicable Mexican occupational health and safety regulations and standards.

PCBs

In the case of PCBs, Mexican Official Standard NOM-133-SEMARNAT-2015 contains handling specifications for fluids or any electrical equipment containing PCBs. The standard also establishes thresholds to determine whether equipment requires special handling or should have special disposal requirements due to the presence of PCBs, as well as action limits in the case of soil that may contain PCBs. For example, if electrical equipment contains PCBs in concentrations below the 50 ppm threshold (or 100 µg/100 cm²), the equipment will not be considered contaminated by PCBs.

16. Waste

16.1 Key Laws and Regulatory Controls

The Waste Law and its regulations establish the basic legal framework regarding the generation, handling, management, containment,

transportation and disposal of hazardous and non-hazardous waste. There are also a number of standards containing criteria to determine if a waste may be hazardous, as well as on containment and disposal requirements for specific types of waste.

States have also enacted laws establishing handling, transportation and disposal requirements for non-hazardous and “special” waste.

16.2 Retention of Environmental Liability

A producer or consignor of waste retains liability for waste only if it has hired disposal services from a party that lacks the required licences to store, transport and dispose of waste, or if it has sent waste to a location lacking a licence to receive it. Also, and as mentioned in **13.4 Proceedings Against Polluters**, consenting to the transportation of hazardous waste to an unlicensed site is a federal crime, punishable by a prison term of one to four years.

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

Certain forms of waste are subject to specific management (including take-back) requirements. Generators, producers or owners of these kinds of waste must prepare and file waste management plans, specifying how the waste is to be managed.

Producers, importers, exporters and distributors of goods that at the end of their life cycle become hazardous waste are also required to prepare management plans. Among the types of waste that must be included in management plans are spent oils, used organic solvents, catalytic converters, mercury or nickel-cadmium batteries and pesticides. Waste management plans must be registered with SEMARNAT, ASEA or

with state or municipal agencies in the case of certain types of non-hazardous waste.

In the case of the Circular Economy Law approved by the Senate (and yet to be approved by the Chamber of Deputies), its purpose is to promote efficiency in the use of products, services, materials, energy, water, secondary raw materials and by-products, through clean production, reuse, recycling and redesign and also to meet a zero-waste target. Among the more relevant features of this Law are the following.

- Any person or entity that produces or imports containers or packing materials must submit a circular economy plan.
- Secondary raw materials may be used to produce any good. If not suitable to be reincorporated into a production process, secondary raw materials may be transformed into energy or exported to be reincorporated into other productive chains.
- Operators of final disposal sites, such as landfills, must take advantage of energy originating from gases emanating from such installations, after evaluating technical and environmental viability.
- The minimum content of recycled plastic in products should be 20% by 2025 and 30% by 2035.

16.4 Rights and Obligations Applicable to Waste Operators

Waste operators (hazardous or non-hazardous waste) are required to secure a number of environmental permits and approvals. Hazardous waste storage, recycling or disposal facilities must secure operating permits from SEMARNAT and comply with a wide range of requirements to ensure that waste is properly handled and disposed of. This is also the case with operators of hazardous waste transportation companies,

noting that – aside from SEMARNAT permits – all vehicles used to transport hazardous waste, are required to secure permits from the Ministry of Infrastructure, Communications and Transportation.

Non-hazardous waste or “special waste” operators are required to comply with state or local laws and regulations and secure operating permits from state environmental authorities. Each state has its own rules on how to construct and operate non-hazardous waste disposal facilities.

Failing to comply with any of the requirements listed above may bring about administrative liability in the form of fines, shutdowns and remediation obligations. There may also be civil liability (if environmental damage is caused) as well as criminal liability if there is gross negligence or wilful intent that causes environmental damage.

17. Environmental Disclosure and Information

17.1 Self-Reporting Requirements

Accidental releases of waste water, as well as of hazardous materials or waste, must be reported to regulators, and all actions designed to reduce or minimise environmental damage must be implemented.

In the case of an accidental hazardous waste spill covering an area not exceeding 1 m³, generators or transporters must immediately carry out the necessary actions to minimise and limit its dispersion and clean up the affected area.

If the spill covers a large area, PROFEPA or ASEA must be notified immediately so that they may adopt the necessary actions to prevent damage

from being caused, in co-ordination with the parties causing the spill.

17.2 Public Environmental Information

According to the General Law, and the Law of Access to Public Information, any person has the right to have SEMARNAT, ASEA, as well as other federal or state environmental agencies, put at their disposal any environmental information requested. Any petition must be in writing, specifying the type of information being requested and the reasons behind the request. In some cases, regulatory agencies may deny access to information if it is deemed of a confidential nature or if its disclosure may damage third-party rights.

17.3 Corporate Disclosure Requirement

Corporates are not required by law to disclose environmental information in their annual reports. However, many companies do provide reports on their sustainability initiatives and on how they are contributing to the fight against climate change, as part of a trend to meet global ESG requirements.

17.4 Green Finance

There are no legally binding arrangements in place yet for green financing in Mexico. In 2015, the members of the Mexican Banking Association signed a voluntary Sustainability Protocol that, among other things, sought to institutionalise a commitment towards sustainable development. The Protocol comprised five principles:

- a commitment to establish an internal sustainability policy;
- management of environmental and social risks in investment projects and the granting of credit;
- promote financing of sustainable projects;

- a corporate policy that encompasses sustainability principles in internal operations; and
- follow-up to sustainable policies implemented by the banking sector.

18. Transactions

18.1 Environmental Due Diligence

When purchasing or leasing land, environmental due diligence is conducted on M&A, finance and property transactions in order to determine whether there may be any type of remediation liability, because the Waste Law requires that the parties involved determine who will be responsible for remediation if a site being purchased is contaminated.

It is also customary to conduct a permit review in order to determine whether the target company is in compliance with relevant permitting and compliance requirements and if it has incurred any type of environmental liability.

A buyer may incur environmental liability for historic environmental damage because under federal law an owner or lessee of a contaminated site will be jointly liable for its remediation, regardless of fault. This is why it is important to conduct proper due diligence prior to purchasing a site and, in some instances, carry out a site characterisation study that will help determine if remediation may be warranted.

18.2 Disclosure of Environmental Information

Laws do not require a seller to disclose any environmental information to a purchaser. This is more a contractual requirement. However, in the case of soil contamination, if a seller fails to disclose to a buyer the fact that a site was contaminated prior to its transfer, it will retain

environmental liability for historic environmental damage if the buyer discovers that the site was contaminated and that the contamination was generated prior to the transfer. This is according to the Waste Regulations. Likewise, in the absence of an express agreement to determine which party is liable for remediation of a polluted site, the seller retains liability for such remediation.

In the interest of environmental due diligence, a purchaser may investigate to determine if a site may be contaminated, given that owners or occupiers have remediation liability regardless of when contamination occurred. Typically, the purchaser requests the execution of a site characterisation study. In addition, a permitting review should also be conducted, in order to determine whether the company in question is legally authorised to operate and whether the permits are in full force and effect.

Warranties, indemnities or other provisions that may be given during a share or assets sale mainly deal with remediation obligations if a site being sold or transferred is contaminated. It is common for parties to include language on who will be contractually required to undertake remediation or who will indemnify and free the other party from any liability associated with soil or groundwater contamination.

There may also be warranties and indemnities in place if a purchased site is cited or shut down for causing environmental damage that was generated prior to the purchase date, or if regulators impose penalties for violations of environmental laws occurring prior to the deal taking place.

18.3 Key Issues in Environmental Due Diligence

See 18.1 Environmental Due Diligence.

Trends and Developments

Contributed by:

Salvador Briffault Sánchez, Amador Guil-Liem Carboney, Diego Samperio Vega and Edgar Roberto Acevedo Gómez

Briffault Abogados

Briffault Abogados provides specialised legal services efficiently, effectively, ethically, and with excellence, offering the best strategies to resolve legal conflicts and achieve their objectives to its clients across a range of sectors. The firm is comprised of legal consultants who offer legal and strategic advice for sustainable devel-

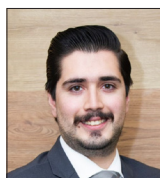
opment planning, and it creates environmental strategies for decision-making. Briffault Abogados is committed to continuous growth, and the team stays at the forefront of the regulations that facilitate the sustainable development of projects.

Authors



Salvador Briffault Sánchez specialises in Environmental Law, with over ten years of experience in environmental matters, administrative litigation, and amparo proceedings. He

has completed the Environmental Crimes Seminar by INACIPE and the Diploma in Environmental Law and Management from the Center for Legal and Environmental Studies. He is a founding partner of Briffault Abogados, S.C., where he focuses on preventive and corrective legal strategies, nullity proceedings in environmental matters, and administrative amparos related to water, wastewater discharge, contaminated sites, air emissions, waste, and urban development.

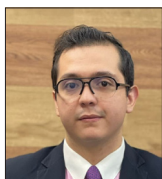


Amador Guil-Liem Carboney completed postgraduate studies in business law and has experience in the private sector in administrative, corporate and environmental law. He has

participated in several diploma courses related to human rights, entertainment law and digital marketing. He currently works at Briffault Abogados, S.C. as an attorney in the areas of regulatory and environmental law.

MEXICO TRENDS AND DEVELOPMENTS

Contributed by: Salvador Briffault Sánchez, Amador Guil-Liem Carboney, Diego Samperio Vega and Edgar Roberto Acevedo Gómez, **Briffault Abogados**



Diego Samperio Vega has, in addition to his experience in the private sector in civil, commercial, administrative and constitutional litigation, a diploma from the Suprema

Corte de Justicia de la Nación titled “Jurisprudencia: su difusión y su consulta.” He is a junior attorney at Briffault Abogados, S.C., where he focuses on regulatory, environmental, and administrative litigation matters. His role involves providing legal counsel on compliance with national regulations and representing clients in disputes before various administrative and judicial bodies. He is committed to developing strategies that address complex legal challenges while promoting environmental sustainability.



Edgar Roberto Acevedo Gómez has experience in administrative, environmental, corporate and real estate law. Currently part of the team at Briffault Abogados, S.C., he specialises in

regulatory, environmental, corporate, real estate law, and administrative litigation. His expertise in key areas of law enables him to effectively address complex issues in the regulatory and business sectors.

Briffault Abogados

Prolongación Paseo de la Reforma 379
Oficina 506,
Col. Santa Fe, Álvaro
Obregon
01310 CDMX
Mexico

Tel: + 55 5941 5268
Email: contacto@briffaultab.com
Web: briffaultab.com



Contributed by: Salvador Briffault Sánchez, Amador Guil-Liem Carboney, Diego Samperio Vega and Edgar Roberto Acevedo Gómez, **Briffault Abogados**

Introduction

The right to a healthy environment, established in Article 4 of the Mexican Constitution, marks a significant step forward in the recognition of environmental protection as a fundamental human right. This principle guarantees individual and collective rights and imposes clear obligations on the state to ensure their protection and realisation. The historical context of how environmental concerns transitioned into constitutional law reflects the irrefutable fact that environmental sustainability is an essential component of human well-being, acknowledged both internationally and domestically.

International Treaties

The formalisation and structuring of global environmental protection began in the latter half of the 20th century with the United Nations Conference on the Human Environment, in Stockholm, Sweden, celebrated in 1972. This was the first time a framework linking environmental protection to human rights and environmental development was established. It was acknowledged that environmental preservation is essential for ensuring the well-being of all individuals and future generations.

Mexico played an active role in the Stockholm Conference, along with other member states of the United Nations. Mexico then proceeded to integrate environmental concerns into its national policies in line with its international commitments. However, it was not until years later that these concerns were formally elevated to the constitutional level.

Mexico reinforced the idea that a healthy environment is essential for the full enjoyment of other fundamental rights by implanting environmental protection within the framework of human rights. This recognition imposes a duty

on the state to prevent environmental harm and promote policies that ensure ecological balance. It also empowers citizens to demand government accountability in environmental matters, fostering a system of checks and balances that promotes sustainable development.

Mexico has demonstrated its unwavering commitment to international environmental protection through its ratification of numerous multilateral environmental agreements, including the Kyoto Protocol in 2000, and its role as a member of the United Nations Conference on Environment and Development (UNCED), also known as the Earth Summit, which was signed in 1992 in Rio de Janeiro, Brazil. This has led to the adoption of five subsequent documents, two of which are legally binding treaties: the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change (UNFCCC)

The Convention on Biological Diversity aims to conserve biodiversity, ensure the sustainable use of the components of that biodiversity, and guarantee the fair and equitable sharing of benefits arising from genetic resources. The UNFCCC seeks to stabilise the concentration of greenhouse gases in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. These treaties are the bedrock of international environmental law. They require all signatory states to take concrete measures to protect the environment and promote sustainability.

The Role of the Mexican Judiciary

Given the importance placed on – indeed the legal obligation of – complying with the international treaties to which Mexico is a party, the fact that they have been elevated to the status of supreme law, such as the Federal Constitution,

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means that courts now have the authority to hear cases where environmental rights are alleged to have been violated. They can and will protect animals from violations and order corrective measures. The Mexican Supreme Court has also developed a robust body of case law concerning environmental rights. It often invokes international human rights instruments such as the American Convention on Human Rights to support its rulings. This interplay between domestic law and international obligations undoubtedly strengthens the legal framework for environmental protection.

While significant progress has been made in recognising and protecting environmental rights, there is still work to be done. Mexico must still deal with some major environmental challenges, including deforestation, pollution and climate change. Corruption, insufficient resources and a lack of political will often hinder the enforcement of environmental regulations. However, civil society organisations and international bodies are demanding stronger environmental governance. Further legal reforms must be enacted to address these challenges and ensure the full realisation of the right to a healthy environment.

Article 4 of the Constitution of the United Mexican States is a landmark in the advancement of environmental protection as a fundamental human right. It not only guarantees the right to a healthy environment but also establishes a legal framework for the state to act as a guardian of natural resources. The inclusion of environmental rights within the Constitution demonstrates Mexico's unwavering commitment to sustainable development and the protection of the environment for present and future generations. This commitment, grounded in both national legislation and international agreements, signals Mexico's role as an active and indispen-

sable participant in the global effort to address environmental challenges.

Renewable Energy Within the Framework of Environmental Law in Mexico

The use of renewable energy has gained increasing importance in Mexico due to the need to reduce greenhouse gas emissions and combat the effects of climate change. As a part of international agreements, such as the Paris Agreement, Mexico has developed a robust regulatory framework to promote the adoption of clean and sustainable energy sources like solar, wind, and geothermal. However, the path towards a true energy transition faces various challenges, both from a regulatory standpoint and in practical implementation.

Regulatory Framework for Renewable Energy in Mexico

One of the key pillars of Mexico's renewable energy legal regime is the Energy Transition Law (LTE), enacted in 2015. This law establishes the foundation for ensuring the sustainable use of energy sources and sets clear goals: it has been stipulated that by 2024, at least 35% of the electricity generated in the country must come from clean sources. This legislation aims to reduce dependence on fossil fuels and promote the development of environmentally friendly technologies.

Another essential component of the legal framework is the General Law of Ecological Balance and Environmental Protection (LGEEPA), which regulates activities related to the use and exploitation of natural resources, with a strong focus on environmental preservation and mitigating the ecological impact of the energy industry. This law also establishes key principles for the regulation of energy projects, which must undergo

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environmental impact assessments to mitigate any potential harm to biodiversity.

The institutions operating within this legal framework are the Ministry of Energy (SENER), responsible for planning and executing the country's energy policy, and the Energy Regulatory Commission (CRE), tasked with regulating the electricity market. On the other hand, the Ministry of Environment and Natural Resources (SEMARNAT) and the National Agency for Industrial Safety and Environmental Protection in the Hydrocarbon Sector (ASEA) oversee the compliance with environmental provisions in projects related to renewable energy.

Challenges and Opportunities

Although progress has been made in creating a solid legal framework, the implementation of renewable energy in Mexico faces significant challenges. One of the main obstacles is the regulatory uncertainty that has prevailed in recent years. Reforms such as the 2021 Electricity Industry Law have created a tension between efforts to promote clean energy and the protection of the hydrocarbon industry's interests. This legislation has raised concerns about its compatibility with international commitments to reduce emissions and has caused uncertainty among private sector investors, who see the rules of the game unexpectedly altered.

Another challenge is the lack of sufficient infrastructure to integrate large amounts of renewable energy into the national electricity system. The development of smart grids and the modernisation of electricity transmission and distribution infrastructure are crucial factors in ensuring an efficient and stable energy transition.

However, despite these challenges, Mexico has enormous potential resource potentials to har-

ness for renewable energy development. The northern and southeastern regions of the country are especially suitable for the development of solar and wind farms due to the high solar irradiation and constant winds that characterise these areas. Additionally, the central region has significant geothermal potential, making it an ideal zone for the development of geothermal power plants.

These sources not only contribute to the reduction of greenhouse gas emissions but also offer local economic benefits, such as job creation and attracting investment for infrastructure. Moreover, the development of clean energy promotes the country's energy independence, reducing its reliance on imported fossil fuels and stabilising energy prices in the long term.

Private Sector Participation

The Mexican legal framework allows and encourages the participation of private companies in the generation of renewable energy. To do so, companies must comply with a series of legal and environmental requirements, including obtaining generation permits and undergoing environmental impact assessments. This process seeks to ensure that investments in clean energy not only promote economic growth but do so in a responsible manner, minimising adverse effects on the natural environment.

An essential aspect of renewable energy regulation is the environmental impact assessment. According to the LGEEPA, any project that may cause significant environmental changes must undergo an exhaustive assessment process by environmental authorities. In this regard, SEMARNAT plays a key role in overseeing projects to ensure that they align with the environmental protection principles established by legislation. Additionally, ASEA plays a role in

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supervising and regulating projects related to gas and oil, especially those that may affect the implementation of clean energy in nearby areas.

Renewable Energy and International Commitments

In addition to national regulations, Mexico has assumed a series of international commitments aimed at mitigating climate change. The Paris Agreement, signed in 2016, establishes a global framework to limit the global temperature increase to less than 2°C above pre-industrial levels. As part of this agreement, Mexico committed to reducing its greenhouse gas emissions by 22% by 2030. To achieve this goal, renewable energy plays a crucial role in the national mitigation strategy.

Moreover, Mexico is a member of the International Solar Alliance and has signed various bilateral and multilateral agreements that promote the transfer of technology for and financing of clean energy projects. These efforts not only boost foreign investment in the sector but also promote the technological innovation necessary to optimise the production and distribution of renewable energy.

Environmental Best Practices

The participation of companies in the protection and care of the environment plays a fundamental role, as their activities tend to have a significant impact. Similarly, the production processes of companies consume a large amount of resources and may generate hazardous waste that affects the environment.

Environmental best practices are actions aimed at reducing the negative environmental impact caused by the production processes of companies on the surrounding environment and the natural resources they use. This is achieved

through changes in the organisation of processes and daily activities.

These practices involve changes in the organisation's ideology as well as in the behaviour and habits of workers, regardless of their position within the company. They help reduce environmental risks and promote resource savings as well as a sustainable management of business activities.

These best practices aim to facilitate the minimisation and pricing of waste, reduce atmospheric emissions, lower the consumption of natural resources such as water and energy, and diminish the generation of hazardous waste, special management waste, and urban solid waste.

It will be necessary to assign individuals responsible for systematically tracking various information and documentation to ensure compliance with environmental regulations and policies. These individuals should also promote co-operation among all employees and foster environmental improvement measures.

The specific environmental measures taken by a company may vary depending on the industry in which it operates. However, the following environmental aspects are important for any industry in general.

Waste generation

Any productive or service activity carried out generates different amounts and types of waste. Proper waste management is crucial as it will have an environmental impact.

Waste generation is a factor present in all types of industries, occurring daily at any hour. This is why many examples of environmental best practices exist to control this factor. Among the most

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important are placing waste in the designated containers for each type and storing waste properly according to applicable regulations, giving the appropriate treatment to each one of the wastes according to their classification, among many others.

It is important to distinguish and classify hazardous waste, since its treatment is more delicate.

Wastewater

Wastewater produced by various industries must be managed in accordance with the standards set for its handling. Failure to do so could endanger the environment in which these waters are produced and discharged.

Examples of best practices in this area include replacing solvents with biodegradable materials and products, using oil traps and other contaminant traps, installing necessary devices for sampling and measurement, and having water reuse management plans in place.

Atmospheric emissions

The amount and quality of emissions generated will depend on the type of industry. These emissions can affect the air in the work environment and the geographical location where they are produced. It is important to note that emissions may include gases, vapours and volatile organic compounds, among others.

Identifying the types of gases, volatile organic compounds and vapours that could be generated is crucial. This is essential for implementing measures to reduce environmental pollution.

For example, ensuring that areas where potentially harmful products are handled are properly ventilated can protect personnel or anyone who

may come into contact with the different types of gases emitted.

It is also important to reduce or avoid the unnecessary use of solvents or any other type of material that could be harmful to the environment, but also to the health of the people who are in direct and indirect contact with these products.

Noise emission

Noise is an important factor that can impact both the work environment and the area surrounding a business. Some of the main sources of noise generation include manual tools, idling vehicles and heavy machinery. Although these noise sources are necessary for the proper functioning of a company, they should still be considered when looking to improve environmental quality.

Energy, water and paper

In addition to all of the above, it is important to use energy, water, and paper efficiently. Regardless of the industry, these three factors are fundamental for any company. Therefore, they must be used appropriately. In the case of energy, mechanisms for lights that automatically switch off in low-traffic areas can be implemented, as well as making the most of natural light, using devices with lower power consumption and using the most appropriate tools and machinery for each job.

For water, it is necessary to have a water-saving plan that is communicated to all a company's personnel, as well as to timely detect malfunctions in the hydraulic network to prevent leaks, install toilets with low water consumption, adjust the irrigation periods of areas, conduct audits to verify water consumption and detect possible anomalies, and install volumetric meters to determine water consumption.

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Finally, using paper efficiently can significantly reduce the company's environmental impact. This can be achieved by reducing unnecessary copies and prints, using electronic documents whenever possible to avoid paper consumption, and promoting the reuse of paper for certain types of documents.

Conclusion

In conclusion, environmental law in Mexico provides a solid and constantly evolving framework to promote the development of renewable energy. However, the key to success lies in the consistency of public policies, regulatory certainty to attract private investment, and the development of adequate infrastructure. Additionally, it is essential to have efficient co-ordination between different levels of government and regulatory bodies, as well as greater promotion of technological innovation and the training of specialised talent in the energy sector.

The active participation of civil society and local communities also plays a crucial role, as their inclusion in consultation and decision-making processes can reduce socio-environmental conflicts and ensure that energy projects are implemented fairly and sustainably. Only through these joint efforts can an effective energy transition be ensured, one that not only meets international commitments but also drives local economic development, promotes social justice, and protects the environment for future generations.

In conclusion, the environmental legal framework in Mexico provides a solid and constantly evolving base from which to promote the development of renewable energy. However, success depends on the consistency of public policies, regulatory certainty to attract private investment, and the development of adequate infrastructure. It is essential to foster a favourable environment that encourages both national and foreign investors to engage in clean energy projects. This can be achieved through tax incentives, accessible financing, and guarantees of regulatory stability.

Moreover, efficient co-ordination between different levels of government and regulatory bodies is crucial, along with the promotion of technological innovation and the training of specialised talent in the energy sector. The active participation of civil society and local communities is also essential, as their inclusion in consultation and decision-making processes can reduce socio-environmental conflicts and ensure that energy projects are implemented fairly and sustainably. Only through these joint efforts can an effective energy transition be ensured, one that not only meets international commitments but also drives local economic development, promotes social justice and protects the environment for future generations.

NETHERLANDS



Law and Practice

Contributed by:

Guido Koop, Jan de Heer and Nanne Kusters

Loyens & Loeff

Contents

1. Regulatory Framework and Law p.339

1.1 Environmental Protection Policies, Principles and Laws p.339

2. Enforcement Authorities and Mechanisms p.340

2.1 Regulatory Authorities p.340

2.2 Co-operation p.340

3. Environmental Protections p.341

3.1 Protection of Environmental Assets p.341

3.2 Breaching Protections p.341

4. Environmental Incidents and Permits p.341

4.1 Investigative and Access Powers p.341

4.2 Environmental Permits/Approvals p.341

4.3 Regulators' Approach to Policy and Enforcement p.342

4.4 Transferring Permits/Approvals p.342

4.5 Consequences of Breaching Permits/Approvals p.342

5. Environmental Liability p.343

5.1 Key Types of Liability p.343

5.2 Disclosure p.343

6. Environmental Incidents and Damage p.344

6.1 Liability for Historical Environmental Incidents or Damage p.344

6.2 Reporting Requirements p.344

6.3 Types of Liability and Key Defences p.344

7. Corporate Liability p.345

7.1 Liability for Environmental Damage or Breaches of Environmental Law p.345

7.2 Environmental Taxes p.345

7.3 Incentives, Exemptions and Penalties p.346

7.4 Shareholder or Parent Company Liability p.346

7.5 ESG Requirements p.347

7.6 Environmental Audits p.347

8. Personal Liability p.348

8.1 Directors and Other Officers p.348

8.2 Insuring Against Liability p.348

9. Insurance p.348

9.1 Environmental Insurance p.348

10. Lender Liability p.348

10.1 Financial Institutions/Lender Liability p.348

10.2 Lender Protection p.349

11. Civil Liability p.349

11.1 Civil Claims p.349

11.2 Exemplary or Punitive Damages p.349

11.3 Class or Group Actions p.349

11.4 Landmark Cases p.349

12. Contractual Agreements p.350

12.1 Transferring or Apportioning Liability p.350

12.2 Environmental Insurance p.350

13. Contaminated Land p.350

13.1 Key Laws Governing Contaminated Land p.350

13.2 Clearing Contaminated Land p.350

13.3 Determining Liability p.351

13.4 Proceedings Against Polluters p.351

13.5 Investigating Environmental Accidents p.351

14. Climate Change and Emissions Trading p.351

14.1 Key Policies, Principles and Laws p.351

14.2 Targets to Reduce Greenhouse Gas Emissions p.352

15. Asbestos and Polychlorinated Biphenyls (PCBs) p.353

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs p.353

16. Waste p.354

16.1 Key Laws and Regulatory Controls p.354

16.2 Retention of Environmental Liability p.354

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods p.354

16.4 Rights and Obligations Applicable to Waste Operators p.354

17. Environmental Disclosure and Information p.355

17.1 Self-Reporting Requirements p.355

17.2 Public Environmental Information p.355

17.3 Corporate Disclosure Requirement p.355

17.4 Green Finance p.355

18. Transactions p.356

18.1 Environmental Due Diligence p.356

18.2 Disclosure of Environmental Information p.356

18.3 Key Issues in Environmental Due Diligence p.356

Loyens & Loeff has an environmental law group that is part of a fully integrated (tax and legal) firm with home markets in the Benelux countries and Switzerland, as well as offices in all the major financial centres such as London, New York, Paris and Tokyo. The group has nine lawyers in the Netherlands alone and forms a crucial part of the firm's leading real estate and energy and infrastructure practices. The team has vast experience in advising on all types of environmental law matters, including EU and

other cross-border regulations pertaining to, inter alia, waste, chemicals, emission trade and environmental liabilities. Aside from transaction-related work, the team assists both (international) private and public sector clients on contentious and non-contentious matters ranging from (the restructuring of) complex permit situations to compliance and enforcement-related procedures, reflecting its ability to provide knowledgeable and practical guidance in all environmental law matters.

Authors



Guido Koop is a partner in Loyens & Loeff's competition and regulatory group, and heads the firm's environmental law practice. He specialises in high-end development projects,

environmental compliance and liabilities, as well as administrative litigation involving regulatory authorities. His clients range from international investors, industrials and governments to renewable energy companies, mostly operating at the interface of the public and private sectors. Guido is a member of the editorial board of an environmental law magazine, a teacher for the Law Firm School and co-author of the publications "Building in the Netherlands" and "Investing in Real Estate in the Netherlands".



Jan de Heer is a senior associate in Loyens & Loeff's competition and regulatory practice group and part of the firm's project development and energy teams. He advises and

litigates on behalf of a broad range of clients, including real estate investors, developers and (multinational) industrial companies, with a specific focus on the energy transition. Jan completed postgraduate specialisation courses on environment and planning law (cum laude) and an energy law specialisation course. He is a board member at the Rotterdam Legal Society and regularly lectures at Leiden University, the Law Firm School and Instituut voor Bouwrecht.



Nanne Kusters is an associate in Loyens & Loeff's competition and regulatory practice group, and part of the firm's real estate, energy and regulatory enforcement teams. His practice

focuses on advising and litigating on a broad range of environmental law and zoning and planning law matters for (multinational) companies and international investors. Nanne has a particular focus on complex European environmental regulations and directives. He also teaches at Leiden University and the Law Firm School.

Loyens & Loeff

PO Box 71170
1008 BD Amsterdam
Parnassusweg 300
1081 LC Amsterdam
The Netherlands

Tel: +31 20 578 57 85
Fax: +31 20 578 58 00
Email: info@loyensloeff.com
Web: www.loyensloeff.com

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Law & Tax

1. Regulatory Framework and Law

1.1 Environmental Protection Policies, Principles and Laws

As a small and densely populated country and a member of the EU, the Netherlands has a comprehensive and well-established regulatory framework governing environmental protection.

The Environment and Planning Act (*Omgevingswet* – EPA) has entered into force in 2024, ushering in a new era in Dutch environmental law. The EPA is intended to (gradually) replace the currently applicable environmental law framework, with the aim of creating a single integrated framework.

The EPA has, as of 1 January 2024, replaced most of the Dutch environmental regulatory framework, with an exception being that part of the Environmental Management Act (*Wet milieubeheer* – EMA) will remain in effect. The EPA contains generally applicable regulations and minimum standards for a large variety of environmental concerns, such as air pollution, noise hindrance, emission rights and waste management, as well as a more procedural framework in respect of the issuing of permits and/or other public law consents. In addition, the EPA serves as a statutory basis for several lower environmental decrees and regulations, including the Environmental Activities Decree (*Besluit activiteiten leefomgeving*).

The Environmental Activities Decree stipulates general rules with regard to environmentally sensitive activities (*milieubelastende activiteiten*), covering virtually all relevant environmental aspects (eg, noise limits, air emission standards and odour limits). General rules under the Environmental Activities Decree apply to all businesses performing certain activities.

Under the Environmental Activities Decree, a permitting regime applies to environmentally harmful activities with a more substantial impact. If granted, an environmental permit will include a set of company-specific regulations that will apply in addition to the general rules applicable under the Environmental Activities Decree. Generally speaking, companies requiring a permit for their operations should comply with the best available techniques stipulated in the European Best Available Techniques Reference Documents (BREDS).

For less environmentally sensitive activities, a notification obligation may apply, and customised provisions could be imposed in addition to the aforementioned general regulations on a case-by-case basis.

Other lower decrees of note include:

- the Environment and Planning Decree (*Omgevingsbesluit*), which contains procedural rules and rules about general topics on protecting and using the physical environment;
- the Environmental Quality Decree (*Besluit kwaliteit leefomgeving*), which contains rules on the quality of the physical environment and the performance of tasks and authorities; and
- the Environment Buildings Decree (*Besluit bouwwerken leefomgeving*), which contains rules on technical aspects of buildings and structures.

Since the Administrative Jurisdiction Division of the Council of State annulled the so-called Programmatic Approach to Nitrogen (*Programmatiese Aanpak Stikstof* – PAS) in 2019, nitrogen deposition onto Natura 2000 areas has become an increasingly important aspect of the Dutch

permit-granting process. Initiators are now once more required to establish upfront that a project does not have significant negative effects for Natura 2000 areas. If this cannot be demonstrated based on nitrogen deposition calculations, a nature permit requirement will apply. Such permit might be very difficult to obtain given the high levels of nitrogen deposition affecting Dutch Natura 2000 areas in the Netherlands.

2. Enforcement Authorities and Mechanisms

2.1 Regulatory Authorities

In the Netherlands, environmental policy and enforcement are applied at both local and national levels. Local governments such as municipalities, provinces and water authorities grant permits and enforce them for environmental topics such as odour, noise, environment (municipalities), nature, large facilities, and soil (provinces) and water management and quality (water authorities). Regional environmental agencies (*omgevingsdiensten*) are often instructed to carry out supervisory and enforcement-related tasks on behalf of these authorities.

Furthermore, competent authorities are appointed at the national level with respect to certain topics. The key regulatory authorities in that respect are as follows.

- The Living Environment and Transportation Inspectorate (*Inspectie, Leefomgeving en Transport* – ILT) has a supervisory role in the fields of transport, waste and chemicals. It is competent to decide on permits for high-risk water discharges, and to receive notifications of the transport of waste on the basis of the European Waste Shipment Regulation.

- The Dutch Emissions Authority (*Nederlandse Emissie, Autoriteit* – NEA) has a supervisory role in the context of the climate and the reduction of CO₂. It is competent to grant emission permits and to supervise the EU emissions trading scheme and renewable fuel regulations.
- Other national supervisory authorities are also active on specific topics, such as occupational safety (the Netherlands Labour Authority (*Nederlandse Arbeidsinspectie*) – NLA), mining (State Supervision of Mines (*Staatstoezicht op de Mijnen*) – SodM), radiation (the Nuclear Safety and Radiation Authority (*Autoriteit Nucleaire Veiligheid en Stralingsbescherming*)), and pesticides and biocides (the Food and Consumer Product Safety Authority (*Nederlandse Voedsel- en Warenautoriteit*) – NVWA).

All national supervisory authorities operate under the name and instruction of the competent ministry.

2.2 Co-operation

Co-operation between administrative bodies is a central aspect of the legislative changes introduced under the EPA. Before making a decision, an administrative body has to take into account the duties and powers of other administrative bodies and, if necessary, co-ordinate with them, with the aim of providing a “one-stop shop” as far as possible. Further rules on the co-operation of different administrative bodies are contained in the Environmental and Planning Regulation (*Omgevingsregeling*), which includes rules on exchanging information.

3. Environmental Protections

3.1 Protection of Environmental Assets

The EPA caters for the protection of all environmental assets in the Netherlands in a single act. The EPA contains a general duty of care pursuant to which both administrative bodies and residents in the Netherlands bear responsibility for a safe and healthy physical environment.

Specific rules apply under the EPA for nearly all environmental assets. For instance, the EPA contains a comprehensive framework for all activities that may negatively impact the quality of surface waters. Furthermore, it contains a framework for the protection of soil and groundwater quality, including a general duty of care pursuant to which a party causing spills or leakages is, in principle, obliged to remediate any resulting soil and groundwater pollution. Similarly, the EPA contains rules for limiting air and odour emissions.

The protection of flora, fauna, natural habitats and landscapes flows from EU regulations, the Birds Directive and the Habitats Directive. Where required, these have been codified in the EPA.

3.2 Breaching Protections

Please see 4. **Environmental Incidents and Permits** regarding administrative and criminal enforcement actions available to the regulatory authorities.

4. Environmental Incidents and Permits

4.1 Investigative and Access Powers

The power of regulatory authorities is generally governed by the General Administrative Law Act (*Algemene wet bestuursrecht*) and specific

legislation where additional powers are granted. Supervisory authorities in the Netherlands have relatively extensive investigative and access powers to carry out their tasks, generally including rights to:

- access business locations (whether accompanied by the police or not);
- obtain business-related data and documents (unless legally privileged);
- obtain information, verbally or in writing; and
- investigate objects and take samples.

Investigations may take place unannounced. Following an inspection, an inspection report or an official report is usually drafted and sent to the site operator. The use of investigative powers must be proportional to the scope of the alleged violation.

When confronted with investigations, there is a legal obligation to co-operate with the relevant authority, provided that the authorities safeguard against self-incrimination in respect of will-dependent material (such as explanations) if such authority intends to impose a punitive sanction (such as a criminal sanction or administrative fine). The validity/lawfulness of investigative actions can (only) be challenged in proceedings against any actual enforcement measures.

4.2 Environmental Permits/Approvals

In general, the environmental regulatory framework – as primarily stipulated in the EPA – will apply to all economical or comparable human activities of any substance that fall within the definition of an environmentally harmful activity (*milieubelastende activiteit*), as listed in the Environmental Activities Decree. Additional rules may apply at the local level, although local rules may generally not be more stringent than the

applicable national framework under the EPA and the Environmental Activities Decree.

Within the categories of activities that are governed by the environmental regulatory framework, only those activities with a more substantial environmental impact are required to operate under an environmental permit. The environmental permit for these activities can pertain to commencing a new activity, or to relevant subsequent changes to (parts of) such activities. Where an activity is not subject to a permit requirement, a notification obligation and general rules may still apply; certain local regulations listed in the zoning plan may also apply.

If necessary, an environmental permit to perform a new environmentally harmful activity, or to alter such activities, is applied for by submitting a permit application to the competent authorities.

Under the EPA, most permits are set to be handled within a statutory decision period of eight weeks, which can be extended for a further six weeks. This is, however, not a fatal term.

In some cases, the so-called extended preparatory procedure applies, which has a statutory decision period of six months. Again, there are no direct legal consequences if the authorities do not comply with this period.

Under the regular procedure, the decision will be published, and third parties and/or the applicant can initiate objection proceedings against this decision within six weeks of publication. If the extended procedure applies, formal views can be submitted against a draft version of the permit within a six-week period. Parties having a legitimate interest (generally those experiencing some form of consequences from the relevant permit) can subsequently appeal a permit once

issued. Depending on the contents of the permit, such appeals can be lodged with a first instance court or a specific higher appellate court (which will generally be the Administrative Jurisdiction Division of the Council of State).

4.3 Regulators' Approach to Policy and Enforcement

Regarding the regulators' approach to policy and enforcement, please see 4.1 Investigative and Access Powers and 5.1 Key Types of Liability.

4.4 Transferring Permits/Approvals

The basic premise under the EPA is that permits are linked to a specific property or activity (*zaaksgebonden*). The EPA holds that the entity performing the activity at that location is the entity to which the permit pertains. A change in permit holder needs to be notified to the competent authority in writing four weeks prior to the change occurring.

4.5 Consequences of Breaching Permits/Approvals

In the event of a breach of an environmental approval/permit, Dutch law provides for three types of potential administrative enforcement measures:

- an administrative fine (*administratieve boete*);
- an order subject to a penalty (*last onder dwangsom*); and
- direct enforcement by the authorities (*bestuursdwang*).

In the event of a breach of environmental laws, in most cases the authority will impose an order subject to a penalty fine. That way, the offender is given the opportunity to end the breach itself within a certain period of time in order to avoid a fine.

Depending on the severity of the matter, a competent authority might (also) take far-reaching actions such as shutting down an operation and/or revoking or amending permits (or conditions attached thereto).

Most violations of environmental requirements also qualify as criminal offences under the Economic Offences Act. Therefore, the Public Prosecution Service (*Openbaar Ministerie*) is the main competent authority carrying out enforcement tasks from a criminal law perspective. Criminal enforcement is, however, in practice often limited to more severe matters.

In general, there are objections to the accumulation of sanctions of a punitive nature. For example, it is not permitted to impose an administrative fine if criminal action is already being pursued for the same conduct. However, restorative and punitive sanctions may, in principle, accumulate and apply to the same conduct, although the severity of the administrative measure must be taken into account when determining the extent of the punitive sanction.

Please also see 4.1 Investigative and Access Powers and 5.1 Key Types of Liability.

5. Environmental Liability

5.1 Key Types of Liability

Under Dutch law, environmental issues are primarily administrative matters. Administrative liability can lead to sanctions and measures being imposed by a Dutch regulatory authority. Administrative sanctions can be divided into punitive sanctions (administrative fine) and remedial sanctions (administrative enforcement order and order subject to a penalty fine).

Secondly, both the company and its de facto manager(s) (*feitelijk leidinggevende(n)*) might be liable under criminal law as most environmental violations (also) qualify as “economic offences”. If committed with intent or as a result of wilful misconduct, such offences qualify as a crime (*misdrift*); if committed without intent, they constitute (mere) criminal infringements (*overtredingen*). In short, the offender could face a fine, community service (*taakstraf*) or even imprisonment, with more severe punishments being applicable to crimes. Administrative and criminal enforcement can coincide under certain circumstances.

Thirdly, civil liability plays a role when an environmental breach causes an unlawful act towards a third party – eg, in the case of harmful pollution or hindrance. Civil liability could lead to the obligation to pay damages to the aggrieved party.

5.2 Disclosure

An obligation to notify the relevant competent authorities of any incidents might apply, pursuant to permit conditions. There is no general obligation to report each and every (possible) incident. However, a notification duty does apply in the event of calamities if such calamities could result in significant negative consequences for the physical environment.

Non-disclosure or incomplete disclosure may be enforced through either administrative or criminal enforcement measures; please see 4.1 Investigative and Access Powers and 5.1 Key Types of Liability. Note that protection from self-incrimination only applies in the event of potential criminal enforcement measures, and such protection would not remove the notification duty in respect of the aforementioned calamities.

6. Environmental Incidents and Damage

6.1 Liability for Historical Environmental Incidents or Damage

If an order subject to penalty is imposed by an authority, that authority can decide that this measure will automatically apply to a possible legal successor if a legal basis for this approach is present (which is the case in the EPA, for example). As a result, the legal successor faces the risk of having to pay a penalty.

In the event of soil pollution, an authority could order a party to investigate or remediate the pollution. Generally speaking, this party will also carry the costs of the remediation. In most cases, this party is the owner of a polluted property or land, but it could also be the leaseholder. However, this does not have to be the party that caused the pollution. Recourse against the party that did cause the pollution may be possible on the basis of civil law or the purchase agreement. Furthermore, recent case law may limit the possibility of the competent authorities enforcing against a party that did not cause the pollution.

As the new owner of real estate or land could still face enforcement measures, environmental topics are typically addressed as part of due diligence processes and, if needed, addressed in transaction documentation either by way of warranties or specific indemnities if particular risks would be identified.

Civil Liability

On the basis of Article 3:310 of the Dutch Civil Code, in conjunction with Article 6:175, the expiry date for a legal claim for compensation of damages or a contractual fine as a result of pollution of the air, water or soil is five years. This period commences the day following the day on

which the aggrieved party became aware of (i) the damage or the enforceability of the claim and (ii) the identity of the party liable for the damage. Regardless of these conditions being fulfilled, the claim expires 30 years after the incident in any case.

Criminal Enforcement

The expiration of the period during which criminal enforcement is possible depends on the maximum sentence of that violation. For environmental offences/crimes, this means that the expiry period varies, but will expire 12 years after the violation at the latest.

Administrative Enforcement

The power to enforce an illegal situation does not “expire” after a specific period of time. In principle, administrative bodies will maintain their power to impose enforcement measures on an offender. In many cases, a new owner of a property can be qualified as an offender.

6.2 Reporting Requirements

Please see 5.2 Disclosure, 7.5 ESG Requirements and 7.6 Environmental Audits.

Depending on the scope of the activities conducted, certain reporting obligations may apply, such as filing an annual report on environmental aspects of the business pursuant to the European Pollutant Release and Transfer Register Directive, or in relation to implemented energy-saving measures.

6.3 Types of Liability and Key Defences

Please see 6.1 Liability for Historical Environmental Incidents or Damage regarding the different types of liability under Dutch law.

If faced with one of these liabilities, the key defences, limits and conditions to such liability are as follows:

- expiration periods in civil and criminal law (*verjaring*);
- in the case of criminal liability, an argument that the offender did not deliberately commit the offence (in light of the distinction between infringements and crimes);
- in the case of civil liability, an argument that there is no causal relation between the unlawful act and this damage; and
- in the case of administrative liability, (i) a challenge of the lawfulness of the manner in which the authority exercised its powers; (ii) a challenge of the evidence of the offence or incident, including the qualification of the offender as such or (iii) an argument that the enforcement is disproportionate to the interests that it serves.

Aside from the foregoing, the main discussions will often focus on (challenging) the relevant facts and circumstances and the legal qualification thereof.

7. Corporate Liability

7.1 Liability for Environmental Damage or Breaches of Environmental Law

General civil liability is assumed for any person causing damages through a breach of environmental law. This general liability is supplemented in specific topical rules, such as for asbestos, soil contamination or hazardous substances. No specific rules apply for corporate entities.

With respect to administrative or criminal fines, the type and size of the offender can be relevant, as the proportionality of the punishment can be

connected to the size/entity of a company (eg, large corporations are subject to higher fines than a local shopkeeper).

7.2 Environmental Taxes

In the Netherlands, several types of taxes are in place in order to meet the objectives set out in the Dutch climate policy and legislation. These taxes generally aim to discourage the use of (energy) resources.

Taxes on Energy

Users of natural (compressed) gas pay energy tax for every cubic metre of natural (compressed) gas used. Users of electricity pay energy tax for every kWh used. Energy taxes are charged by the energy suppliers, which in turn pay the energy taxes to the tax authorities. It is possible to claim back energy taxes under certain conditions, such as if the natural (compressed) gas or electricity is used to generate electricity.

A tax reduction applies to the natural (compressed) gas or electricity that is necessary to fulfil the basic needs of the user. Furthermore, an exemption applies for legal entities and natural persons who generate electricity for their own use by means of renewable sources.

Taxes on Greenhouse Gases (GHGs)

A GHG tax was introduced in the Netherlands on 1 January 2021, with all sites that fall under the European Emissions Trading System (EU ETS) being subject to such tax. Waste incineration plants and industrial businesses emitting significant volumes of nitrous oxide are also affected by this tax. The carbon tax does not apply to certain applications, such as the capture and storage of CO₂. As part of the Tax Plan 2023, the part of the emissions that are currently exempt will be reduced, meaning that industrial businesses

that emit too much CO₂ will pay more taxes than they currently do.

Taxes on Tap Water

In the Netherlands, taxes apply to the use of tap water for the first 300 cubic metres used. These taxes are charged by the water suppliers, which in turn pay the taxes to the tax authority.

Taxes on Waste

Companies in the Netherlands with a waste incinerator must pay waste tax of EUR33.58 for every 1,000 kg of incinerated waste, and must report the total amount of incinerated waste to the tax authorities in their yearly tax return declaration. Companies transporting their waste to foreign countries to have it dumped or incinerated also face taxes. In that way, an equal system applies to all waste that was produced in the Netherlands, regardless of where it will be processed. With these taxes, the government encourages businesses to recycle materials instead of incinerating them.

Flight Taxes

Since 1 January 2021, a national flight tax applies to all individual passengers departing from a Dutch airport. The flight tax currently amounts to EUR26.43 per flight, with the aims of encouraging individuals to make environment-conscious decisions and enhancing sustainability in the aviation sector by reducing CO₂ deposition. Transfer passengers are currently exempt from the flight tax.

Municipal and Other Local Taxes

Municipalities and (local) water authorities generally also levy certain waste and water taxes, the rate and base of which differ by municipality and local water authority.

7.3 Incentives, Exemptions and Penalties

There are certain tax incentives that allow for an additional deduction of up to 45% if an investment is made in certain qualifying energy or environmentally friendly assets. The qualifying assets are listed exhaustively each year on specific lists. Accelerated depreciation is also possible for specific assets. To qualify for the deduction or accelerated depreciation, the investment should be notified to the Netherlands Enterprise Agency (*Rijksdienst voor Ondernemend Nederland*) within three months of being made.

The Netherlands also has a significant production subsidy scheme (the SDE++ subsidy) for the stimulation of sustainable energy production and the reduction of GHG emissions.

7.4 Shareholder or Parent Company Liability

As a general principle, shareholders or a parent company cannot be held liable for environmental damage or breaches of environmental law of the violating company in which they have a share and/or their subsidiaries as such, unless the shareholder/parent company qualifies as the “de facto manager” in charge of the actual violation. This may be the case for a single or majority shareholder who is also the executive/statutory director of the violating company.

A factual manager (ie, a natural person who does not have to be a statutory director or executive) can be held liable (next to the violating company itself) if they were responsible for a breach, where they had the means and opportunity to prevent the breach from occurring but the breach occurred nonetheless. It is a relatively high standard and is not often successfully demonstrated in court by a public prosecutor.

7.5 ESG Requirements

In recent years, EU sustainability legislation has been put in place, which will become increasingly relevant. In particular, the EU Corporate Sustainability Reporting Directive (CSRD) entered into force on 5 January 2023 and is currently being implemented by the EU member states, and the EU Corporate Sustainability Due Diligence Directive (CSDDD) is currently still under negotiation by the EU legislative bodies.

In summary, the CSRD requires the inclusion of a sustainability report in the management report. This sustainability report must be included in a distinct section of the management report and must be clearly identified as such. The information provided in that section must cover the sustainability impacts from two perspectives, also known as the double materiality perspective. The CSRD requires in-scope undertakings to report on the effects of their operations on the environment and society (inside-out), and also on how sustainability issues impact their business (outside-in). As such, both the risks of, and impacts on, the undertaking are considered from a materiality perspective. In addition, the reporting is not limited solely to the sustainability of the company itself, but also includes the sustainability of the value chain of which the company is a part. All undertakings falling within the scope of the CSRD will be required to report on a broad collection of ESG topics set out in the European Sustainability Reporting Standards, a uniform set of reporting standards. The sustainability reporting requirements introduced by the CSRD will be phased in for financial years 2024–28, alongside micro, small, medium-sized and large companies.

On 17 October 2023, the European Commission adopted a Delegated Directive to adjust the monetary size criteria (balance sheet and

net turnover) for micro, small, medium-sized and large companies by at least 25%, thereby reducing the number of companies subject to full reporting obligations. Consequently, fewer companies will become subject to related legislation, such as the CSRD.

The CSDDD requires in-scope companies to implement certain processes throughout their value chains in line with ESG criteria. The extent of the obligations under the CSDDD are subject to the current negotiations by the EU legislative bodies, but may include:

- conducting risk-based human rights and environmental due diligence;
- adopting a climate change action plan; and
- the introduction of directors' duties in respect of monitoring of and compliance with the foregoing.

The scope of the CSDDD is also subject to the current negotiations, but the scope as originally proposed by the European Commission would be limited to (very) large companies.

7.6 Environmental Audits

Under Sections 3.84 and 5.1.5 of the Environmental Activities Decree, entities are obliged to carry out an energy audit once every four years and to submit such audit report to the Netherlands Enterprise Agency (*Rijksdienst voor Ondernemend Nederland*).

However, many companies voluntarily opt for certification of their management systems, for instance under International Environmental Management System standards (International Organization for Standardization (ISO) 14001).

Aside from the foregoing, environmental permits often contain conditions in relation to monitoring and reporting.

Please also see **7.5 ESG Requirements** and **17.3 Corporate Disclosure Requirement**.

8. Personal Liability

8.1 Directors and Other Officers

Statutory directors can be held liable for the proper performance of their duties and for the general course of affairs. A director who is culpable for a serious imputable act in relation to the performance of their duties as a director can be held liable next to the company itself. This is, however, a high threshold more commonly invoked in matters relating to corporate law and statutory governance or bankruptcy.

As stated in **7.4 Shareholder or Parent Company Liability**, a de facto manager (a natural person who does not have to be a statutory director or executive) can be held liable (next to the company itself) if it was, in short, responsible for the prevention of a breach where it had the means and opportunity to prevent the breach from occurring. This is a relatively high standard and is not often successfully demonstrated in court by a public prosecutor.

The fines are not different for a specific violation, but as de facto managers are always natural persons, they would generally be subjected to lower fines (compared to companies qualifying as offenders).

8.2 Insuring Against Liability

The company (or its directors and/or officers) can take out a directors' and officers' (D&O) insurance policy providing coverage for liabilities

based on acts and omissions committed or omitted by the directors and officers. However, depending on the insurer and the policy, D&O insurance may exclude claims resulting from or based on, inter alia, the actual, alleged or threatened disposal, emission or escape of environmental contamination substances.

Furthermore, exclusions may apply with respect to penalties for the breach of environmental law.

9. Insurance

9.1 Environmental Insurance

There is no compulsory environmental insurance by law.

However, it is possible to take out environmental damages insurance covering the financial risks of environmental damage, such as surface water or soil contamination. Environmental damages insurance generally does not cover damages relating to underground storage tanks.

10. Lender Liability

10.1 Financial Institutions/Lender Liability

Generally, lenders will not be liable for the borrower's environmental actions or property unless factual management is present, or such is explicitly agreed upon.

If the lender would have to step in on the borrower's position (eg, ownership of land or a company), the associated liabilities connected to such position might (and often will) be transferred, such as liability relating to soil contamination or permit compliance (for aspects of the environment, water, safety, etc).

10.2 Lender Protection

The lender should (and typically will) refrain from exercising control or influence over the day-to-day management decisions relating to environmental aspects.

11. Civil Liability

11.1 Civil Claims

Apart from contract liability, civil claims for compensation in environment-related cases are generally tort-based. Typically, compensation can be awarded in the event of unlawful nuisance or violation of a permit causing damages to third parties, and based on a certain duty of care arising from specific environmental legislation (eg, relating to soil protection) or even an “unwritten” duty of care. For instance, in Dutch case law, the liability of the Dutch state has been accepted based on its duty of care to take adequate measures to protect its citizens from the consequences of climate change. The Dutch Civil Code further provides a basis for the strict civil liability of professional users and custodians of hazardous substances, as well as dumpsite and mine work operators.

11.2 Exemplary or Punitive Damages

The concepts of exemplary and punitive damages are unknown under Dutch law, so cannot be awarded by courts.

11.3 Class or Group Actions

The Netherlands has been at the forefront of collective redress in Europe since the early 1990s. On 1 January 2020, the Act on Collective Damages in Class Actions (WAMCA) entered into effect. Class actions filed after the WAMCA took effect can relate to monetary damages (allegedly) caused by events on or after 15 November 2016.

A class action can be litigated through the competent Dutch civil court. The same rules apply for all class actions, regardless of whether monetary relief is sought and the legal grounds for damages. As a starting point, the judgment in a class action is binding on all Dutch residents who fall within the scope of the claim organisation, with the exception of those residents that opted out.

11.4 Landmark Cases

A landmark case that is expected to set an important precedent within other countries is the Urgenda case (also known as the “Climate Case”), in which a class action resulted in both the District Court and the Court of Appeal of The Hague holding the Dutch state liable for not taking adequate measures to protect its citizens from the consequences of climate change. The courts ordered that the Dutch state should take additional measures to further reduce the emission of GHGs in the Netherlands by at least 25% compared to 1990, before the end of 2020. This order was confirmed by the Dutch Supreme Court.

Another landmark case in the private sector is the Shell case. On 26 May 2021, the Hague District Court ordered Shell (previously Royal Dutch Shell), both directly and via its group companies, to limit its CO₂ emissions by at least net 45% by the end of 2030 relative to 2019 levels. The Court concluded that Shell is obliged to ensure through the Shell group’s corporate policy that the CO₂ emissions of the Shell group, its suppliers and its customers are reduced. This follows from the unwritten standard of care applicable to Shell. In this respect, Shell has an “obligation of result” with respect to the Shell group’s CO₂ emissions and a material “best-efforts obligation” in respect of its suppliers and customers. Shell successfully appealed this District Court verdict, and the Court of Appeal overturned

the earlier court ruling on 12 November 2024. Whether Friends of the Earth, the claimants in this case, will litigate this matter further before the Dutch Supreme Court remains to be seen.

Several other climate cases are pending, for example a case by Greenpeace against the Dutch state in which it is being discussed whether the Dutch state is taking sufficient action to prevent negative effects of climate change on the Caribbean part of the Netherlands. Most of these climate cases are class actions, although not all claimants are seeking to claim damages; instead, these claimants often seek legal change through the courts.

12. Contractual Agreements

12.1 Transferring or Apportioning Liability

Generally, under Dutch law, civil liability for damages and breaches of law can be limited by means of indemnities and other contractual arrangements between parties, such as buyers and sellers. Indemnities and other contractual arrangements between parties do not affect the parties' liability vis-à-vis regulatory authorities.

12.2 Environmental Insurance

Environmental liability insurance is offered for corporate liability issues. Such insurance is additional to the general corporate liability insurance that frequently excludes or limits these types of risks.

Please also see **9.1 Environmental Insurance**.

13. Contaminated Land

13.1 Key Laws Governing Contaminated Land

The EPA is the main act governing Dutch soil and groundwater protection. However, the preceding legal framework will remain relevant during the transition to the new framework.

Under the EPA and preceding soil protection legislation, the contaminator can be held responsible for the remediation of a contamination. In cases where the contamination occurred prior to 1987, remediation is only required in the event of severe and urgent contamination. New contaminations as of 1 January 2024 will be fully governed by the EPA.

Remediation has to be notified to the competent authority. In the case of substantial remediation works, the competent authority has to approve the remediation plan, the evaluation report and, if applicable, the aftercare plan. The competent authority has the possibility of imposing remediation orders (depending on the type, size and urgency of the remediation). Co-ordinated approaches are also possible when a contamination covers a wider area (with multiple owners).

In relation to soil/groundwater contamination of certain industrial sites requiring remediation, the owner as such can be held responsible (at the discretion of the competent authority) for the remediation, as an alternative to the actual polluter. In practice, however, authorities will only go after the owner if the actual polluter is no longer in sight.

13.2 Clearing Contaminated Land

Please see **13.1 Key Laws Governing Contaminated Land**.

Although it is possible to contractually allocate the responsibility for remediation of contaminated land to another party, such contractual allocation pursuant to a contract does not achieve the same effect under administrative law.

13.3 Determining Liability

In cases of multiple polluters, liability will have to be assessed on a case-by-case basis. The general duty of care in respect of soil and groundwater applies in any event: whichever party directly caused contamination can be held responsible for soil contamination, and so can all parties that are competent and capable of preventing or mitigating a violation of the general duty of care. Depending on the actual circumstances of the matter, polluters might be held jointly liable, or such liability might be attributed on a pro rata basis if their respective contributions to pollution can be substantiated.

13.4 Proceedings Against Polluters

Interested parties may request enforcement from the competent authorities if they suspect soil contamination. Upon such enforcement request, the competent authority will need to investigate whether contamination has taken place.

Under civil law, it may be possible to claim damages from another party on the basis of tort.

13.5 Investigating Environmental Accidents

Investigations by the competent authorities can take place ex officio, may follow from self-reporting (pursuant to an incident) or may take place pursuant to an enforcement request by a third party.

14. Climate Change and Emissions Trading

14.1 Key Policies, Principles and Laws

Key Policies

The Netherlands is a member of multiple international treaties regarding climate change, including the Climate Agreement as presented at the Paris Climate Conference in 2015. The key policies in the Netherlands regarding climate change mainly derive from the objectives set out in the Paris Climate Agreement, including the goal to keep anthropogenic global warming below 2°C. With respect thereto, the key national policy aims to reduce the use of energy sources in general (for instance, by making certain energy-saving measures mandatory) and to promote the use of energy derived from renewable energy resources instead of from fossil resources.

Key Principles

The key principles regarding climate change have been laid down in the Climate Agreement, as published by the Dutch government on 28 June 2019, and the Climate Act. The latter Act stipulates that, by 2030, the emission of GHGs must be reduced by at least 55% in comparison with the emission thereof in 1990, and that the Netherlands has 100% CO₂ neutral energy production by 2050. Furthermore, the Netherlands strives for a reduction of net emission of GHGs to zero by 2050, and negative GHG emissions after 2050.

In both the Urgenda and Shell cases (see 11.4 Landmark Cases), claimants have taken steps to follow up on these rulings, also under threat of further litigation, to demand adherence to the respective judgments.

In 2022, the Dutch government presented its new climate policy programme, which targets

60% GHG reduction by 2030 and describes the main lines of policy for the coming years, aimed at the transitions needed for climate neutrality by 2050. In view of the climate goals and the court ruling in the Urgenda case, the government wants to sharply reduce GHG emissions and drive the necessary transitions towards climate neutrality. The policy focuses on making five sectors more sustainable:

- electricity;
- mobility;
- industry;
- the built environment; and
- agriculture and land use.

The government has set a residual emission target for all sectors, which clarifies the maximum amount of emissions each sector can still emit in 2030.

The government also announced an Additional Climate Package (*Aanvullend klimaatpakket*) on 26 April 2023, which sets out the policies to achieve an additional 22 megaton reduction in GHGs.

Lastly, the EU has established a system of trading with emission allowances (EU ETS), which in the Netherlands has been (and will continue to be) implemented in the EMA. In addition, flanking regulations have been agreed upon at the EU level, which will impose a so-called carbon border adjustment mechanism (EU CBAM) aimed at addressing the risk of carbon leakage and stimulating the reduction of GHG emissions by non-EU countries. The EU CBAM will function in parallel with the EU ETS to ensure equivalent carbon pricing between imported goods and EU-produced goods. Under the EU CBAM, importers will have to buy and surrender a number of EU CBAM certificates correspond-

ing to the embedded emission intensity of their imported products.

Key Laws

A key national law related to climate change is the Climate Act, as discussed in the foregoing. Furthermore, the Prohibition of Coal in Electricity Production Act (*Wet verbod op kolen bij elektriciteitsproductie*), passed at the end of 2019, prohibits the use of coal as a fuel within electricity-generating facilities. In addition, operators of a facility are obliged to implement all energy-saving measures with a return on investment of up to five years. As of 1 January 2023, office buildings in the Netherlands with a ground floor area exceeding 100 square metres are required to have at least an energy label C to be (or to continue to be) used as such.

14.2 Targets to Reduce Greenhouse Gas Emissions

As indicated in 14.1 Key Policies, Principles and Laws, Dutch policy and legislation have set out the following targets to reduce GHG emissions within the Netherlands:

- by 2023, at least 16% of all energy that is produced within the Netherlands must derive from renewable resources;
- by 2030, the emission of GHGs within the Netherlands must be reduced by at least 55% in comparison with the emission of GHGs within the Netherlands in 1990, as a prelude to a climate-neutral Netherlands by 2050; and
- by 2050, the Netherlands strives for net-zero emissions of GHGs, with negative GHG emissions in the years following 2050.

15. Asbestos and Polychlorinated Biphenyls (PCBs)

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs

The use of polychlorinated biphenyls (PCB) has been prohibited in the Netherlands since 1985. As PCBs were used prior to that date, these may from time to time still be found in the soil and groundwater at industrial locations with a long industrial history, or in (very) old machines. Generally, remediation is required in respect of PCB, although such remediation may, depending on the circumstances of the case, take place at a later moment in time. Please also refer to **13.1 Key Laws Governing Contaminated Land**.

The use of asbestos-containing materials (ACMs) for construction activities has been banned in the Netherlands since 1993. Due to the fact that ACMs were frequently used prior to that date, asbestos is still commonly present in buildings in the Netherlands, especially buildings that were constructed in the 1960s and 1970s. In relation to this ban, the regulatory framework is very much geared towards advancing human health aspects and protecting the general public from the risks associated with ACMs.

However, under Dutch law, there is no obligation to actively remove ACMs that are present in a building, provided that the presence of such ACMs does not entail health and safety risks for the users of the relevant building or for the public in general.

The removal of ACMs will be required in the event of the demolition or (partial) refurbishment of a building containing ACMs.

In addition, the removal of asbestos might be required pursuant to the EPA, as noted in **13.1**

Key Laws Governing Contaminated Land. In such an event, the Environmental Buildings Decree stipulates strict rules and conditions for such remediation works, including an obligation to carry out an asbestos investigation prior to the envisaged demolition works. Depending on the amount and type of ACMs found (friable/non-friable), removal might only be allowed by engaging a certified asbestos abatement firm. A register is in place that lists all certified asbestos abatement firms.

Apart from the foregoing, the production, import, possession or disposal of ACMs has been prohibited under the Asbestos (Product) Decree (*Productenbesluit Asbest*), which also provides labelling and packaging requirements for products that are allowed to contain asbestos. Furthermore, strict rules for worker protection have been laid down in the Working Conditions Decree (*Arbeidsomstandighedenbesluit*), which also applies to the prevention of asbestos-related incidents.

The supervision and enforcement of asbestos-related regulations falls within the authority of either the Human Environment and Transport Inspectorate or the NLA in the event of worker-related potential asbestos contaminations. Non-compliance with the above-mentioned rules and regulations is subject to administrative enforcement measures, as well as penalty fines. Criminal prosecution is also possible for wilful violations resulting in, for example, the death of an employee.

In civil law cases, the statute of limitations is extended to 30 years after a claimant was exposed to ACMs.

16. Waste

16.1 Key Laws and Regulatory Controls

Waste legislation is based on the implementation of the European Waste Framework Directive (2008/98/EG), which is (and will continue to be) incorporated in the EMA and elaborated in the national waste management plan. This regulatory framework defines when a product is qualified as waste – ie, “any substance or object which the holder discards or intends or is required to discard”. Furthermore, this framework set out registration and permitting requirements.

16.2 Retention of Environmental Liability

The operator of a site or facility that disposes of waste (the producer or importer) has to comply with administrative obligations. The operator of the site or facility needs to specify the following:

- from which type of business or person they accept waste, insofar as is relevant for the acceptance and control thereof;
- which requirements they set for offering waste;
- how they inspect the waste before receipt (mostly visual); and
- how waste that deviates in an environmental hygienically relevant way from what is usual for the category concerned is treated.

The operator of such site or facility is responsible for complying with these acceptance and control procedures. The form on which this is documented must be kept for five years.

Specific regulations apply to recycling schemes where a producer of products that will undoubtedly lead to waste (glass bottles, plastic bottles, electronics) will have to take further actions, such as imposing a fee on the consumer or attribution to a recycling system.

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

There is no general obligation for a producer of waste to choose a specific type of waste processing (recycling, recovering or reusing). However, there are specific product-related regulations that prescribe participation in a take-back system or recycle scheme – examples include batteries, some electronic appliances, some types of packaging and car tyres.

16.4 Rights and Obligations Applicable to Waste Operators

The EMA contains several prohibitions and regulations, such as a ban on the unauthorised discarding of waste and regulations pertaining to handing over, receiving, transporting and collecting hazardous waste and industrial waste. In short, waste may only be transferred by a discharger/producer to a party that is qualified (registered or permitted) to accept and/or transport waste. The minister, municipalities and provinces can grant exemptions from some of these prohibitions and regulations, if permitted by law.

The Environmental Activities Decree qualifies several forms of waste management as environmentally harmful activities, for which different regulations apply.

In general, the party that disposes of the waste is responsible for the transfer to a qualified person, and for filing (and storing) the required waste transfer forms. If this is not done correctly, enforcement actions can be taken for not disposing of waste in accordance with the law.

17. Environmental Disclosure and Information

17.1 Self-Reporting Requirements

Regarding self-reporting requirements, please see 5.2 Disclosure, 6.2 Reporting Requirements, 7.5 ESG Requirements and 7.6 Environmental Audits.

17.2 Public Environmental Information

Under the Open Government Act (*Wet Open Overheid* – WOO), information held by public bodies will (have to) be provided if it is requested in a so-called WOO request, unless an exception as provided for in the WOO applies.

These exceptions include that the disclosure of this information would:

- release confidential business and manufacturing data;
- infringe the private lives of one or more individuals; or
- result in the disproportionate favouring of certain involved parties.

With respect to environmental information, the WOO applies a specific regime that ensures a wider disclosure regime compared to other information concerning administrative matters (following from the Aarhus Convention). The WOO contains restrictions for environmental information in terms of applying the statutory grounds for refusal, including that absolute and relative grounds for exception do not apply to emissions data.

17.3 Corporate Disclosure Requirement

Article 2:391 of the Dutch Civil Code states that corporations should include an analysis of their non-financial performance in their annual report, such as their performance regarding the environ-

ment. This obligation is further regulated in the decree on the publication of non-financial information (*Besluit bekendmaking niet-financiële informatie*).

This decree states, amongst other things, that legal entities that meet certain conditions (such as having more than 500 employees) are required to publish a non-financial clarification, which includes information on the policy, the applied due care procedures and the results thereof concerning, for example, environmental matters.

If the corporation involved does not have any policies with respect to the environment, its annual report should state the reason for not having such policies.

Please also see 7.5 ESG Requirements.

17.4 Green Finance

There are no mandatory green financing arrangements or monitoring thereof for commercial transactions, but the majority of Dutch banks now offer green and sustainability-linked loans to borrowers looking to finance a green project or make their operations more sustainable. This increased offering has been facilitated by the publication of principles and guidelines for green and sustainability-linked loans by the Loan Markets Association (LMA), particularly its recent publication of model provisions for sustainability-linked loans in leveraged acquisition finance transactions, which has helped to standardise the drafting and use of green provisions in standard loan documentation. It is worth noting, however, that these LMA principles and guidelines are a form of self-regulation, intended only as recommendations and leaving it to finance parties to freely choose whether and to what extent to adopt these recommendations.

Green loans and sustainability-linked loans are the main types of green loan products. Green loans are any type of loan instrument made exclusively available to finance new and/or existing eligible green projects. No uniform definition exists for what can be considered an eligible green project, but the LMA offers a non-exhaustive list in its Green Loan Principles that are considered to qualify for a green loan. The “use of proceeds” in a green loan is the fundamental characteristic of this loan product; this contrasts with sustainability-linked loans, which focus instead on a borrower’s performance.

A sustainability-linked loan is any kind of loan instrument that incentivises a borrower’s achievement of ambitious, predetermined sustainability performance targets (SPTs), measured according to pre-defined key performance indicators that quantify improvements in the borrower’s sustainability profile. Incentivising better sustainability performance comes from aligning the loan terms with the borrower’s performance in meeting its SPTs, often through decreases (or increases) in the margin.

18. Transactions

18.1 Environmental Due Diligence

In transactions where shares or assets in real estate and companies are transferred, vendor due diligence is usually performed.

For real estate transactions (depending on the deal), both zoning and permit review is usual, focusing on property-related aspects such as zoning compliance, building requirements and fire safety. Depending on the asset or share transfer of the property, a different review might be performed.

For M&A transactions (and, to a lesser extent, finance deals), environmental due diligence is performed on aspects of compliance and permits for health, safety and environment aspects. An increasingly applied mechanism in M&A transactions is a warranty and indemnity insurance that also covers most of the environmental aspects (although usually excluding soil aspects).

Depending on the target (and its environmental activities) and the character of the deal (asset or share), several environmental aspects can and often will be reviewed, such as:

- the presence of and compliance with permits and approvals;
- the enforcement actions completed, pending or announced;
- site-related aspects (zoning, soil and groundwater, nitrogen deposition, water, asbestos, occupational safety, etc); and
- production-related aspects (chemicals, product safety, reporting requirements, etc).

18.2 Disclosure of Environmental Information

A seller is not generally required to disclose any environmental information to a purchaser, although there might be a duty to disclose information that is specifically requested by a potential purchaser. Once a purchaser explicitly indicates that it is interested in particular information (eg, relating to the environment), the seller is obliged to provide that information (to a reasonable extent), to prevent themselves being liable for misinforming the purchaser.

18.3 Key Issues in Environmental Due Diligence

Currently, nitrogen deposition is a major focus of attention in the Dutch market: nitrogen deposition levels onto protected Natura 2000 nature

conservation areas are generally too high, as a result of which any additional nitrogen deposition (eg, caused by a new business activity within a 25 kilometre range of a Natura 2000 area) can trigger the need for a nature permit. These are, however, very hard to come by given that most Natura 2000 areas are already overexposed to nitrogen deposition. A second major point of attention in the Netherlands currently is the congestion of the electricity grid. Various grid operators have queues for grid connections, and businesses may not always be able to obtain a grid connection with their desired capacity. Water is becoming an increasingly important topic, as the end-of-2027 deadline for compliance with the Water Framework Directive is closing in.

ESG is increasingly becoming part of standard environmental due diligence in the Netherlands, following the roll-out of several directives and regulations at the European level.

PORTUGAL



Law and Practice

Contributed by:

Raquel Freitas, Andreia Candeias Mousinho, Diogo Duarte Campos
and João Marques Mendes

PLMJ

Contents

1. Regulatory Framework and Law p.362

1.1 Environmental Protection Policies, Principles and Laws p.362

2. Enforcement Authorities and Mechanisms p.363

2.1 Regulatory Authorities p.363

2.2 Co-operation p.363

3. Environmental Protections p.363

3.1 Protection of Environmental Assets p.363

3.2 Breaching Protections p.364

4. Environmental Incidents and Permits p.364

4.1 Investigative and Access Powers p.364

4.2 Environmental Permits/Approvals p.364

4.3 Regulators' Approach to Policy and Enforcement p.365

4.4 Transferring Permits/Approvals p.365

4.5 Consequences of Breaching Permits/Approvals p.365

5. Environmental Liability p.365

5.1 Key Types of Liability p.365

5.2 Disclosure p.365

6. Environmental Incidents and Damage p.365

6.1 Liability for Historical Environmental Incidents or Damage p.365

6.2 Reporting Requirements p.366

6.3 Types of Liability and Key Defences p.366

7. Corporate Liability p.368

7.1 Liability for Environmental Damage or Breaches of Environmental Law p.368

7.2 Environmental Taxes p.369

7.3 Incentives, Exemptions and Penalties p.370

7.4 Shareholder or Parent Company Liability p.370

7.5 ESG Requirements p.370

7.6 Environmental Audits p.372

8. Personal Liability p.372

8.1 Directors and Other Officers p.372

8.2 Insuring Against Liability p.373

9. Insurance p.373

9.1 Environmental Insurance p.373

10. Lender Liability p.373

10.1 Financial Institutions/Lender Liability p.373

10.2 Lender Protection p.374

11. Civil Liability p.374

11.1 Civil Claims p.374

11.2 Exemplary or Punitive Damages p.374

11.3 Class or Group Actions p.375

11.4 Landmark Cases p.375

12. Contractual Agreements p.376

12.1 Transferring or Apportioning Liability p.376

12.2 Environmental Insurance p.376

13. Contaminated Land p.377

13.1 Key Laws Governing Contaminated Land p.377

13.2 Clearing Contaminated Land p.377

13.3 Determining Liability p.377

13.4 Proceedings Against Polluters p.377

13.5 Investigating Environmental Accidents p.377

14. Climate Change and Emissions Trading p.378

14.1 Key Policies, Principles and Laws p.378

14.2 Targets to Reduce Greenhouse Gas Emissions p.379

15. Asbestos and Polychlorinated Biphenyls (PCBs) p.380

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs p.380

16. Waste p.380

16.1 Key Laws and Regulatory Controls p.380

16.2 Retention of Environmental Liability p.381

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods p.381

16.4 Rights and Obligations Applicable to Waste Operators p.382

17. Environmental Disclosure and Information p.383

17.1 Self-Reporting Requirements p.383

17.2 Public Environmental Information p.383

17.3 Corporate Disclosure Requirement p.384

17.4 Green Finance p.385

18. Transactions p.385

18.1 Environmental Due Diligence p.385

18.2 Disclosure of Environmental Information p.385

18.3 Key Issues in Environmental Due Diligence p.385

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a network of law firms spread across Portugal and other countries with which it has cultural and strategic ties. PLMJ Colab makes the best use of resources and provides a concerted response to the international challenges of its clients, wherever they are. International collaboration is ensured through firms specialising in the legal systems and local cultures of Angola, China/Macao, Guinea-Bissau, Mozambique, São Tome and Príncipe, and Timor-Leste.

Authors



Raquel Freitas is a senior counsel in the public law practice at PLMJ and has over 30 years' experience as a lawyer. She focuses on administrative law, especially environmental law, and public procurement. Raquel advises Portuguese and international clients from various industries, in particular, paper pulp, packaging production, healthcare, the chemical industry and mass catering. She also has extensive experience in environmental issues related to the energy sector. Raquel has completed several postgraduate courses and is a lecturer on public procurement and an Introduction to Environmental Law at the Faculty of Law of Universidade Católica Portuguesa (Porto). She was previously with the public law practice of Cuatrecasas.



Andreia Candeias Mousinho is a partner in the public law practice at PLMJ. With 20 years' experience, she specialises in town and country planning and environmental law, in particular, EIA procedures and the use of water resources, as well as administrative litigation. Her clients include Portuguese and international developers, real estate investment funds, PE funds and banks. Andreia has extensive experience in the management and development of pools of diversified real estate assets. She has completed postgraduate courses in administrative and tax justice, spatial planning and environmental law, and administrative procedure, and previously worked as an external adviser on urban planning and land-use matters.

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Diogo Duarte Campos is the head of the public law practice at PLMJ. He has more than 20 years' experience, particularly in the areas of administrative law, public contracts, public

procurement and construction. His experience includes litigation in the state courts, as well as arbitration. Diogo has worked with clients on a range of infrastructure projects in several lusophone countries. He has experience in the construction, transport, real estate, water and sanitation, and energy sectors. In Portugal, Diogo has worked on some of the largest public tenders, as well as construction, concession, privatisation and public-private partnership projects. He is an author and arbitrator, and has been a university lecturer.



João Marques Mendes is a partner in the public law practice at PLMJ. In his ten years of professional experience, he has focused on energy and natural resources, providing legal

assistance to Portuguese and international clients on projects and transactions, as well as regulatory and litigation matters. In the area of energy and public law, he advises on the implementation and operation of projects and infrastructures, with a special focus on renewable energy. He advises leading energy companies, especially on regulatory and contractual issues. He also advises on dispute resolution. João has authored numerous papers and articles and has frequently been invited to lecture on energy and regulatory law.

PLMJ

Av Fontes Pereira de Melo, 43
1050-119
Lisboa
Portugal

Tel: +351 213 197 300
Email: plmjlaw@plmj.pt
Web: www.plmj.com/pt



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1. Regulatory Framework and Law

1.1 Environmental Protection Policies, Principles and Laws

The aim of environmental policy is to enforce environmental rights by promoting sustainable development. This is supported by appropriate management of the environment, in particular of ecosystems and natural resources. This contributes to the development of a low-carbon society and a “green economy”, and to rational and efficient use of natural resources, including the promotion of the circular economy, which ensures the well-being and gradual improvement of the quality of life of citizens.

Public action in environmental matters is guided by the following principles:

- sustainable development;
- intra and inter-generational responsibility;
- prevention and precaution;
- responsibility;
- recovery;
- the user pays; and
- the polluter pays.

Public policies for the environment are guided by the following principles:

- a transversal approach and integration;
- international co-operation;
- knowledge and science;
- environmental education; and
- information and participation.

There are several laws governing environmental protection, which relate to specific subjects. The key pieces of legislation include:

- the Constitution of the Portuguese Republic;

- Law 19/2014, the bases of environmental policy;
- Law 98/2021, the Climate Law;
- Law 50/2006, on environmental administrative offences;
- Decree Law 151-B/2013, on environmental impact assessment;
- Decree Law 147/2008, on responsibility for environmental damage;
- Decree Law 127/2013, on industrial emissions applicable to integrated pollution prevention and control;
- Law 58/2005, Decree Law 226-A/2007 and Decree Law 119/2019, on water;
- Decree Law 102-D/2020, on waste management;
- Decree Law 150/2015, on the prevention of major accidents (Seveso legislation);
- Decree Law 39/2018, on prevention and control of emissions of pollutants into the air;
- Decree Law 12/2020, transposing the EU Emissions Trading System (EU ETS) into Portuguese law;
- Decree Law 4/2024, implementing the Portuguese Voluntary Carbon Market (VCM);
- Decree Law 142/2008, on the conservation of nature and biodiversity;
- Decree Law 140/99, on the conservation of wild birds and the conservation of natural habitats and wild flora;
- Law 83/95, on environmental information and popular court actions (class actions);
- Law 26/2016, on administrative and environmental information;
- Decree Law 75/2015, on the single environmental licensing procedure;
- Decree Law 30-A/2022 – exceptional rules aimed at ensuring the simplification of procedures for producing energy from renewable sources;
- Decree Law 9/2007, the general noise regulation; and

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- Decree Law 169/2001, on the protection of cork oaks and holm oaks.

2. Enforcement Authorities and Mechanisms

2.1 Regulatory Authorities

The key regulatory bodies with authority in environmental matters are divided into two main categories.

Government bodies:

- Ministry for the Environment and Energy; and
- Ministry of the Economy.

Other public bodies:

- Portuguese Environmental Agency (*Agência Portuguesa do Ambiente*, or APA);
- Commissions for Regional Co-ordination and Development, one for each region (*Comissões de Coordenação e Desenvolvimento Regional*, or CCDRs);
- Inspectorate General of Agriculture, the Sea, Environment and Land Planning (*Inspecção-Geral da Agricultura, do Mar, do Ambiente e do Ordenamento do Território*, or IGAMAOT);
- Portuguese Institute for the Conservation of Nature and Forests (*Instituto da Conservação da Natureza e das Florestas*, or ICNF);
- Portuguese Institute of the Sea and Atmosphere (*Instituto Português do Mar e da Atmosfera*, or IPMA);
- Climate Agency (*Agência para o Clima*, or ApC) – this agency is yet to be sanctioned by the president of the republic; and
- Environment Fund (*Fundo Ambiental*, or FA).

2.2 Co-operation

There is no specific co-operation mechanism concerning national key regulatory authorities in Portugal. The general administrative co-operation instruments provided for in the Code of Administrative Procedure (Decree Law 4/2015) are applicable.

3. Environmental Protections

3.1 Protection of Environmental Assets

Environmental law is based on two basic principles: the principle of prevention and the principle of precaution. These legal principles are implemented through rules laid down by law, regulations or sectoral and territorial plans, designed to prevent the degradation of environmental components.

Activities which may have a negative impact on the environment are prohibited or subject to an advance environmental impact assessment procedure, and, in certain situations, the provision of a financial guarantee is required. For such activities, permits or authorisations are also required, setting limits on the performance of those activities and establishing monitoring and reporting obligations.

The protection of the environment and the need to adapt activities to scientific developments and physical changes in the environment led to the legal development of a mechanism typical of environmental law: the temporary and precarious nature of permits and licences. Thus, the law empowers licensing authorities to unilaterally amend the licences granted and even to revoke them. In such cases, when the licensee has made investments based on the assumption of a certain duration of the licence, the law recognises the right to compensation.

3.2 Breaching Protections

Failure to comply with legal, regulatory or licensing provisions gives rise to sanctioning liability and may give rise to reparatory liability. See 4.5 Consequences of Breaching Permits/Approvals, 5.1 Key Types of Liability and 6.3 Types of Liability and Key Defences.

On the other hand, violations of legal provisions when obtaining licences and permits can render them null and void.

Finally, in the event of serious non-compliance with the provisions of the licence, it may be revoked by the licensing authority.

4. Environmental Incidents and Permits

4.1 Investigative and Access Powers

Some of the entities listed in 2.1 Regulatory Authorities have the power to control, inspect and monitor compliance with environmental legislation. In exercising these powers, they may request the collaboration of the police authorities. Whenever a situation of serious danger to the environment or human health is detected, they may adopt, as a preventative measure and with immediate effect, the precautionary measures that are justified, in each case, to prevent or eliminate the hazardous situation. In the worst-case scenario, such measures may entail the closure of the installation.

IGAMAOT has the right to free access to the operators' facilities, to request examinations (including expert examinations), document collection and consultation. Throughout these actions, despite the investigated operator's right to a prior hearing, it must be co-operative and diligent.

4.2 Environmental Permits/Approvals

In general terms, an environmental permit is required whenever an activity may significantly affect environmental assets (eg, the soil, water, sea or air, or biodiversity).

The granting of some permits is preceded by a public consultation phase, when the public may suggest conditions to be imposed and express environmental concerns. Any permit granted by skipping this phase will be invalid.

The environmental licences necessary for a given project are obtained within a single licensing procedure, at the end of which the "Single Environmental Permit" is issued, an electronic title that gathers all the environmental licences identified below.

The main environmental licences/authorisations are the:

- Environmental Impact Statement – DIA (*Declaração de Impacte Ambiental*), DECAPE (*Decisão de Conformidade Ambiental do Projeto de Execução*) and DINCA (*Declaração de Incidências Ambientais*);
- Environmental Licence;
- Title for Use of Water Resources;
- Air-Pollutant Emissions Title;
- Approval decisions under the Seveso legislation;
- GHG Permit;
- Waste Management Operator Licence;
- Landfill Operating Licence;
- Installation and Operation of Integrated Centres for Recovery, Valorisation and Disposal of Hazardous Waste Licence; and
- Water Reuse Licence.

4.3 Regulators' Approach to Policy and Enforcement

The regulators' traditional approach is mainly based on the logic of command and control.

A more pedagogical approach by some regulators is noteworthy, as they provide information on their websites that is useful for understanding the law.

Moreover, the law provides for the possibility of contracts being signed between public entities and private operators in certain situations, either to enable them to gradually bring their behaviour in line with the law or to involve them in the management of environmental assets.

4.4 Transferring Permits/Approvals

Environmental permits may be transferred from one operator to another, whether they are natural or legal persons, as long as they are identified. However, specific conditions may have to be complied with.

4.5 Consequences of Breaching Permits/Approvals

In the case of breaching of an environmental approval/permit, immediate action to contain or repair the consequences of said breach may be necessary, as well as communication of the occurrence to the competent entities. These entities may establish a deadline for all required corrections to be made, and schedule a visit to the site to confirm that this has been done.

Moreover, non-compliance with environmental permits may trigger environmental liability. See 6.2 Reporting Requirements.

5. Environmental Liability

5.1 Key Types of Liability

There are two main types of liability for environmental damage or breaches of environmental law. Specifically, there is punitive liability (administrative offence liability and criminal liability) and restorative liability (civil liability and environmental liability).

5.2 Disclosure

Under some regimes, operators must report environmental constraints to the competent authorities. See 17.1 Self-Reporting Requirements.

Furthermore, there is a national registry of environmental offences, managed by IGAMAOT. This entity must disclose this information to all judges and public prosecutors for the purposes of a criminal investigation, as well as to all official entities so they can pursue the public purposes for which they are responsible. The Single Environmental Title may be amended to include the registration of convicting decisions concerning some of these offences.

6. Environmental Incidents and Damage

6.1 Liability for Historical Environmental Incidents or Damage

The extent of liability for non-compliance with environmental standards can be analysed from two perspectives: (i) the subjects to whom the liability might be attributed; and (ii) the period during which the liability subsists.

The Liable Party

Environmental law is structured to attribute liability to the person who committed the unlawful act

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and caused the environmental damage, that is, to the person who carries out, controls, registers or notifies an activity whenever that person exercises or may exercise decisive powers over the technical and economic functioning of that activity.

As such, the criterion for attributing liability is not that of the current (or purchasing) operator or landowner, but rather the subject to whom the activity that harmed the environment can be attributed.

Liability Limitation Period

Administrative offence liability

The limitation period for administrative offences is a maximum of five years from the commission of the offence. Nevertheless, this timeframe can be extended to eight years if there is a suspension or interruption in the proceedings.

Environmental liability (for environmental damage) and civil liability

Liability for environmental damage from events over 30 years ago is time-barred. For civil liability, compensation claims must be made within three years of the injured party becoming aware of their right, as long as this is within 30 years of the event.

Moreover, environmental liability is not applicable to damage caused by any emissions, events or incidents prior to 1 August 2008 or to damage caused by any emissions, events or incidents that occurred after 1 August 2008 due to a specific activity performed or concluded before that date.

Criminal liability

The statute of limitations for crimes depends on the applicable penalty and the specific crime in question. In the worst-case scenario, criminal

liability expires 15 years after the commission of the act.

6.2 Reporting Requirements

See 5.2 Disclosure.

6.3 Types of Liability and Key Defences

Types of Liability

The violation of legal and/or regulatory provisions in environmental matters might constitute an administrative offence, or entail the civil liability or environmental liability of the offender, or be considered an environmental crime.

Administrative offence liability

This type of liability is most commonly used to punish environmental violations. It corresponds to social and administrative censure for actions less severe and less socially reprehensible than criminal offences.

Administrative offence proceedings can lead to the application of fines of between EUR2,000 and EUR5 million, depending, among other criteria, on the type of offence, its perceived seriousness and the infringer's degree of guilt. In the case of the presence or emission of one or more dangerous substances that seriously affect health, the safety of people and property, and the environment, the range of fines for the more serious offences can be doubled. Additionally, in the most serious situations, apart from fines, interim decisions (including the preventative suspension of the polluting activity) and ancillary sanctions (such as a ban on carrying out the activity or the loss of public subsidies) may be applied.

Civil liability

If an environmental offence causes damage to a third party, the perpetrator is liable to pay compensation to repair the damage caused to people and property.

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Environmental liability for environmental damage

This type of responsibility is designed to repair the damage caused to the environment itself – specifically, significant damage caused to protected environmental assets. Causing environmental damage, or an imminent danger of such damage, while pursuing economic activities might lead to the liability of the perpetrator. Liability for environmental damage implies the obligation to implement preventative and repair measures, and to bear the associated costs.

Criminal environmental liability

The Portuguese Criminal Code includes four environmental crimes:

- damage to nature (species, natural habitats and subsoil);
- pollution, associated with the degradation of environmental components like air, water and soil;
- pollution that causes a common danger, in cases where the pollution triggers danger to the life or physical integrity of a third party; and
- activities that are dangerous to the environment, including some actions concerning ozone-depleting substances, and trans-boundary movements of waste.

In the worst-case scenario, environmental crimes may lead to the application of a five-year custodial sentence. If death or physical injury results from the crime of pollution that causes a common danger, both the minimum and maximum thresholds are increased by one third.

For the crimes they commit, legal persons and similar entities are subject to the main penalties of a fine or of dissolution. The limits of the fine applicable to legal persons and similar enti-

ties are determined with reference to the term of imprisonment provided for natural persons, and one month's imprisonment corresponds to ten days of fine. Each day of fine corresponds to an amount between EUR100 and EUR10,000, which the court sets according to, among other things, the economic and financial situation of the convicted person and its costs regarding employees.

Limits and Conditions on Civil, Environmental and Administrative Liability

The limitation periods referred to above should be considered as general limits on liability.

In the case of civil and environmental liability, there are specifics concerning guilt and causation. In these kinds of liabilities, the assessment of the causal link is based on the likelihood and probability that the harmful act caused the damage in question. Concerning guilt, for some economic activities listed in the law, these types of liability are applicable regardless of the existence of guilt or intent.

Civil liability

Traditionally, this depends on meeting five requirements, specifically:

- the fact;
- the illegality;
- the fault (in cases where the liability is not strict);
- the damage to a third party caused by damaging an environmental component; and
- the causal connection between the fact and the damage (based on a likelihood criterion).

These conditions are cumulative, so the failure to meet any one of them is sufficient for there to be no liability.

If several persons are liable, all are jointly and severally liable for the damage, even if one or more are at fault, without prejudice to the correlative right of recourse that they may exercise reciprocally. When it is not possible to individualise the degree of participation of each of the responsible parties, they are presumed to be liable in equal shares.

Environmental liability for environmental damage

Environmental liability is traditionally dependent on meeting the same five cumulative requirements listed above.

An important issue is that there are specific grounds for exclusion of liability.

Additionally, concerning fault and joint/several liability, the considerations above also apply.

Administrative offence liability

Administrative offence liability is based on the same five requirements as civil liability. However, in this case, it is always necessary to establish the guilt of the perpetrator.

As in criminal law, only acts declared punishable by a prior law can be fined as an administrative offence. Moreover, if the law in force at the time the act was committed is subsequently changed, the law that is more favourable to the defendant will apply.

The minimum and maximum limits of the fine are reduced by half when there are circumstances prior or subsequent to, or contemporaneous with, the commission of the administrative offence which markedly reduce the unlawfulness of the act, the culpability of the perpetrator, or the need for a fine.

In some circumstances, voluntary payment of the fine in the minimum amount or with a reduction of up to 25% is allowed.

7. Corporate Liability

7.1 Liability for Environmental Damage or Breaches of Environmental Law

Administrative Offence Liability

As far as administrative offences are concerned, legal persons are liable if the damaging activity is attributable to them. The general rules specifically state that legal persons or equivalent are responsible for administrative offences committed by their bodies in the performance of their duties.

Civil Liability and Environmental Liability (for Environmental Damage)

Regarding civil liability and environmental liability, legal persons are liable if the damaging activity is attributable to them. See 7.4 **Shareholder or Parent Company Liability** and 8.1 **Directors and Other Officers**.

Criminal Liability

Legal persons or equivalent are liable for environmental crimes when committed:

- in their name or on their behalf and in their direct or indirect interest by persons occupying a leadership position; or
- by whoever acts in their name or on their behalf and in their direct or indirect interest, under the authority of the persons referred to in the preceding bullet point, by virtue of a breach of their duties of vigilance or control.

It is understood that the bodies and representatives of the legal entity and whoever has the

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authority to exercise control over its activity occupy a leadership position.

The criminal liability of legal persons and similar entities is excluded when the agent has acted against express orders or instructions from those in charge.

The criminal responsibility of the legal person does not exclude the individual liability of the actual perpetrators, nor does it depend on their liability.

Climate Risk in Corporate Governance

See 7.5 ESG Requirements.

7.2 Environmental Taxes

The aim of green taxation is to penalise those causing pollution and damage to the environment, to reduce energy dependence from abroad, and to encourage more sustainable production and consumption patterns. In so doing, green taxation reinforces both the freedom and liability of citizens and companies, and promotes efficiency in the use of resources.

From a taxation perspective, there are essentially two groups of mechanisms to pursue environmental goals: deterrence taxes (or fees or financial contributions), in line with the “polluter pays” principle, and tax benefits, such as exemptions. Moreover, environmental components may influence the calculation formulae of classic taxes such as corporate income tax (*Imposto Sobre o Rendimento das Pessoas Coletivas*, or IRC).

Below are some examples of environmental tax mechanisms currently in force in Portugal.

Deterrence Taxes, Fees and Contributions

- Waste management fee (*Taxa de Gestão de Resíduos*) – this aims to encourage the reduc-

tion of waste production, stimulate compliance with national waste management targets and improve the performance of the sector.

- Fees due under Producers Responsibility Organisation (PRO) schemes (eg, *ecovalor* paid to PRO and *contribuição financeira* paid to public services for municipal waste management).
- Water resources management fee (*Taxa de Recursos Hídricos*) – this aims to compensate the environmental cost inherent in activities likely to have a significant impact on water resources.
- Carbon tax (TCO₂) – this is levied on sectors not included in the ETS. This tax is indexed to the price of carbon in the ETS sector.
- Road vehicle tax (*Imposto Único de Circulação*), vehicle excise duty (*Imposto Sobre Veículos*) and excise duty (*Impostos Especiais de Consumo*) – these seek to burden taxpayers in proportion to the environmental cost they cause (eg, the influence of particle or CO₂ emission levels in the calculation of the road vehicle tax).
- A financial contribution for light or very light plastic bags and for single-use take-away packaging for meals (save for packaging used for meals handed under charitable schemes or, being 100% recyclable, having at least 25% of recycled materials incorporated).
- A tax on less energy-efficient light bulbs.
- A carbon tax on air and sea travel.
- A contribution for single-use plastic, shopping bags, or aluminium packaging for readymade meals.
- Influence of parameters such as location in areas of urban regeneration, energy efficiency or use of renewable energy (eg, 50% reduction in the municipal property tax rate when the property is exclusively used in the production of energy from renewable sources)

in the calculation of municipal property tax (*Imposto Municipal Sobre Imóveis*).

- Expenses related to electric vehicles are not subject to autonomous taxation for corporate income tax (*Imposto sobre o Rendimento das Pessoas Coletivas*, or IRC) or personal income tax (*Imposto sobre o Rendimento das Pessoas Singulares*, or IRS).

7.3 Incentives, Exemptions and Penalties Tax Benefits

- Corporate income tax (IRC) exemption for PROs – to manage specific waste flows during the entire licensing period for the results which, during this period, are reinvested or used for the purposes legally attributed to them.
- Exemption of property transfer tax (*Imposto Municipal a Transmissão Onerosa de Imóveis*) and stamp duty (*Imposto de Selo*, or IS) on acquisitions that fall within forest intervention areas.
- Vehicle purchase tax (*Imposto Sobre Compra de Veículos*) exclusion for non-motorised vehicles and exclusively electric vehicles or those powered by non-combustible renewable energies.
- Exemption from road vehicle tax for non-motorised, exclusively electric vehicles or those powered by non-combustible renewable energies.
- Deductible expenses in higher proportion to their nominal value, such as the expenses of car-sharing and bike-sharing systems, with the acquisition of fleets of bicycles, with electricity and vehicular natural gas for vehicle supply, etc.
- Possibility of deducting value added tax (VAT) on the purchase, manufacture or import, leasing and conversion of electric vehicles or plug-in hybrids.

- Exemption from municipal property tax, municipal property transfer tax and stamp duty for buildings completed more than 30 years ago or located in urban regeneration areas, provided they fulfil certain conditions, namely, that they have been rehabilitated.
- Under IRC, there is the possibility of deducting provisions set up to cover the cost of repairing environmental damage.

7.4 Shareholder or Parent Company Liability

Administrative Offence Liability

Given the legal provisions of the framework law for environmental administrative offences, it is not clear that this type of liability cannot also extend to shareholders.

Civil Liability and Environmental Liability (for Environmental Damage)

Regarding civil liability and environmental liability, if the operator is a commercial company that is in a group or control relationship, the environmental liability extends to the parent or controlling company when there is abuse of legal personality or illegal fraud.

7.5 ESG Requirements

The main ESG requirements have been enacted at the EU level and are directly applicable, notably through the Taxonomy Regulation (which offers a unified system for classifying environmentally sustainable activities, aiding financial actors to distinguish between and compare environmentally friendly investments) and the Sustainable Finance Disclosure Regulation and the respective delegated acts (aiming to standardise how sustainability-related information in the financial sector should be reported). Financial intermediaries and alternative investment fund managers must also integrate ESG risks into their operations, as dictated by the Com-

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mission Delegated Regulations (EU) 2021/1253 and 2021/1255.

Supervision and Enforcement

ESG requirements are mainly supervised and enforced by the Bank of Portugal, the Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários*, or CMVM) and the Supervisory Authority for Insurance and Pension Funds (*Autoridade de Supervisão de Seguros e Fundos de Pensões*, or ASF). The Bank of Portugal has a dedicated committee that streamlines its ESG initiatives annually and has shown its commitment to exploring the interaction between the environment, the financial system, and monetary policy. The CMVM ensures that regulated companies maintain transparency in financial and sustainability practices and promote the integration of ESG factors in market practices. The ASF analyses the environmental dimension and ESG rating application to the national insurance sector's investment portfolio, overseeing the regulation and supervision of insurance, reinsurance, pension funds, and their managing entities.

The following legal requirements at the national level should be highlighted:

- The Climate Law mandates that private companies prioritise climate and environmental balance. Directors are also expected to consider and disclose climate change-related risks to companies.
- The Portuguese parliament on 8 October 2024 issued Resolution No 78/2024 recommending that the government adheres to the Climate Law, namely, by taking the following steps:
 - (a) approving sectoral mitigation and adaptation plans for priority sectors;
 - (b) regulating the sharing of information

regarding climate risks in financial assets; and

- (c) submitting a report to parliament proposing revisions to align the Portuguese Companies Code and related legislation with the Climate Law.
- The Structured Deposits Law (Law 35/2018) mandates that credit institutions include sustainability objectives in the design of structured deposits, and provide transparent information about their sustainability characteristics. This also extends to marketing and advisory roles.
- The Asset Management Legal Framework (Decree Law 27/2023) dictates that asset managers incorporate sustainability risks, ensuring they have the resources and procedures to do so effectively.
- The Investment Firms Regulation (Decree Law 109-H/2021) emphasises the importance of investment firms having strategies and internal policies to manage and control sustainability risks that can adversely affect investment value.
- The Commercial Companies Code mandates that major corporations disclose non-financial and diversity information in accordance with the EU Non-financial Reporting Directive. Although the Corporate Sustainability Reporting Directive (CSRD) has not yet been transposed into Portuguese law, the CMVM has issued guidance clarifying that companies already subject to the obligation to publish non-financial statements should do so in accordance with the European Sustainability Reporting Standards.
- The Securities Code requires each listed company to establish and disclose their remuneration policy on their website and explain how the remuneration policy contributes to the sustainability of the company. In addition, the remuneration policy must set out

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the criteria for granting variable remuneration, if applicable, and how these criteria contribute to the company's business strategy, long-term interests and sustainability.

- The Balanced Gender Representation Law (Law 62/2017) ensures gender parity in management positions and the supervisory bodies of public sector entities and listed companies.
- Companies with over 75 employees must hire a percentage of staff with significant disabilities, as per the Employment of Persons with Disabilities Law (Law 4/2019).
- The Labour Code guards against discrimination and addresses workers' health and safety.
- The Gender Salary Equality Law (Law 60/2018) promotes gender-neutral pay structures.
- The Protection for Whistle-Blowers Law (Law 93/2021) safeguards individuals reporting specific violations.

7.6 Environmental Audits

Environmental Impact Assessment (EIA)

During the post-evaluation phase of the EIA, audits should be conducted to ensure compliance with the terms and conditions set forth for project approval within the EIA process.

In exceptional and duly substantiated cases, additional measures may be established in this phase to minimise or compensate for significant unforeseen negative impacts.

Control of Major-Accident Hazards (Seveso)

Higher hazard levels, as established in the Seveso legislation, are subject to specific prevention measures, which come with various obligations that are subject to annual audits and inspections.

Waste Treatment Activity

Establishments where waste treatment activities are carried out are subject to inspections to ensure compliance with the legal conditions established in the licence, as well as an overall re-examination of their operating conditions every seven years.

EU Emissions Trading Scheme (ETS)

Under the ETS regime, there is an annual procedure of monitoring, reporting and verifying operators' emissions. This is known as the ETS compliance cycle.

8. Personal Liability

8.1 Directors and Other Officers

Environmental Administrative Offences

Directors, managers and other persons who hold management positions (even if only de facto) in legal entities (even if irregularly constituted) and any other similar entities, are responsible on a subsidiary level for:

- fines imposed for infractions for acts that took place during the period they held their positions, or for previous acts if they are responsible for the company's assets or the legal person being insufficient to pay the fine;
- fines due for previous acts when the definitive decision to apply them was notified during their term of office and the failure to pay is attributable to them; and
- the procedural costs resulting from the proceedings brought under the framework law for environmental administrative offences.

If there are several individual persons responsible for the wrongful acts or omissions that result in the insufficiency of the assets, their responsibility is joint and several.

Civil Liability and Liability for Environmental Damage

When the harmful activity is attributable to a legal person, the obligations arising from the legal framework on liability for environmental damage are jointly and severally levied on its managers, directors, or persons with leading functions.

Environmental Crimes

Persons occupying a leadership position may be liable on a subsidiary basis for the payment of fines and compensation for which the legal person or equivalent entity is convicted.

If there are several individual persons responsible under these terms, their responsibility is joint and several.

8.2 Insuring Against Liability

Directors' and officers' liability insurance may include administrative, civil and environmental liability, even if this is achieved by negotiating tailor-made insurance with the insurer. Environmental liability can be included in the insurance if agreed with the insurance company.

Climate Risk in Corporate Governance

Under the Climate Law the duties of care, loyalty and reporting of managers or directors and members of corporate bodies with supervisory functions include prudent consideration and transparent information-sharing about the risk that climate change poses to the business model, capital structure and assets of companies.

9. Insurance

9.1 Environmental Insurance

Environmental insurance is available in the Portuguese legal system. Regarding potentially

harmful activities, it is mandatory to have a financial guarantee, which can be provided by taking out environmental responsibility insurance. This type of insurance usually covers multiple risks arising from pollutant discharges into an environmental asset due to the activity of the insured.

Normally, insurers exclude damage caused by workers' errors and intentional acts. However, IGAMAOT believes that these exclusions violate the law. There are currently several administrative offence cases on this subject, and the courts have yet to rule on the matter.

10. Lender Liability

10.1 Financial Institutions/Lender Liability

As referred to in 6.1 Liability for Historical Environmental Incidents or Damage, liability falls upon the operator to which the activity that harmed the environment is attributed. Therefore, financial institutions or lenders are not, in principle, liable for the offences the operator commits.

Nevertheless, financial institutions and lenders should consider the provisions set out in the Climate Law.

In fact, as far as sustainable financing is concerned, several guiding principles were laid down that should guide the financial policies, financial management, capitalisation support and borrowing, of the state and of private entities. Examples include the principle of accountability and prudence, which is intended to incorporate climate risks in the valuation of assets and liabilities, and the principle of transparency, which promotes the disclosure of information regarding the impact of management and investment decisions by managers, investors

and consumers. Lack of transparency or failure to share information is considered an improper sale, under the regulation of the market of financial instruments.

Furthermore, failure to take climate risk and climate impact into account in financing decisions is considered a violation of fiduciary duties.

See 7.5 ESG Requirements.

10.2 Lender Protection

The liability of financial institutions can only be safeguarded contractually. Specifically in the case mentioned of the constitution of a mandatory financial guarantee (see 10.1 Financial Institutions/Lender Liability), the limits of the financial institution's liability will be stated in the terms of the bank guarantee.

11. Civil Liability

11.1 Civil Claims

Civil damages recovery relating to claims for environmental damage may occur provided private interests are damaged in consequence of the event (causal link). Environmental assets are often private property or located on private property. Thus, the injured party may bring an action for damages based on civil liability whenever someone offends their rights or interests by damaging any component of the environment. In other words, the act committed by the agent is unlawful and, as such, raises civil liability if it violates another person's subjective right – such as the right to property – or if it violates any legal provision intended to protect the interests of others. In these cases, the agent is obliged to repair the damage resulting from the offence.

Compensation is enforced in kind (eg, replacing injured specimens with new ones) or by paying the corresponding amount of money whenever the former is not feasible.

It should be noted that financial compensation often poses difficulties in measuring damage.

The real damage thus assessed works as a limit on the eligible compensation, although sometimes, especially when the unlawful act is not intentional, the judge is granted powers to reduce the compensation equitably, considering the degree of culpability of the agent, its economic situation and that of the injured party, as well as other circumstances of the case. This principle of equitability may also apply in cases where there are several agents: compensation is allocated according to the degree of culpability of each one and not merely pro rata. See 6.1 Liability for Historical Environmental Incidents or Damage and 6.3 Types of Liability and Key Defences.

11.2 Exemplary or Punitive Damages

The principle of equivalence between damage and compensation applies to environmental civil claims to its full extent. Thus, exemplary or punitive damages have no place in Portuguese law.

It should be noted that the deterrence effect usually linked to exemplary or punitive damages is pursued by the application of significant penalties when the unlawful act is also specifically qualified by the law as an administrative offence. Of course, these penalties revert to the Portuguese State and not to the injured party, which is only entitled to the above-mentioned equivalent to the damage.

11.3 Class or Group Actions

The Portuguese Constitution recognises the fundamental right to bring a popular action, as part of the set of political participation rights. The constitution expressly lists the environment as an asset that can be protected by popular action. This means that, by means of popular action, any citizen, as well as certain associations and organisations can access the judiciary system to protect legal situations that are not susceptible to individual appropriation, as is often the case with environment-related matters. This protection can be exercised judicially or before the administrative authorities.

Institutional parties can bring popular actions and it is important to emphasise the role of environmental non-governmental organisations (ENGOS), which have been granted broad legal standing in environmental matters. ENGOS are, in principle, exempt from paying court fees and benefit from a 50% exemption from the fees due for accessing environmental information held by public authorities.

Whether or not they have a direct interest in the legal action, ENGOS have legal standing to:

- bring the legal actions necessary to prevent, correct, suspend and put an end to acts or omissions of public or private entities that constitute a threat to or may damage the environment;
- bring legal actions to enforce civil liability in relation to the acts and omissions referred to above (although they are not entitled to any financial compensation arising from them, the role of ENGOS here is to open the court case and organise the joinder of any entitled injured parties to the court action);
- take legal action against administrative acts, decisions and regulations that violate the

legal provisions that protect the environment; and

- lodge complaints or accusations, act as interested parties (*assistentes*) in criminal proceedings for crimes against the environment, and monitor administrative offence proceedings, should they require to do so.

11.4 Landmark Cases

Citizens' Right Not to be Disturbed

In matters of noise, there is case law in Portugal deciding, in general terms, that the rights of the residents should prevail over the rights of the operators of economic activities, and this may happen even if the licensing is valid and noise limits are not exceeded. Consequently, in such circumstances, operators may be obliged to adopt mitigation measures in order to reduce the noise produced.

Specifically, there is case law in which the court (Case No 2209/08.0TBTVD.L1-1) upheld the right of inhabitants living in the vicinity of a wind farm to have wind turbines removed or their operation suspended at a certain time of the day, on the grounds of noise emission and/or the shadows from the wind turbines.

The Portuguese courts have taken the view that, in these situations, there is a collision of rights at issue between on one hand, the right to rest and sleep and the right of the residents to tranquillity, and on the other, the economic right of the wind farm, the wind turbines of which emit noise and/or shadows, to operate as a business.

In the abstract, it is considered that the rights of the residents should prevail over the rights of the economic operator. However, even if the economic activity is licensed, it has been held that this assessment should be made considering each specific case individually. Therefore,

the residents are required to definitively demonstrate that the location in question is their home and that they are truly affected by such noise.

Animal Rights

Concerning the right to civil compensation, Law 90/88 specifies that the State is liable for compensating all citizens who are directly harmed by actions of Iberian wolves (*Canis lupus signatus*). In this context, the court decided (Case No 00242/05.2BEMDL), that when Iberian wolves kill animals owned by citizens, this damage is eligible for compensation by the State, as is any emotional damage suffered by the owners. This is because the above law does not differentiate between property damage or personal injuries, although the complementary legislation in force at the time of the decision (Decree Law 139/90) referred to damage to animals. The current complementary legislation provides far more detailed rules on compensation for damage to animals.

Furthermore, a decision from the court (Case No 00036/06.8BEPNF) established that the operation of a wastewater treatment plant that is licensed for this purpose cannot be grounds under normal conditions to award compensation to people living nearby. The court stressed that the aim of these plants is to prevent the contamination of soils and water, and that a public interest objective of this type will prevail over any minor inconveniences that were eventually suffered by these people. As such, it does not trigger the right to compensation. From another perspective, to protect a bat colony, the court decided in a protective order (Case No 06793/10), that a windmill on a wind farm could only be constructed and installed at certain times of the day and during certain months of the year. Moreover, its operation could only occur at a certain speed and in specific time periods. This demonstrates that the courts decide on environmental mat-

ters regardless of the presence of other legal institutes. On similar grounds, similar measures have been imposed by the competent authorities under the environmental impact assessment procedure to project sponsors.

12. Contractual Agreements

12.1 Transferring or Apportioning Liability

It is possible to use indemnities or other contractual agreements, which are subject to the general principles of the law, such as good faith and proportionality, to transfer liability to another party.

These types of contracts do not have any binding effect on the Regulators, who will always take into consideration the party responsible for the activity that harms the environment. This follows the accountability and “polluter pays” principles.

The contracts might, however, have an influence on the Regulators, especially in a scenario where the damaging activity is continued and where it may be difficult to locate in time the fact that gave rise to the damage, and establish a causal link with an operator.

In water legislation, in cases of non-compliance with the law, it is possible for adaptation contracts to be signed between the licensing authority and the operator. These contracts provide a recovery plan that will allow the operator to remedy the illegalities and may also provide the obligation to install an environmental management system and carry out periodic environmental audits.

12.2 Environmental Insurance

See 9.1 Environmental Insurance.

13. Contaminated Land

13.1 Key Laws Governing Contaminated Land

There are no specific laws concerning contaminated land. A draft law has been under discussion in Portugal since 2015 and a proposal for a European Directive on soil monitoring and resilience was released in 2023, but no official publication of these laws has yet occurred.

Nevertheless, the prevention of emissions into the soil is covered by environmental procedures, such as environmental licensing and the EIA. Furthermore, the law of responsibility for environmental damage determines that soil damage must be communicated to the appropriate authorities within 24 hours. For further details concerning self-reporting obligations, see **17. Environmental Disclosure and Information**.

Considering the absence of regulation on this matter, the APA recommends that, in the case of transfer of property on land where potentially polluting activities have been carried out, or where there are signs of contamination, a technical quality assessment should be carried out.

The APA has issued supporting documents about the technical requirements to use in contamination assessments and remediation operations.

13.2 Clearing Contaminated Land

If the soil contamination creates a significant risk to human health and the environment (environmental damage), remediation can be demanded from the liable party referred to in **6.1 Liability for Historical Environmental Incidents or Damage**. However, the public authorities may intervene as a last resource solution if the operator does not act accordingly or if it cannot be identified.

Furthermore, in contamination situations that are not considered environmental damage, if the current owner wishes to excavate contaminated soil and the liable operator is not identified, the owner may have to take on the remediation operations under the terms of the previous licence obtained.

Soil remediation operations aim to remove the source of contamination and treat the contaminated soil so that the contamination no longer poses an unacceptable risk to human health and/or the environment, taking into account its current or intended use.

Soil remediation operations may or may not be carried out under the environmental liability regime (Decree-Law 147/2008 of 29 July).

13.3 Determining Liability

See **6.3 Types of Liability and Key Defences**.

13.4 Proceedings Against Polluters

See **6.3 Types of Liability and Key Defences**.

From another perspective, if any legal or natural person is aware of a situation of contamination or environmental damage, a complaint may be made to the competent authorities – even if the person concerned did not suffer any damage as a result of said situation.

13.5 Investigating Environmental Accidents

An investigation may be triggered following information disclosure by the operators (referred to in **5.2 Disclosure**), a complaint from any third party, or inspections performed by the public authorities.

Regarding the investigation process, see **4.1 Investigative and Access Powers**.

14. Climate Change and Emissions Trading

14.1 Key Policies, Principles and Laws Key Policies

The key policies to combat climate change are based on fundamental principles of environmental law, particularly the principle of sustainable development, the “polluter pays” principle and the principle of intergenerational solidarity.

In particular, the following goals have been set to tackle climate change:

- a reduction in GHG emissions;
- improving the capacity for CO₂ sequestration; and
- adaptation to expected climate change impacts.

Planning Instruments

There are several important planning instruments to achieve these goals, of which the following stand out:

- at the European level, the European Climate Law (Regulation (EU) No 2021/1119) establishing the framework for achieving climate neutrality in the EU by 2050, which entails a zero balance between GHG emissions and their removal; and
- at the national level, the National Energy and Climate Plan 2030, the PNEC 2030 (Council of Ministers Resolution 53/2020), under review, which establishes policies for decarbonisation of the economy, energy efficiency and energy transition, as well as goals for sectors to reduce GHG emissions, among others.

Legislation

Furthermore, there is legislation that addresses GHG emissions and seeks to achieve the established goals, namely:

- Decree Law 12/2020 (transposing Directive 2003/87/EC), which establishes the framework for the trading of licences for the emission of GHGs, along with Decree Law 93/2010, which provides such a framework for the scheme; and
- Decree Law 145/2017 incorporating Regulation (EU) 517/2014 into Portuguese law, which aims to reduce GHG emissions.

The Climate Law sets forth an ambitious approach to climate change. Several instruments are provided to prevent and adapt to climate change, including tax and monitoring by specific bodies. This law also introduces some significant measures, such as:

- climate change impact assessment of parliamentary or government laws;
- identification and quantification of avoided GHG emissions in the state's general accounts, with a breakdown of the information for each climate protection measure implemented;
- progressive elimination of public funds for fossil fuel usage until 2030;
- a ban on prospection or exploitation of oil;
- a ban on using coal for electricity generation from 2021 onwards; and
- a ban on using fossil natural gas for electricity generation from 2040 onwards, effective only if energy safety is considered safeguarded.

Portuguese climate change legislation will be revised for the purpose of transposing/implementing recent “Fit for 55” European acts, such as, Directive (EU) 2023/959 amending Direc-

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tive 2003/87/EC, and Regulation (EU) 2023/956 establishing a carbon border adjustment mechanism, replacing current measures against carbon leakage. Such measures were already approved by the government and are pending promulgation by the president of the republic.

Furthermore, aligned with the EC strategy, the Portuguese government enacted a law to establish and regulate a Voluntary Carbon Market (VCM). This market lets companies buy carbon offsets voluntarily, supporting their internal climate goals beyond mandatory regulations. The act also sets standards, project eligibility, and mechanisms for issuing, transferring and using carbon credits in a state-managed market.

14.2 Targets to Reduce Greenhouse Gas Emissions

The European Climate Law provides that climate neutrality should be reached by 2050. To achieve this, a goal has been set to reduce GHG emissions at the EU level by at least 55% (compared to 1990 levels) by 2030.

“Fit for 55”

In line with this goal, “Fit for 55”, a package of proposals, was published through a communication from the EC, dated 14 July 2021, proposing a comprehensive set of measures to ensure that GHG emissions are reduced by at least 55% by 2030 (compared to 1990 levels). The Effort Sharing Regulation (Regulation (EU) 2018/842) provides that between 2023 and 2030, Portugal must reduce its GHG emissions by 28.7% (compared to 2005 levels). This represents an increase of more than 10% in relation to the current goal of a 17% reduction.

These proposals, once approved, are to be inserted by transposition or implementation into legal texts, which may affect current Portuguese legislation. In the meantime, other legislation is expected to be published that will lead to changes in these goals.

The PNEC2030

The PNEC2030 governs the main climate action goals, pursuant and in compliance with Regulation (EU) 2018/1999 of 11 December 2018 on the Governance of the Energy Union and Climate Action. The first version of PNEC2030 was approved before the enactment of the new European Climate Law and establishes that the reduction of GHG emissions must be between 45% and 55% (compared to 2005 levels). It also defined the following goals by sector for the reduction of GHG emissions, in comparison to 2005:

- 70% for services;
- 35% for the residential sector;
- 40% for transport;
- 11% for agriculture; and
- 30% for the waste and industrial waste water sector.

PNEC2030 was recently reviewed to accommodate the most recent strategy on an EU level and is pending promulgation by the president of the republic.

Voluntary Carbon Market (VCM)

See 14.1 Key Policies, Principles and Laws.

15. Asbestos and Polychlorinated Biphenyls (PCBs)

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs

Asbestos

The legislation that regulates the protection of workers against the risks of exposure to asbestos at work is Decree-Law 266/2007 of 24 July.

The law determines that employers must use all available means to reduce the exposure of workers in the workplace to dust from asbestos or materials containing asbestos and must restrict exposure to the limit value (0.1 fibres per cubic centimetre over a daily period of eight hours).

Furthermore, the removal of material containing asbestos – as well as the wrapping, transportation and management of the corresponding construction and demolition waste – is subject to a specific regulation, Ordinance No 40/2014 of 17 February 2024, and may only be performed by duly licensed waste-management operators.

PCBs

The management of PCBs and equipment containing them is regulated by Decree-Law 277/99 of 23 July 2024.

This law stipulates that owners of equipment containing more than 5 dm³ of PCBs must notify the National Waste Authority annually of the quantity they hold.

Holders of PCBs and equipment containing them are also obliged to decontaminate or dispose of them in accordance with the timetable and other conditions established by the law. PCB decontamination and/or disposal operations must be carried out by companies duly licensed by the National Waste Authority.

16. Waste

16.1 Key Laws and Regulatory Controls

The General Framework on Waste Management (*Regime Geral de Gestão de Resíduos*, or RGGR), Decree Law 102-D/2020, is the cornerstone of waste law in Portugal. Decree Law 152-D/2017 (UNILEX), the Portuguese regime on extended producer responsibility (EPR), is also relevant for the following waste flows: packaging, used oil, used tyres, electric and electronic equipment, batteries and accumulators, end-of-life vehicles, furniture, mattresses and self-caring health products.

The RGGR sets out the main principles and rules on responsibility, liability and regulatory conditions for waste management, in line with the Directive 2008/98/EC, known as the Waste Framework Directive. Among these principles, the following are most important:

- The responsibility for waste management – this general principle establishes the waste producer as the person responsible for the management of its own waste under a licensed enterprise (of the responsible person or of a third person), save for urban waste, which is managed by the public service for waste management. A special EPR principle applies to the person placing products on the market resulting in waste pertaining to one of the specific waste flows set forth in UNILEX. EPR obligations are to ensure the management of the life cycle of the product under a Producers Responsibility Organisation (PRO) or under a licensed individual scheme.
- The waste management hierarchy – this involves setting a priority order in waste prevention and waste management options, ie, prevention, preparation for re-use, recycling,

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waste-to-energy recovery and other forms of recovery and, as a last resort, disposal.

- The planning of waste prevention and waste management – this is government planning, notably providing certain targets for which some persons (usually PROs) are accountable.
- The proximity of waste management operations to the place where the product became waste.

This legislation also covers waste transportation and establishes rules and schemes on urban waste, construction and demolition waste, as well as dangerous waste. Finally, it sets out the main provisions on the licensing procedures for waste management operators.

To create the conditions necessary for a circular economy, the RGGR has also introduced rules on by-products and end-of-waste status, as well as other forms of waste declassification.

16.2 Retention of Environmental Liability

Environmental liability falls on the person responsible under the applicable law, and sanctions and regulatory responsibility cannot be transferred. However, from a contractual standpoint, the costs relating to environmental responsibility/liability may be transferred or retained under the parties' agreement.

Transferral of Liability

When a party responsible for waste management delivers the waste to a third party, such as a licensed waste management operator or any other operator authorised to deal with it (eg, a PRO or public urban waste management system), the first party's liability for waste management ceases and it is transferred to these operators. To properly transfer their responsibility, the person concerned must be sure that the chosen

operator's scope of licensing covers the waste that is being delivered for management.

Documentation

Evidence on the proper management and circulation of waste can be found in the documents that waste producers, transporters and final recipients are obliged to fill in, such as electronic waste notes (e-GAR), which must accompany all waste transport operations and set out information on the above players and the waste. Likewise, waste producers must fill in and submit annual waste record charts to the APA, eg, on the types and quantities of waste produced and to whom it was delivered for transportation and treatment.

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

The eco-design of products, take-back schemes and recovery obligations are prominent in specific waste flow regulations (listed in **16.1 Key Laws and Regulatory Controls**).

Information for End-Users

Nevertheless, concerning goods in general, producers must ensure that their end-users can obtain the necessary information about the possibility of reusing the goods and their components and about their dismantling, as well as information on substances of high concern. In addition, specific regulations need to be enacted and products are not to be placed on the market unless some quotas of recovered materials are incorporated in them. For specific waste flows, producers must also provide end-users with certain information, such as on waste prevention measures, their contribution to reuse and preparation for reuse, existing take-back and collection schemes, and the prohibition on littering.

UNILEX

UNILEX is based on two main features and brings into effect the EPR principle set out in European law. Producers placing products on the market under these flows (eg, packaging) must sign up to one of the corresponding PROs, by which the producers' responsibility is transferred to the manager of such scheme. Adhering to a PRO triggers a payment obligation of a regulatory fee (*prestação financeira aka ecovalor*) intended to cover all the costs of waste management vis-à-vis the products placed on the market and declared to the PRO.

These producers can implement an individual scheme by carrying out the waste management operations themselves, subject to the prior approval of the APA. Although provided for in Portuguese law, individual schemes are rare, but this solution is of growing interest to big players under the EPR.

Take-Back

Regarding take-back, if the producer of the tyres or of the electrical and electronic equipment is simultaneously the seller to the final user, it is obliged, in some circumstances, to take back the waste arising from those goods at no cost. If the producer is not the seller to the end-user, it must provide for the creation and implementation of a collection grid and pay the corresponding costs.

Deposit Refund System

In 2024, Portugal created a mandatory deposit refund system (*Sistema de Depósito e Reembolso*, or SDR) applicable to non-reusable plastic and metal beverage bottles of less than three litres. This SDR, carved out of the universe of general packaging EPR systems, will be managed by special-purpose PROs, in competition, and aims to get end-users to deliver their pack-

aging to certain collection points against the return of a deposit pre-paid in the act of buying the beverage, thus allowing better chances of recycling this packaging waste. The goal fixed by the Portuguese government is the recycling of at least 90% of this packaging waste by 2029. No licence for an SDR PRO has yet been granted.

The Circular Economy

Portuguese law intertwines production and recovery in line with the principles of the circular economy. For instance, secondary raw materials obtained from the recycling of packages must be incorporated, whenever possible, into the production of packages, and electrical and electronic equipment must be designed for ease of dismantling and the recovery of waste, components and materials. The producers of this equipment must also do so bearing in mind the goals of resources efficiency, the reduction of dangerous chemical products and the durability of the products. The producers of batteries and accumulators must also, among other requirements, design these so that they progressively contain fewer dangerous substances (eg, by replacing heavy metals such as mercury, cadmium and lead).

Disposal

Finally, disposal may occur in the form of incineration, especially waste-to-energy incineration, or landfilling. Requirements for disposal are directly linked to the principle of hierarchy of waste management options and waste characteristics (eg, hazardousness).

16.4 Rights and Obligations Applicable to Waste Operators

Waste operators can only manage waste under a specific permit issued by public entities. It is usual for these permits to set out obligations on

the proper handling of the waste to avoid contamination events.

Furthermore, for the decommissioning of a waste-treatment plant, the operator must follow the conditions specifically established in the permit and must present a waiver request alongside an assessment of the state of the soil. Maintenance actions may also be required after the plant's closing. Regarding the obligation to take over a financial guarantee, see **9.1 Environmental Insurance**.

An application for a soil remediation licence must contain an assessment of the local contamination, including a risk analysis for human health and/or the environment, as well as a definition of the decontamination objectives, a timetable and a monitoring plan to assess the effectiveness of the operation. Decontamination operations are subject to a final inspection by the licensing authority (CCDR).

Regarding the consequences of non-compliance, see **4.5 Consequences of Breaching Permits/Approvals**.

17. Environmental Disclosure and Information

17.1 Self-Reporting Requirements Responsibility to Inform the Competent Authority

The law determines that operators must immediately inform the competent authority of all matters relating to the existence of an imminent threat of environmental damage, of the preventative measures taken, and of the success of these measures in preventing damage. If environmental damage actually occurs, the operator must inform the competent authority of all the

relevant facts within 24 hours. These obligations are usually included in the operators' environmental permits and are preferably fulfilled by electronic means.

Without prejudice to these obligations, the competent authority may, at any time, require the operator to provide information on an imminent or suspected threat of environmental damage, or on damage that has already occurred. All prevention and remediation costs are paid by the operator.

Responsibility to Inform the Public

Concerning information to the public, the competent authorities must inform health authorities about any imminent threats of environmental damage that could affect public health.

Additionally, public entities must ensure immediate release of environmental information in case of an imminent threat to human health or the environment, caused by human actions or natural phenomena, enabling at-risk populations to take preventative action. Besides that, no general warnings to the public are required, unless a warning is considered to be a necessary prevention measure.

Periodic Reporting

Conversely, operators must regularly report on their environmental performance, including water discharge and abstraction quality and quantity, atmospheric emissions, and waste production (see **17.3 Corporate Disclosure Requirement**).

17.2 Public Environmental Information

The law provides that all people have the right to access environmental information by consulting, reproducing or being informed of the existence and content of such documents. Applicants do not have to provide a specific interest to exer-

cise this right; however, the request for access to environmental information may be subject to additional requirements, and it may be denied, or reduced.

On the other hand, the law provides for a duty, applicable to public authorities and bodies, to actively disclose, electronically, certain parts of this information, in such a way that it is publicly accessible.

Entities Obligated to Disclose Environmental Information

This legal framework applies to all public entities. It also applies to private associations or organisations in which public entities exercise powers of management control, or appoint, directly or indirectly, the majority of the members of the administrative, management or supervisory body. Furthermore, it applies to entities responsible for managing public archives and entities actually performing an administrative role or exercising public powers. This includes entities holding concessions or delegations of public services. In some cases, the law also covers documents held or produced by any entities with legal personality that have been created to satisfy, in a specific manner, needs of general interest.

Moreover, this framework applies to any natural or legal person, of a public or private nature, that belongs to the indirect administration of the bodies or entities referred to above and which has duties or roles, or which performs public administrative functions or provides public services relating to the environment. This includes public corporate entities, owned or part-owned companies, and concessionary companies. It also includes any natural or legal person that holds or materially maintains environmental information on behalf, or on account, of any of the bodies or

entities referred to. Finally, this law also applies to entities that met the above requirements at an earlier time, for documents corresponding to that period.

The public can also be informed of, and participate in, environmental issues during the public consultation periods – see **5.2 Disclosure**.

17.3 Corporate Disclosure Requirement

Companies are obliged to disclose environmental information in three different ways, as follows:

- to the general public, by making information available on their websites or at their premises (Seveso legislation);
- to public bodies, which will analyse it and provide conclusions to the company only; and
- to public entities that are subsequently obliged to make the information available to the general public – for example, following requests to obtain an Environmental Licence (Decree Law 127/2013) or those within the EIA procedure (Decree Law 151-B/2013), the competent entity must disclose this information via its website.

Companies which hold an Environmental Licence are also required to send an annual environmental report to the APA, to demonstrate compliance with all the conditions set by the Environmental Licence.

The management report that companies must prepare under corporate legislation must include, as far as necessary to understand the evolution of the business, the company's performance or position, non-financial information, including environmental matters, and an assessment of the risk exposure to climate change. For large companies, which, by the closing of

the balance sheet, employ an average of more than 500 workers during the financial year, this is mandatory (Decree Law 262/86). See **7.5 ESG Requirements**.

For details of the environmental information to be made available to economic and financial agents, see **10.1 Financial Institutions/Lender Liability**.

17.4 Green Finance

Green finance in Portugal tends to be aligned with widely recognised international standards, such as the Loan Market Association (LMA) principles and guidelines for green, social and sustainability-linked loans.

The Portuguese regulators that play a role in the supervision and enforcement of green financing regulations and initiatives in Portugal are the Portuguese Securities Market Commission (CMVM), the Bank of Portugal and the Supervisory Authority for Insurance and Pension Funds (ASF). These entities have not published any divergent approach from the main international standards so far. This adherence to international standards helps foster consistency, comparability and transparency in green finance.

Despite its soft law nature, another relevant set of data regarding green finance in Portuguese and European sustainable commercial practices is the ICMA Principles, which aim to promote the role that global debt capital markets can play in financing progress towards environmental and social sustainability. Through the Green Bonds Principles (2021), Sustainability Bonds Guidelines (2021), Social Bonds Principles (2023)

and the Sustainability-Linked Bonds Principles (2024), the public has an overview of voluntary ways companies may promote sustainable finance.

18. Transactions

18.1 Environmental Due Diligence

It is now very common to include an analysis of environmental matters in the scope of the due diligence exercises that precede M&A, finance and property transactions. Moreover, it is also usual to complement legal due diligence with technical due diligence.

Typically, the matters examined include whether the essential environmental permits are in place to conduct an activity or to utilise a property.

18.2 Disclosure of Environmental Information

There is no express legal requirement that requires a seller to disclose environmental information to a purchaser. However, the principle of good faith in the pre-contractual phase, imposes duties of information that bind the parties to provide all the clarifications necessary for the honest conclusion of the contract.

18.3 Key Issues in Environmental Due Diligence

The most common environmental issues that usually arise within the context of a transaction are related to environmental licensing, contamination of soil and water lines and the absence of, or non-compliance with, environmental impact assessments.

Trends and Developments

Contributed by:

Assunção Cristas, Catarina Pinto Correia, João Almeida Filipe and Carolina Vaza

VdA

VdA is a leading international law firm with more than 40 years of history, recognised for its impressive track record and innovative approach. The excellence of its comprehensive legal services covers several industries and practice areas, including agribusiness; aviation; banking and finance; competition; corporate and M&A; defence; digital frontiers; energy and natural resources; the environment; governance; health-care; information, communication and technology; infrastructure and mobility; insurance; investigations and white-collar crime; IP; life sciences; litigation and arbitration; mining; oil and

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Authors



Assunção Cristas is a partner at VdA, head of its ESG integrated services platform and co-head of its environment and climate change practice. She is an associate professor at Nova

School of Law, where she co-ordinates the master's degree in Law and Economics of the Sea – Ocean Governance. She is also a director of NOVA OCEAN. She has held several political positions, including Minister of Agriculture, the Sea, Environment and Spatial Planning. Additionally, she is a member of the World Economic Forum's Expert Network on the ocean and sustainability. She was a speaker at The World Ocean Summit 2024 and the H2O Sustainability Summit, and at both COP28 and COP29.



Catarina Pinto Correia is a partner at VdA and co-head of the environment and climate change practice, which includes agribusiness and ocean matters. With an extensive background in

environmental law and climate change, Catarina advises on a range of critical issues, including waste management, water, carbon projects and credits, biodiversity and ecosystem services projects, soil contamination, environmental licensing and reporting, and due diligence. Catarina is a prolific author and lecturer, and also a board member of the BlueBio Alliance. She actively participated at COP29 (Uzbekistan 2024) and also at the NY Climate Week and Sustainable Development Impact Meetings in September 2024, in parallel with the United Nations General Assembly.

PORTUGAL TRENDS AND DEVELOPMENTS

Contributed by: Assunção Cristas, Catarina Pinto Correia, João Almeida Filipe and Carolina Vaz, **VdA**



João Almeida Filipe joined VdA in 2023 as a principal consultant in the environment practice area. He is a guest assistant professor at Nova University of Lisbon, and he was a legal adviser to several members of government, including the Minister of the Environment and Climate Action, giving advice in the fields of spatial planning, coastal zone management, nature conservation and sustainable use of biodiversity, forests, carbon markets, nature conservation, sustainable use of biodiversity and water resources. He was also a parliamentary adviser for the European Affairs Committee at the Portuguese parliament.



Carolina Vaza joined VdA in 2018. She is an associate in the environment practice area, where she has been involved in several transactions, and she is part of the team dedicated to agribusiness. In addition to her LLB from the University of Lisbon, Carolina has a post-grad qualification in administrative litigation and another in environmental law. She also has a master's in Law and Economics of the Sea – Ocean Governance, from Nova School of Law.

VdA

Rua Dom Luis I, 28
1200-151
Lisboa
Portugal

Tel: +351 2131 13400
Email: fvda@vda.pt
Web: www.vda.pt



First Projects and Methodologies to Emerge in the Portuguese Voluntary Carbon Market

Although the European Commission's proposal for a regulation to certify carbon removals submitted in November 2022 is still pending approval, Portugal has already set its national rules and criteria. Both legal frameworks aim to create a healthy market for developing high-quality carbon mitigation projects within a transparent system that can prevent greenwashing.

Portuguese Decree-Law 4/2024, published on 5 January 2024, sets the rules for operating the Voluntary Carbon Market (VCM), based on the assumption that it can significantly support efforts to reduce greenhouse gas emissions. The VCM can further contribute to achieving other ambitious national goals, including as arising from the Portuguese Climate Framework Law, which requires the government to evaluate whether climate neutrality can be achieved before the 2050 EU target.

The development of the VCM has been discussed in Portugal since the publication of its legal framework at the beginning of this year.

Market operators have from that moment on been hopeful about the future of investments in carbon projects under the national regulation and still-to-be-determined rules, such as how to access the public platform to register carbon projects and credits, and the criteria for becoming an independent verifier.

A series of measures was recently announced to address these questions, which is especially important for those wishing to have methodologies and carbon projects approved in the VCM in the short and medium term.

Disclosed Requirements to Operate on the VCM

The effective implementation of the VCM is predicated on the adoption of additional measures after the publication of the relevant decree-law.

These measures include launching a public platform for registering carbon projects and credits, developing carbon methodologies in line with VCM principles, appointing members to the technical committee responsible for validation, and adopting a series of ordinances.

These ordinances are needed to set detailed rules for registering carbon projects and credits, to provide insurance for situations of reversal of sequestered emissions, and to outline the requirements for verifiers working under the VCM. Three out of four ordinances were already published on 2 October 2024, setting rules on the following:

- the requirements for the qualification of independent verifiers of GHG projects to work in the VCM and the appointment of the entity tasked with the qualification system;
- the general requirements for the electronic platform to register the VCM; and
- the fee amounts payable to the supervisory and managing entities of the registration platform within the VCM.

The requirements for qualifying independent verifiers of GHG projects are expected to become applicable by the end of the year, but the last two ordinances already came into effect on 3 October 2024.

Understanding the practical application of all VCM regulations requires a careful and combined reading of the different ordinances and the ordinances and Decree-Law 4/2024.

Requirements to qualify independent verifiers of GHG projects in the VCM

Independent verifiers are key to validate projects and their results for the generation of carbon credits as part of the framework of a robust monitoring, reporting and verification system. The VCM's legal framework requires independent verifiers to be “duly qualified”, relying on the criteria specified in Ordinance 240/2024.

The following is required to qualify as an independent verifier:

- higher education in the relevant area of expertise;
- relevant professional experience;
- professional training in auditing;
- passing an exam of the qualification management entity; and
- being an effective member of the respective public professional association, where applicable.

ADENE – Energy Agency (“ADENE”) is the “qualification management entity”, whose remit under the ordinance is to conduct the qualification procedure, which includes administering a compulsory exam and issuing the relevant certificate of approval. In so far as this is a condition to freely exercising a profession, it must be closely scrutinised in accordance with the principle of proportionality.

Registration platform requirements

The transparency of the VCM is vital to the success of this reputable and reliable market. To this end, the VCM has established a public platform that allows the tracking of carbon credits.

Ordinance 241/2024 regulates the platform's operational requirements. It establishes the requirements for operating the platform and the

functionalities it must ensure. A combined reading of the ordinance and Article 18 of the VCM legal framework shows that:

- market agents have to open an account;
- projects and carbon credits must be registered;
- credits (including the guarantee exchange mechanism) must be issued and cancelled;
- promoters must submit their project monitoring reports;
- initial verification reports and periodic verification by independent verifiers must be submitted; and
- proposals for carbon methodologies must be submitted (and managed) on the platform.

Some aspects, however, raise interpretation or application doubts that need to be resolved, such as the following – on the one hand, the rules governing the trade of carbon credits could use some clarification. For example, the ordinance introduces a novel definition of credit “trade” different to the definition included in Decree-Law 4/2024.

The latter requires “registering credits traded between market operators on the platform, which occurs whenever there is a change in ownership”.

In other words, it suggests that credit trade (ie, changes in ownership), occur outside but must subsequently be registered on the platform, which means that the registration does not operate as a transfer of ownership.

The ordinance defines “credit trade” as “a procedure on the platform involving the transfer of carbon credits between accounts”, presumably opened on the platform. There is also reference to the possibility of the platform providing con-

nections to external marketplaces to support such trades.

It would seem that the platform is designed to ensure the transparency and trackability of carbon credit trades rather than to operate as a marketplace. It is also not clear from either act whether carbon credits can be traded on the registration platform.

On the other hand, the distinction between the information market operators will be required to submit on the platform, and that which will then be made publicly available, is yet to be clarified.

The VCM provides for certain information and documentation to be available to the public to ensure the transparency of the activities developed within the VCM.

The ordinance, however, adds that “additional information that is deemed relevant” may still be made available to the public without specifying anything further. The access to this information is free and does not require prior registration on the platform. The scope of the information to become publicly available should, however, be defined beforehand to reinforce operators’ trust in this market.

It bears pointing out that the ordinance vests in ADENE the power to define which documentation or information should, or should not, be kept confidential at the request of the market operators. It would also be appropriate to clarify the intervention of the Portuguese Environment Agency as a supervisory entity and the criteria for submitting and approving confidentiality requests.

Market operator, carbon project, and credit trading fees

VCM fee amounts are set out in Ordinance 239/2024:

- opening and maintaining an account on the registration platform (between EUR50 and EUR500 for natural and legal persons, respectively);
- registering carbon projects or programmes on the registration platform (EUR950 plus an additional amount for each project added to programmes after the initial project);
- carbon credit trades (EUR0.20/credit); and
- approving methodologies proposed by market operators (EUR3,000 per new submission and EUR1,500 per review).

A EUR500 fee will be required for approving methodologies put forward by market operators by 31/12/2026. In other words, the ordinance is seemingly worded to imply that the standard EUR3,000 fee will only apply from 1 January 2027.

This benefit is relevant to encourage kicking off the VCM across several industries. In the future, a reduced fee could be offered during an initial period for opening and maintaining an account. Additionally, the fee amounts could vary depending on the role of carbon market operators (such as promoters, intermediaries and buyers). Lastly, applying different fees based on whether the individuals are natural persons or legal entities would make the fee structure more consistent.

The Missing Pieces of the Puzzle

Despite the significance of the rules mentioned above for the development of the VCM in Portugal, some key aspects have not yet been made publicly available.

Publication of the ordinance

Firstly, it is crucial to publish the ordinance that sets out the capital requirements and minimum conditions for insurance to cover potential reversals of sequestered emissions, which may arise from natural risks (such as, wild fires, storms, floods, pests and diseases). This is essential in terms of reassurance.

The minimum conditions and capital requirements for insurance to cover potential sequestered emission reversals are crucial for ensuring market reliability and investor trust, especially in forestry projects, a sector prioritised by the law.

Given the high risk of wild fires in Portugal, it is paramount to quickly regulate the conditions for insurance coverage to support forest sequestration projects and other nature-based projects.

These insurance policies can be standalone or combined with contributions to a public guarantee fund, which would cover unintended emission reversals for the project's duration.

If an unintended reversal of emissions occurs within a project, an equivalent number of untraded carbon credits must be cancelled on the VCM platform.

It bears noting that any reversal of emissions during a project does not affect the carbon credits already issued by that project and traded between the promoter and third parties.

Appointment of the Technical Monitoring Committee

Secondly, the appointment of the Technical Monitoring Committee members remains pending. Although the committee's composition was determined in April of this year, no members

have yet been appointed, leaving this crucial aspect unaddressed.

This committee is the public body responsible for developing methodologies for each type of carbon project (such as forestry, agricultural, marine, etc) and for validating methodologies submitted by interested parties.

The committee is therefore fundamental to approving methodologies and the stringency or flexibility of its requirements will influence the attractiveness and success of the VCM in Portugal. Balance and adaptation to national realities are the key to success.

The development of the digital platform

Lastly, the development and entry into operation of the digital platform for public registration is required.

As previously mentioned, it would appear that the primary purpose of the platform is registration, not trade. Once a credit is traded outside the platform, the platform's records must be updated with the new holder's name, helping to ensure legal certainty.

The Light at the End of the Tunnel

The regulatory framework for the VCM market in Portugal has been developing step by step, taking into account both international climate action policies and the national market's interest in and capacity for implementing carbon projects.

A [website](#) has been made available online with all the relevant information regarding VCM in Portugal. This site also allows users to register their interest in submitting methodology proposals or carbon projects to the VCM. It provides information on the next steps scheduled to occur in the first half of 2025:

- the start of training for independent verifiers by the ADENE Academy, considering that the ordinance outlining the requirements will come into effect by the end of 2024; and
- the public discussion of the first carbon methodology, which will focus on forest sequestration projects aimed at conserving natural capital and creating a more resilient landscape, including reducing fire vulnerability, in accordance with the priorities established in Decree-Law 4/2024.

A significant step is still required for the VCM to operate effectively – launching the public platform for registering market operators, approved methodologies, carbon projects and their follow-up reports, qualified independent verifiers, carbon credits, and their trades and final uses.

Although initially expected to be available in 2024, no one can now predict exactly when the VCM platform will be fully operational. This platform is crucial for implementing the VCM in Portugal, and its repeated delays have turned out to be the proverbial fly in the ointment.

However, the launch of a public tender in October for developing a VCM registration platform brings renewed hope. It suggests that 2025 might be the first year of carbon projects and credits issued under the VCM scheme in Portugal.

Voluntary carbon markets are anticipated to surge in the coming years. They will enable companies not only to offset their own carbon footprint but also to support climate action by financing carbon reduction and removal projects. This can be done by acquiring and retiring the corresponding credits from the market. Additionally, companies can go a step further by obtaining “Carbon Credits+” that offer benefits beyond just carbon reduction.

Portugal is certainly on the right track to host projects that enhance the value of terrestrial and marine ecosystem services. These projects could attract private sector investments for climate mitigation actions and help combat biodiversity loss within the country.

SOUTH AFRICA



Law and Practice

Contributed by:

Rui Lopes and Mfihlakalo Kubeka
Lopes Attorneys Inc

Contents

1. Regulatory Framework and Law p.396

1.1 Environmental Protection Policies, Principles and Laws p.396

2. Enforcement Authorities and Mechanisms p.396

2.1 Regulatory Authorities p.396

2.2 Co-operation p.397

3. Environmental Protections p.397

3.1 Protection of Environmental Assets p.397

3.2 Breaching Protections p.397

4. Environmental Incidents and Permits p.397

4.1 Investigative and Access Powers p.397

4.2 Environmental Permits/Approvals p.398

4.3 Regulators' Approach to Policy and Enforcement p.398

4.4 Transferring Permits/Approvals p.398

4.5 Consequences of Breaching Permits/Approvals p.399

5. Environmental Liability p.400

5.1 Key Types of Liability p.400

5.2 Disclosure p.400

6. Environmental Incidents and Damage p.400

6.1 Liability for Historical Environmental Incidents or Damage p.400

6.2 Reporting Requirements p.401

6.3 Types of Liability and Key Defences p.401

7. Corporate Liability p.402

7.1 Liability for Environmental Damage or Breaches of Environmental Law p.402

7.2 Environmental Taxes p.402

7.3 Incentives, Exemptions and Penalties p.403

7.4 Shareholder or Parent Company Liability p.404

7.5 ESG Requirements p.404

7.6 Environmental Audits p.405

8. Personal Liability p.405

8.1 Directors and Other Officers p.405

8.2 Insuring Against Liability p.406

9. Insurance p.407

9.1 Environmental Insurance p.407

10. Lender Liability p.407

10.1 Financial Institutions/Lender Liability p.407

10.2 Lender Protection p.407

11. Civil Liability p.408

11.1 Civil Claims p.408

11.2 Exemplary or Punitive Damages p.408

11.3 Class or Group Actions p.408

11.4 Landmark Cases p.408

12. Contractual Agreements p.408

12.1 Transferring or Apportioning Liability p.408

12.2 Environmental Insurance p.409

13. Contaminated Land p.409

13.1 Key Laws Governing Contaminated Land p.409

13.2 Clearing Contaminated Land p.410

13.3 Determining Liability p.410

13.4 Proceedings Against Polluters p.410

13.5 Investigating Environmental Accidents p.410

14. Climate Change and Emissions Trading p.411

14.1 Key Policies, Principles and Laws p.411

14.2 Targets to Reduce Greenhouse Gas Emissions p.412

15. Asbestos and Polychlorinated Biphenyls (PCBs) p.412

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs p.412

16. Waste p.412

16.1 Key Laws and Regulatory Controls p.412

16.2 Retention of Environmental Liability p.413

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods p.413

16.4 Rights and Obligations Applicable to Waste Operators p.413

17. Environmental Disclosure and Information p.414

17.1 Self-Reporting Requirements p.414

17.2 Public Environmental Information p.414

17.3 Corporate Disclosure Requirement p.415

17.4 Green Finance p.415

18. Transactions p.415

18.1 Environmental Due Diligence p.415

18.2 Disclosure of Environmental Information p.416

18.3 Key Issues in Environmental Due Diligence p.416

Lopes Attorneys Inc is a leading boutique law firm based in Johannesburg, South Africa. Known for its innovative and client-centred approach, the firm has gained recognition for its pioneering solutions and expertise in various legal fields. Lopes Attorneys offers a wide range of legal services, encompassing environmental law, sustainability, natural resources, information and media law, and dispute resolution. The firm has received multiple accolades, such as the Specialist Law Firm of the Year in the African

Legal Awards for 2022 and 2024. With a team of skilled lawyers led by Managing Director Rui Lopes, the firm is committed to providing sustainable and pragmatic solutions that meet clients' needs in a commercially viable manner. Lopes Attorneys is also part of the Legal-Netlink Alliance, giving it access to law firms in over 35 countries and 143 cities globally, further enhancing its ability to execute complex mandates.

Authors



Rui Lopes is the equity principal at Lopes Attorneys Inc, a leading boutique law firm based in Johannesburg, South Africa. Rui has rapidly become one of the leading experts in

environmental and animal welfare law in South Africa. With a background in dispute resolution, animal law and environmental law, Rui has built a reputation for providing innovative and client-centred legal solutions. He has extensive experience advising clients on regulatory compliance, business rescue proceedings, and various legal matters, including cannabis, broadcasting, and data privacy matters. Rui's commitment to excellence and his ability to navigate complex legal landscapes have made him a respected figure in the legal community.



Mfihlakalo Kubeka is a dedicated associate at Lopes Attorneys Inc, based in Johannesburg. Mfihlakalo has developed expertise in various fields, including environmental

law, animal welfare, ESG compliance, anti-bribery and corruption, data protection, dispute resolution, cannabis compliance, employment law, and labour disputes. He has played a key role in advocating for fair treatment of animals and access to information for NGOs, often facing powerful opponents. His commitment to social justice and environmental protection, combined with his leadership in diversity and inclusion, underscores his dedication to fostering an inclusive workplace and delivering impactful legal solutions.

Lopes Attorneys Inc

4th Floor, West Wing
Rosebank Corner
191 Jan Smuts Avenue
Rosebank
Johannesburg
South Africa

Tel: +27 11 568 6837
Email: Rui.lopes@lopesattorneys.com
Web: www.lopesattorneys.com



1. Regulatory Framework and Law

1.1 Environmental Protection Policies, Principles and Laws

In South Africa, environmental protection is governed by a comprehensive framework of policies, principles and laws designed to ensure sustainable development and the protection of natural resources, giving effect to the environmental right enshrined in Section 24 of the Constitution of the Republic of South Africa, 1996 (the “Constitution”).

Key laws include the National Environmental Management Act, 1998 (NEMA); the Hazardous Substances Act, 1973 (HSA); the National Environmental Management: Biodiversity Act, 2004 (NEMBA); and the National Environmental Management: Waste Act, 2008 (NEMWA).

Other laws include the National Environmental Management: Air Quality Act, 2004 (NEMAQA), which aims to reform air quality laws to protect the environment and promote sustainable development, and the Climate Change Act, 2024 (the “Climate Change Act”), pending commencement on a date to be determined by the president, which aims to develop an effective climate

change response and a long-term transition to a low-carbon and climate-resilient economy.

2. Enforcement Authorities and Mechanisms

2.1 Regulatory Authorities

In South Africa, several key regulatory authorities and bodies are responsible for environmental policy and enforcement. These include the Department of Forestry, Fisheries and the Environment (DFFE), which oversees the implementation of environmental policies and legislation, and the Environmental Management Inspectorate (EMI), also known as the “Green Scorpions”, which enforces environmental laws and regulations.

Provincial environmental departments and local municipalities also play crucial roles in managing environmental issues within their jurisdictions. The Presidential Climate Commission, established under the Climate Change Act (pending commencement on a date to be determined by the president) advises the government on climate change policies and strategies.

2.2 Co-operation

Mechanisms for co-operation with regulatory authorities in South Africa include legislative frameworks such as NEMA, which promotes integrated environmental management and requires the establishment of interdepartmental committees. Moreover, the requirement for co-operative governance is one of the key enshrined principles contemplated within the Constitution and is constitutionally required.

Intergovernmental committees such as the Presidential Coordinating Council and the Committee of Ministers and Members of Executive Councils (“MINMEC”) facilitate high-level co-ordination among various government departments.

Public participation and stakeholder engagement are also key principles in South Africa’s environmental laws, ensuring that all stakeholders are involved in environmental decision-making processes.

3. Environmental Protections

3.1 Protection of Environmental Assets

Environmental assets in South Africa, such as air, water, soil, flora, fauna, natural habitats and landscapes, are protected through a comprehensive framework of laws, policies and principles, including NEMA, NEMAQA, NEMWA, NEMBA and the Climate Change Act.

Key principles include sustainable development, the precautionary principle, the “polluter pays” principle, and public participation. Protection mechanisms include the establishment of protected areas, mandatory environmental impact assessments (EIAs), compliance and enforcement by the EMI, and public participation and stakeholder engagement.

3.2 Breaching Protections

Breaching environmental protections in South Africa can lead to significant legal, financial and reputational consequences, such as:

- legal consequences including criminal sanctions, civil liability, and administrative penalties;
- financial consequences including fines, the cost of remediation, and compensation for damages; and
- reputational consequences including damage to reputation and loss of business opportunities.

Notable cases such as the “Deadly Air case” highlight the serious legal and health consequences of failing to comply with environmental standards. Another prominent landmark decision was that of *The Trustees for the Time Being of the Humane Society International – Africa v Minister of Forestry, Fisheries and the Environment and Others* (2022), a ground-breaking interdict in which the Minister was prohibited from implementing trophy-hunting quotas due to the harm that stood to be suffered by the animals concerned (as opposed to a consideration of the harm that stood to be suffered by the applicants themselves, as is ordinarily required to be demonstrated in interdict proceedings).

4. Environmental Incidents and Permits

4.1 Investigative and Access Powers

Regulatory, permitting and supervisory authorities in South Africa have significant powers to address environmental incidents and breaches of law or permits.

The DFFE and the EMI have powers to conduct investigations, enter premises, inspect facilities, collect evidence, and take samples for analysis. They also have enforcement powers to issue compliance notices, directives, and administrative penalties, and to initiate legal proceedings against violators.

4.2 Environmental Permits/Approvals

Environmental permits are required for activities that have significant environmental impacts in South Africa. These include land development and construction, mining and resource extraction, industrial operations, and activities involving threatened or protected species.

The process of obtaining environmental permits involves submitting an application to the relevant authority, conducting an EIA if required, and undergoing a review and decision process.

There are also rights to appeal permitting decisions based on procedural errors, substantive issues, or new information.

4.3 Regulators' Approach to Policy and Enforcement

The Role of the Authorities

In South Africa, the approach to environmental policy and enforcement is grounded in principles of sustainable development, precaution, and the “polluter pays” principle. Regulatory authorities aim to ensure compliance with environmental laws and protect natural resources through a combination of legislative frameworks, enforcement mechanisms and public participation.

The EMI is responsible for enforcing environmental laws and regulations. Its operatives, known as the “Green Scorpions”, have the authority to investigate environmental crimes, enter premises,

conduct searches, seize evidence and take samples for analysis.

Regulatory authorities can issue compliance notices and directives to individuals or companies that violate environmental laws. These notices require the offender to take specific actions to remedy the breach and prevent further harm.

The authorities can impose administrative penalties for non-compliance and initiate legal proceedings against violators. This includes substantial fines and imprisonment for serious offences.

The Role of the Public

Public participation is a key principle in South Africa’s environmental laws. It ensures that all stakeholders, including local communities, are involved in environmental decision-making processes. This mechanism fosters transparency and accountability.

The Role of the Courts

The courts play a crucial role in holding regulatory authorities accountable and ensuring that environmental governance aligns with constitutional and legal standards. Judicial review of regulatory decisions ensures that authorities act within their legal mandates and respect the rights of affected parties.

4.4 Transferring Permits/Approvals

Legislative Framework

The transfer of environmental permits and approvals in South Africa is governed by NEMA, and other specific environmental management statutes. These laws ensure that the new holder of the permit is capable of meeting all the environmental obligations and that the transfer does not negatively impact the environment.

Application Process

The current permit holder must submit an application to the relevant regulatory authority, such as the DFFE or provincial environmental departments. The application must include detailed information about the proposed transferee and their ability to comply with the permit conditions. The application must be made in writing, on an official application form, to the competent authority. A fee may be payable.

Review and Approval

The regulatory authority reviews the application to ensure that the transferee is capable of meeting all the environmental obligations. This includes assessing the transferee's technical and financial capacity to comply with the permit conditions. The authority may request additional information or modifications to the proposed transfer to ensure compliance with environmental laws and regulations.

Conditions for Transfer

The transfer must ensure that the new holder is capable of meeting all the environmental obligations and that the transfer does not negatively impact the environment. The courts have emphasised the importance of compliance, transparency, and maintaining environmental standards in the transfer process.

Right to Appeal

Any person or entity affected by a permitting decision can appeal to the Minister of Forestry, Fisheries and the Environment (the "Minister") or the relevant provincial authority. The appeal must be submitted within 20 days from the date the decision was sent to the registered interested and affected parties. Appeals can be based on procedural errors, substantive issues with the decision, or new information that was not considered during the initial review.

The Minister or relevant authority can confirm, set aside, or vary the original decision, provision, condition or directive.

4.5 Consequences of Breaching Permits/ Approvals

Legal Consequences

Breaching an environmental approval or permit in South Africa can lead to significant legal consequences. These include criminal sanctions, civil liability, and administrative penalties. For instance, under NEMA, the courts have the discretion to assess the monetary value of any gained advantage as a result of the offence, in addition to the punishment imposed.

Offenders may be held liable for damages caused by their actions, including the cost of remediation and compensation for any harm caused to individuals or communities.

The regulatory authorities can impose administrative penalties for non-compliance with environmental laws, which can include fines, suspension of permits, and orders to cease harmful activities.

Practical Consequences

The practical consequences of breaching environmental protections include substantial fines intended to deter non-compliance and ensure that the cost of violating environmental laws outweighs any potential benefits.

Offenders are often required to cover the full costs of remediation and restoration of the damaged environment, which can include cleaning up pollution, restoring habitats, and compensating affected communities. Companies found guilty of environmental violations can suffer significant reputational damage, impacting their

relationships with customers, investors and other stakeholders.

Environmental violations can also lead to the loss of business opportunities, as companies may be excluded from contracts, partnerships and projects that require compliance with environmental standards.

5. Environmental Liability

5.1 Key Types of Liability

In South Africa, various types of liability can be imposed on operators, polluters, landowners and others for environmental damage or breaches of environmental law. These include:

- criminal liability – involving substantial fines and imprisonment for serious offences, such as illegal dumping of hazardous waste and pollution;
- civil liability – involving compensation for damages and restoration orders requiring offenders to restore the environment to its original state;
- administrative liability – involving penalties for non-compliance with environmental laws, including fines, suspension of permits, and orders to cease harmful activities;
- strict liability – this may be imposed in cases involving hazardous activities or substances, meaning that the offender is held liable regardless of fault or negligence; and
- vicarious liability – employers can be held vicariously liable for the actions of their employees if the employees' actions result in environmental damage or breaches of environmental law.

5.2 Disclosure Under NEMA

Environmental issues must be disclosed in South Africa under various legislative requirements to ensure transparency, accountability and environmental protection. NEMA mandates that any person who causes significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring.

Under the PAIA and NWA

The Promotion of Access to Information Act (PAIA) provides the public with the right to access information held by the state and private bodies that is required for the exercise or protection of any rights. The National Water Act (NWA) requires the disclosure of any activities that may impact water resources.

JSE Requirements

Companies listed on the Johannesburg Stock Exchange (JSE) are required to disclose their environmental impacts, compliance records, and liabilities in their annual reports. Non-disclosure or incomplete disclosure of environmental issues can lead to significant legal consequences, including criminal sanctions, fines and imprisonment.

6. Environmental Incidents and Damage

6.1 Liability for Historical Environmental Incidents or Damage

Liability for historical environmental incidents or damage can be imposed on current or purchasing operators and landowners in South Africa.

This liability is supported by legislative provisions such as NEMA and the NWA, and reinforced by case law. NEMA includes provisions for retrospective liability, meaning that parties can be held liable for pollution or degradation that occurred before the act came into effect.

The NWA also imposes liability for historical pollution of water resources. When purchasing property or taking over operations, it is crucial to conduct thorough environmental due diligence to assess any historical environmental damage and understand the potential liabilities associated with the property or operations.

Current or purchasing operators and landowners may be required to undertake remediation efforts to address historical environmental damage, including cleaning up pollution, restoring habitats, and compensating affected communities.

6.2 Reporting Requirements

Environmental reporting requirements in South Africa are designed to ensure transparency, accountability, and environmental protection.

NEMA mandates that companies engaging in activities with significant environmental impacts must conduct EIAs, which are documented in environmental impact reports (EIRs). The NWA requires the disclosure of any activities that may impact water resources.

Companies listed on the JSE are required to disclose their environmental, social and governance (ESG) risks and opportunities in their annual reports. Environmental incidents, such as spills, leaks or emissions, must be reported to the relevant regulatory authorities immediately.

Public participation is a key principle in South Africa's environmental laws, ensuring that com-

panies and developers engage with local communities and stakeholders during the EIA process and disclose any potential environmental impacts of proposed projects.

6.3 Types of Liability and Key Defences

In South Africa, liability for environmental incidents or damage can be imposed under various legal frameworks, including civil law, tortious liability, and administrative/regulatory liability.

Civil Law/Codes and Tortious Liability

Negligence

Liability arises when a party fails to exercise reasonable care, resulting in environmental damage. Key defences include demonstrating that reasonable care was exercised, the damage was not foreseeable, or the plaintiff contributed to the harm.

Strict liability

Liability is imposed without the need to prove negligence or fault, particularly for inherently dangerous activities. Key defences include arguing that the damage was caused by an act of God, an act of a third party, or compliance with all relevant regulations.

Administrative/Regulatory Liability

Compliance notices and directives

Regulatory authorities can issue compliance notices and directives to enforce environmental laws and require remedial actions. Key defences include demonstrating compliance with the notice or directive, improper issuance of the notice, or that the alleged breach did not occur.

Administrative penalties

The authorities can impose fines and other penalties for non-compliance with environmental regulations. Key defences include demonstrating compliance with the regulations, disproportional

tionality of the penalty, or lack of jurisdiction on the part of the authority.

Criminal sanctions

Serious breaches of environmental laws can result in criminal charges, leading to fines and imprisonment. Key defences include arguing that the offence was not committed, a lawful excuse, or failure of the prosecution to prove the case beyond a reasonable doubt.

Key Defences, Limits and Conditions

Due diligence

Demonstrating that all reasonable steps were taken to prevent environmental harm. This defence is often used in cases of strict liability and administrative penalties.

Act of God

Arguing that the environmental damage was caused by natural forces beyond human control. This defence is applicable in both civil and regulatory contexts.

Third-party actions

Claiming that the damage was caused by the actions of an independent third party. This defence can be used in cases of negligence, strict liability, and administrative penalties.

Compliance with regulations

Arguing that all relevant environmental regulations and permits were followed. This defence is particularly relevant in administrative and regulatory liability cases.

Statutory limits

Certain statutes may limit the extent of liability or provide specific conditions under which liability can be imposed. These limits are defined by environmental laws such as NEMA, the NWA, etc.

7. Corporate Liability

7.1 Liability for Environmental Damage or Breaches of Environmental Law

In South Africa, corporate entities can be held liable for environmental damage or breaches of environmental law under various legal frameworks. These include NEMA, NEMWA and the NWA.

Companies can face criminal liability, civil liability, and administrative penalties for violations:

- Criminal liability involves substantial fines and imprisonment for serious offences, such as illegal dumping of hazardous waste and pollution.
- Civil liability includes compensation for damages and restoration orders requiring offenders to restore the environment to its original state.
- Administrative penalties can include fines, suspension of permits, and orders to cease harmful activities. Directors and officers of companies can also be held personally liable for environmental damage or breaches of environmental law committed by the company.

7.2 Environmental Taxes

Carbon Tax

South Africa introduced the Carbon Tax to reduce greenhouse gas (GHG) emissions and combat climate change. Governed by the Carbon Tax Act, 15 of 2019, it came into effect in June 2019.

The initial rate was set at ZAR120 per tonne of carbon dioxide equivalent (tCO₂e) and has been subject to periodic increases. As of 2022, the rate is ZAR144 per tCO₂e. The tax is implemented in phases to allow industries time to adapt,

with the first phase starting in 2019, including significant tax-free allowances to ease the transition for businesses.

Plastic Bag Levy

This levy is imposed on plastic bags to reduce plastic waste and encourage the use of reusable bags. The levy is charged per plastic bag and is included in the price paid by consumers.

Motor Vehicle Emissions Tax

This tax is imposed on new motor vehicles based on their carbon dioxide emissions, aiming to encourage the purchase of more fuel-efficient and environmentally friendly vehicles. The tax rate varies depending on the vehicle's emissions, with higher rates for vehicles with higher emissions.

Electricity Levy

This levy is imposed on electricity generated from non-renewable sources to promote the use of renewable energy. The levy is charged per kilowatt-hour (kWh) of electricity consumed.

7.3 Incentives, Exemptions and Penalties Tax Deductions for Conservation Efforts

Section 37C of the Income Tax Act allows eligible taxpayers to deduct qualifying conservation and maintenance expenses from their taxable income. This incentive aids the conservation of threatened species and ecosystems. Taxpayers who sign Biodiversity Management Agreements (BMAs) with the Minister can deduct expenses incurred in conservation activities, such as security costs, ranger salaries, and veterinary expenses.

Green Fund

Established by the DFFE, the Green Fund provides catalytic finance to facilitate investment in green initiatives that support poverty reduction

and job creation. The fund promotes innovative and high-impact green programmes and projects.

Good Green Deeds Programme

Led by the DFFE, this programme mobilises citizens and social partners to act as Good Samaritans for Green Deeds. It promotes sustainable living practices and encourages communities to clean up, fix up, and conserve their environment.

Exemptions for Good Environmental Citizenship

EIA exemptions

A person may be exempted from a provision in the Environmental Impact Assessment Regulations requiring or regulating a public participation process if the rights or interests of other parties are not likely to be adversely affected by the exemption.

Penalties for Bad Environmental Citizenship

Criminal sanctions

Individuals or companies found guilty of violating environmental laws can face substantial fines and imprisonment. Under NEMA, penalties can include fines of up to ZAR10 million and imprisonment for up to ten years.

Administrative penalties

The regulatory authorities can impose administrative penalties for non-compliance with environmental laws. These penalties can include fines, suspension of permits, and orders to cease harmful activities.

Cost of remediation

Offenders are often required to cover the full costs of remediation and restoration of the damaged environment. This can include cleaning up pollution, restoring habitats, and compensating affected communities.

7.4 Shareholder or Parent Company Liability

Shareholding or parent companies can be held liable for environmental damage or breaches of environmental law. Refer to **7.1 Liability for Environmental Damage or Breaches of Environmental Law**.

7.5 ESG Requirements

In South Africa, environmental, social and governance (ESG) requirements are guided by a combination of national laws, regulations and international commitments. These requirements ensure sustainable development, protect natural resources, and promote social equity and good governance.

Environmental Requirements

- NEMA provides the overarching framework for environmental management in South Africa. It sets out principles for decision-making on matters affecting the environment and establishes procedures for EIAs and compliance monitoring.
- The Climate Change Act aims to develop an effective climate change response and a long-term transition to a low-carbon and climate-resilient economy. It includes provisions for national adaptation strategies, GHG emissions targets, and the establishment of the Presidential Climate Commission.
- NEMAQA aims to reform the law regulating air quality to protect the environment and promote sustainable development. It includes provisions for national norms and standards for air quality monitoring, management, and control by all spheres of government.
- NEMWA provides measures for the prevention of pollution and ecological degradation and for securing ecologically sustainable development while promoting justifiable economic and social development.

Social Requirements

Broad-Based Black Economic Empowerment (B-BBEE) is a government policy aimed at redressing historical inequalities and promoting the economic participation of black South Africans. It includes measures for employment equity, skills development, and enterprise development.

The Labour Relations Act, of 1995 (LRA), governs labour relations in South Africa, ensuring fair treatment of employees, promoting collective bargaining, and protecting workers' rights. The Occupational Health and Safety Act, 1993 (OHSA), mandates the disclosure of any environmental hazards that may pose a risk to the health and safety of employees and the public.

Governance Requirements

The Companies Act, of 2008 (the "Companies Act") governs corporate structure and management, ensuring transparency, accountability, and good governance practices. It includes provisions for the establishment of audit committees, disclosure of executive compensation, and compliance with anti-bribery and corruption laws. The King IV Report on Corporate Governance (the "King Code") provides guidelines for corporate governance in South Africa, promoting ethical leadership, sustainability, and integrated reporting.

Reporting, Monitoring and Enforcement

Companies, especially those listed on the JSE, are required to disclose their ESG risks and opportunities in their annual reports. This includes detailed reporting on sustainability practices and climate-related risks.

Environmental incidents, such as spills, leaks or emissions, must be reported to the relevant regulatory authorities immediately. Regulatory

authorities, such as the DFFE and the EMI, are responsible for monitoring compliance with environmental laws and regulations. They conduct inspections, audits and investigations to ensure adherence to ESG requirements.

The regulatory authorities can impose administrative penalties for non-compliance with environmental laws. The courts play a crucial role in enforcing environmental laws and protecting public health.

7.6 Environmental Audits

In South Africa, companies are not universally mandated by law to conduct environmental audits. However, environmental audits are often required to achieve compliance with certain environmental regulations and standards. These audits serve as a tool to formally check compliance with environmental laws and identify areas for improvement.

Voluntary Audits

Many companies voluntarily conduct environmental audits to ensure compliance with environmental laws and to identify areas for improvement. These audits help companies manage their environmental impact and demonstrate their commitment to sustainability.

Industry-Specific Requirements

Environmental audits are particularly common in industries with significant environmental impacts, such as mining, manufacturing and agriculture. For example, the Sustainability Initiative of South Africa (“SIZA”) provides a framework for environmental audits in the agricultural sector, ensuring that producers meet both local and international environmental standards.

Regulatory Compliance

While not universally mandated, environmental audits may be required as part of compliance with specific environmental regulations or permits. For instance, companies may need to conduct audits to comply with the conditions of their environmental authorisations or to meet the requirements of environmental management plans.

Reporting and Monitoring

Companies engaging in activities with significant environmental impacts must conduct EIAs. These assessments are documented in EIRs, which must include a non-technical summary, a comprehensive description of the proposed activity, an evaluation of potential impacts, and proposed mitigation measures. Companies, especially those listed on the JSE, are required to disclose their environmental impacts, compliance records, and liabilities in their annual reports.

Enforcement

Regulatory authorities, such as the DFFE and the EMI, are responsible for monitoring compliance with environmental laws and regulations. They conduct inspections, audits and investigations to ensure adherence to ESG requirements. Companies that fail to comply with environmental regulations or permit conditions may face administrative penalties, including fines, suspension of permits, and orders to cease harmful activities.

8. Personal Liability

8.1 Directors and Other Officers

In South Africa, directors and other officers can be held personally liable for environmental damage or breaches of environmental law committed

by the company. This liability is supported by legislative provisions and reinforced by case law.

- NEMA includes provisions for holding directors and officers personally liable for environmental damage. Directors and officers can be held liable if they participated in, or acquiesced to, conduct that contravenes environmental laws.
- The NWA imposes liability on directors and officers for pollution of water resources. Directors and officers are required to take reasonable measures to prevent pollution and to remedy any pollution that has occurred.
- NEMWA provides measures for the prevention of pollution and ecological degradation. Directors and officers can be held liable for any environmental damage caused by improper waste management.

Penalties for Personal Liability

Directors and officers found guilty of violating environmental laws can face substantial fines and imprisonment. For instance, under NEMA, courts can impose fines of up to ZAR10 million or imprisonment not exceeding ten years, or both. Directors and officers may be held liable for damages caused by their actions, including the cost of remediation and compensation for any harm caused to individuals or communities. The regulatory authorities can impose administrative penalties for non-compliance with environmental laws.

Key Defences and Conditions

Directors and officers can argue that they exercised reasonable care and took all the necessary measures to prevent environmental harm. This defence is often used in cases of strict liability and administrative penalties. They can also argue that the environmental damage was caused by natural forces beyond human control,

a defence applicable in both civil and regulatory contexts. Additionally, they can claim that the damage was caused by the actions of an independent third party.

8.2 Insuring Against Liability

It is possible for individuals and companies in South Africa to insure against environmental liabilities and penalties. Environmental liability insurance policies are designed to cover costs associated with environmental damage, including clean-up expenses, legal defence costs, and third-party claims for bodily injury or property damage resulting from pollution incidents.

Environmental Liability Insurance

Environmental liability insurance (also known as pollution insurance or pollution coverage) provides coverage for loss or damages resulting from unexpected releases of pollutants. This typically includes costs associated with clean-up, legal defence, and third-party claims for bodily injury or property damage. First-party coverage covers the insured's own property and operations, including clean-up costs and business interruption losses. Third-party coverage covers claims made by third parties for bodily injury, property damage, and clean-up costs resulting from pollution incidents.

Policy Inclusions

Environmental liability insurance policies can also cover fines and penalties imposed by regulatory authorities, depending on the specific terms and conditions of the insurance policy. This is particularly valuable for businesses operating in industries with higher environmental risks, such as manufacturing, mining, and chemical processing.

Practical Considerations

Environmental liability insurance is usually discretionary but can become a requirement stipulated in contractual clauses, such as in mergers and acquisitions negotiations or public sector contracts, or to satisfy permitting obligations. Industries with significant environmental impacts, such as mining, manufacturing, and agriculture, are particularly encouraged to obtain environmental liability insurance to mitigate potential risks and liabilities.

9. Insurance

9.1 Environmental Insurance Availability and Coverage

In South Africa, environmental insurance is available and serves as an important tool for managing environmental risks. This insurance typically covers various risks, including pollution liability, costs for clean-up operations, and third-party claims for damages or injuries caused by environmental incidents. Types of coverage include pollution liability insurance, environmental impairment liability insurance, and spill protection plans.

Compulsory Elements

Environmental insurance is generally discretionary but can become a requirement stipulated in contractual clauses, such as in mergers and acquisitions negotiations or public sector contracts, or to satisfy permitting obligations. Certain high-risk industries, such as mining and chemical processing, may have specific regulatory requirements that necessitate environmental insurance to cover potential liabilities and ensure compliance with environmental standards.

Practical Considerations

Environmental insurance policies can be customised to address the specific risks and needs of different industries. This ensures that companies have adequate coverage for their unique environmental exposures.

10. Lender Liability

10.1 Financial Institutions/Lender Liability

Financial institutions and lenders can be held liable for environmental damage or breaches of environmental law under certain circumstances. This liability is supported by legislative provisions such as NEMA and the NWA. Lenders must conduct thorough environmental due diligence when financing projects or acquiring properties. They can be held liable if they have a degree of control over the operations on the land, could reasonably foresee that pollution may take place, and should reasonably have taken the measures necessary to ensure that the pollution did not occur.

10.2 Lender Protection

Lenders can protect themselves from environmental liability risks by conducting thorough environmental due diligence, including environmental site assessments and regulatory compliance reviews. They can include environmental representations and warranties, indemnities, and covenants in loan agreements to ensure compliance with environmental laws. Regular monitoring and enforcement of loan covenants, as well as obtaining environmental liability insurance, are also crucial strategies for mitigating potential risks.

11. Civil Liability

11.1 Civil Claims

Civil claims for compensation or other remedies can be brought in cases of hazardous substances violations, significant environmental harm or pollution, health and safety violations, consumer protection issues, and property damage. Affected parties can seek compensation or other remedies for harm caused by these violations.

11.2 Exemplary or Punitive Damages

Courts can award exemplary or punitive damages in circumstances where the defendant's conduct is found to be particularly egregious or vexatious. In the context of environmental law, this might occur if a party's actions demonstrate a blatant disregard for environmental regulations or the well-being of the community, resulting in significant harm. The purpose of these damages is to punish the wrongdoer and deter similar conduct in the future.

11.3 Class or Group Actions

Class or group actions are possible for environment-related civil claims in South Africa. These actions allow a group of individuals who have suffered similar harm due to environmental damage to collectively bring a claim against the responsible party. This is particularly useful in cases where the harm affects a large number of people, making individual claims impractical.

11.4 Landmark Cases

There have been several landmark cases on civil liability for environment-related claims in South Africa, including the following.

- Minister of Water and Environmental Affairs v Really Useful Investments No 219 (Pty) Ltd – this case involved the interpretation and application of the Environment Conservation

Act and NEMA. It highlighted the responsibilities and liabilities of parties under these laws.

- The “Deadly Air case” – in this landmark High Court judgment, the court found that the poor air quality in the Highveld “Priority Area” violated residents’ constitutional right to an environment that is not harmful to their health and well-being. The court ordered the government to take action to improve air quality, highlighting the serious legal and health consequences of failing to comply with the ambient air quality standards set for the designated Highveld Priority Area. It should be noted that the Supreme Court of Appeal is currently tasked with hearing the appeal on this matter.

12. Contractual Agreements

12.1 Transferring or Apportioning Liability

Indemnities or other contractual agreements can indeed be used to transfer or apportion liability for incidental damage or breaches of law. These agreements are common in various types of contracts, including leases, insurance policies, and commercial agreements. They serve to allocate risk between the parties involved, often stipulating that one party will compensate the other for certain losses or damages.

Limits and Exceptions

However, there are limits and exceptions to the enforceability of these indemnities.

Public policy and legality

Indemnities that attempt to cover illegal activities or gross negligence may be deemed unenforceable as they contravene public policy. The courts are unlikely to uphold agreements that encourage or protect unlawful behaviour.

Statutory restrictions

Certain statutes may impose restrictions on the extent to which liability can be transferred. For example, environmental laws may hold parties strictly liable for pollution, regardless of any indemnity agreements in place.

Fairness and reasonableness

The courts may scrutinise indemnity clauses to ensure they are fair and reasonable. If an indemnity is deemed excessively broad or one-sided, it may be struck down or limited in scope.

Consumer protection

In contracts involving consumers, there are often additional protections in place to prevent unfair indemnity clauses. For instance, the Consumer Protection Act in South Africa limits the extent to which businesses can impose indemnities on consumers.

Regulatory decisions

Regarding their binding effect or influence on regulators, indemnities and contractual agreements between private parties generally do not bind regulatory authorities. Regulators are tasked with enforcing statutory obligations and ensuring compliance with the law. Therefore, even if a private agreement transfers liability from one party to another, regulators can still hold the original party responsible for breaches of law. For example, in environmental law, the party responsible for pollution may still be held liable by regulators, regardless of any indemnity agreements with third parties.

12.2 Environmental Insurance

In South Africa, environmental insurance is available and serves as an important tool for managing environmental risks. This type of insurance typically covers a range of risks, including:

- Pollution liability – this covers the costs associated with pollution incidents, including clean-up operations and third-party claims for damages or injuries caused by environmental incidents.
- Legal defence expenses – environmental insurance policies often include coverage for legal defence costs in the event of litigation related to environmental damage.
- Business interruption – coverage for business interruptions resulting from environmental events is also commonly included. This helps businesses manage the financial impact of operational disruptions caused by environmental incidents.
- Gradual pollution events – in addition to sudden and accidental incidents, environmental insurance can also cover gradual pollution events, which may not be immediately apparent but can cause significant damage over time.
- Industry-specific coverage – environmental insurance can be customised to suit specific industries, such as manufacturing, mining, and waste management, which are more susceptible to environmental risks.

Overall, environmental insurance in South Africa provides comprehensive coverage for various environmental risks, helping businesses manage potential liabilities and ensuring compliance with regulatory requirements.

13. Contaminated Land

13.1 Key Laws Governing Contaminated Land

In South Africa, the key laws governing contaminated land include NEMA, NEMWA and the NWA.

These laws provide a comprehensive framework for managing contaminated land and ensuring that those responsible for contamination are held accountable. The regulatory authorities take a proactive approach to remediation requirements, emphasising the importance of preventing further environmental harm and restoring contaminated sites to a safe and sustainable condition.

13.2 Clearing Contaminated Land

The responsibility for clearing up contaminated land primarily falls on the person or entity that caused the contamination. This principle is rooted in the “polluter pays” doctrine, which is a key aspect of NEMWA. Under this act, those responsible for pollution are required to take reasonable measures to prevent, mitigate and remediate environmental damage. This responsibility can be delegated through contractual agreements, where the liable party may engage third-party contractors to carry out the remediation work. However, the original polluter remains ultimately accountable for ensuring that the remediation meets regulatory standards.

13.3 Determining Liability

In cases where more than one party has contributed to contamination, liability is typically determined based on the principle of joint and several liability. This means that each party responsible for the contamination can be held liable for the entire cost of remediation, regardless of the extent of their individual contribution. The regulatory authorities or courts will assess the degree of involvement and the nature of the actions taken by each party to determine their respective liabilities. In practice, the parties involved may negotiate and agree on the apportionment of liability through contractual agreements. However, the regulatory authorities retain the right to

hold any or all of the responsible parties liable for the entire cost of remediation if necessary.

13.4 Proceedings Against Polluters

In South Africa, the locus standi requirements for bringing proceedings against polluters, land-owners or occupiers are designed to ensure that those affected by contamination can seek legal redress. The Constitution, particularly Section 38, and NEMA, Section 32, have broadened the scope of legal standing in environmental matters. Additionally, the Promotion of Administrative Justice Act, 2000 (PAJA) plays a crucial role in this context. Under these provisions, any person or group of persons acting in the public interest, or in the interest of protecting the environment, has the right to approach a court. This includes individuals directly affected by the contamination, as well as NGOs and community groups advocating for environmental protection.

13.5 Investigating Environmental Accidents

Key Steps Under NEMA

The process of investigating environmental accidents in South Africa is governed by NEMA and involves several key steps to ensure a thorough examination and appropriate response.

Immediate reporting

When an environmental accident occurs, it must be reported immediately to the relevant authorities, including the Department of Environmental Affairs, provincial environmental departments, and local municipalities. The initial report should provide details about the nature of the incident, the substances involved, and any immediate risks to the environment and public health.

Initial assessment

Upon receiving the report, the authorities conduct an initial assessment to determine the

severity of the incident. This assessment helps to identify the immediate actions required to mitigate any risks and prevent further harm.

Investigation

The DFFE and EMI are responsible for conducting investigations into environmental incidents. They have the authority to enter premises, inspect facilities, collect evidence, conduct searches, seize evidence, and take samples for analysis.

Compliance notices and directives

Based on the findings of the investigation, the DFFE can issue compliance notices, directives and administrative penalties to the responsible parties. These notices and directives outline the actions that must be taken to remediate the environmental damage and prevent future incidents.

Legal proceedings

If necessary, the DFFE can initiate legal proceedings against violators. This may include seeking court orders for remediation, imposing fines, or pursuing criminal charges for serious breaches of environmental laws.

Monitoring and follow-up

After the initial response and remediation efforts, the authorities continue to monitor the affected area to ensure that the remediation measures are effective and that there are no ongoing risks to the environment or public health.

This structured approach ensures that environmental accidents are addressed promptly and effectively, with a focus on mitigating harm and holding responsible parties accountable.

14. Climate Change and Emissions Trading

14.1 Key Policies, Principles and Laws

In South Africa, the key policies, principles and laws relating to climate change form a comprehensive framework aimed at addressing climate change and promoting sustainable development.

The Climate Change Act

The Climate Change Act is the cornerstone of South Africa's climate change framework. However, its commencement remains pending on a date to be determined by the president. This act aims to facilitate an effective climate change response and a just transition to a low-carbon and climate-resilient economy. It mandates the development of national adaptation and mitigation strategies, including the allocation of carbon budgets to major GHG emitters. Until the commencement of the Climate Change Act, however, the remaining legislative framework, including NEMA, the Carbon Tax Act, NEMAQA and others remain the legislative framework applicable.

The National Climate Change Response White Paper

The National Climate Change Response White Paper outlines South Africa's strategic priorities for climate change mitigation and adaptation, emphasising risk reduction, sectoral responses, policy alignment, and the promotion of sustainable development.

NEMA

NEMA provides the overarching framework for environmental management in South Africa, including provisions for holding corporate entities liable for environmental damage, and mandates the development of environmental management plans.

The Carbon Tax Act, the REIPPPP and the IRP

The Carbon Tax Act imposes a tax on carbon emissions to incentivise businesses to reduce their GHG emissions, forming part of South Africa's broader strategy to transition to a low-carbon economy. Additionally, South Africa has implemented various renewable energy policies, including the Renewable Energy Independent Power Producer Procurement Programme (REIPPPP), which aims to increase the share of renewable energy in the national grid and reduce reliance on fossil fuels. The Integrated Resource Plan (IRP) outlines South Africa's long-term electricity-generation plan, focusing on diversifying the energy mix and increasing the contribution of renewable energy sources.

14.2 Targets to Reduce Greenhouse Gas Emissions

South Africa has established clear policy and legal targets to reduce GHG emissions, in line with its commitments under the Paris Agreement. The country's updated Nationally Determined Contributions (NDCs) set specific targets for emission reductions.

By 2025, South Africa aims to limit its GHG emissions to a range of 398 to 510 million tonnes of CO₂ equivalent (MtCO₂e). This target becomes more stringent by 2030, with a goal to reduce emissions to between 350 and 420 MtCO₂e.

These targets are part of a broader strategy to transition to a low-carbon economy and achieve net-zero carbon emissions by 2050.

The Climate Change Act is central to this strategy, mandating the development of national adaptation and mitigation plans, including carbon budgets for major emitters and promoting the adoption of cleaner technologies and renew-

able energy sources. Additionally, the Carbon Tax Act incentivises businesses to reduce their carbon footprint by imposing a tax on GHG emissions.

15. Asbestos and Polychlorinated Biphenyls (PCBs)

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs

In South Africa, the regulation of asbestos and PCBs is governed by several key policies and laws aimed at safeguarding public health and the environment. The Asbestos Regulations of 2001, established under the OHS Act, strictly prohibit the use, processing and manufacturing of asbestos and materials containing asbestos. They also enforce stringent controls on the handling, removal and disposal of asbestos to prevent exposure and contamination. NEMWA includes provisions for the management of hazardous waste, specifically addressing PCBs. It mandates the identification, labelling and safe disposal of PCB-containing equipment and materials.

16. Waste

16.1 Key Laws and Regulatory Controls

The management and regulation of waste in South Africa are governed by several key laws and regulatory controls aimed at protecting the environment and public health.

NEMWA

NEMWA provides comprehensive guidelines for waste management, including the classification, handling, storage and disposal of waste. It emphasises the principles of waste minimisa-

tion, recycling and the safe disposal of hazardous waste.

The Waste Classification and Management Regulations, issued under NEMWA, provide detailed requirements for the classification of waste, the management of waste disposal facilities, and the reporting of waste management activities.

NEMA

NEMA establishes overarching principles for sustainable development and environmental protection, mandating that all waste management activities must be conducted in a manner that prevents pollution and environmental degradation.

The Hazardous Substances Act

The Hazardous Substances Act regulates the control and management of hazardous substances, including their disposal, to prevent harm to human health and the environment.

Local By-Laws

Local municipalities also have by-laws that govern waste management within their jurisdictions, often including provisions for waste collection, recycling and the management of waste disposal sites.

16.2 Retention of Environmental Liability

A producer or consignor of waste can retain liability for waste even after it has been disposed of by a third party, under certain circumstances.

This principle is rooted in the “polluter pays” doctrine, which is a key aspect of the NEMWA. According to this act, the original producer or consignor of waste remains responsible for ensuring that the waste is managed and disposed of in an environmentally sound manner. Liability can be retained if the waste is trans-

ferred to a person or entity that is not authorised to handle or dispose of the waste. If the third party lacks the necessary permits or fails to comply with regulatory requirements, the original producer or consignor can be held accountable for any resulting environmental harm.

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

Producers of goods can be required to design, take back, recover, recycle or dispose of their products once they become waste, under specific circumstances. These requirements are primarily governed by NEMWA and the associated Extended Producer Responsibility (EPR) Regulations.

The EPR Regulations mandate that producers take responsibility for the entire life cycle of their products, including the post-consumer stage. This means that producers must implement measures to manage the waste generated from their products, ensuring that it is handled in an environmentally sound manner.

The regulations apply to various product categories, including packaging, electronics, and hazardous materials. Producers are required to design products with their end-of-life management in mind, promoting recyclability and reducing environmental impact.

16.4 Rights and Obligations Applicable to Waste Operators

Waste operators in South Africa have specific rights and obligations under NEMWA and other related regulations. Waste operators have the right to apply for and obtain the necessary permits and licences to conduct waste management activities, including the collection, transportation, treatment and disposal of waste.

They also have the right to access information related to waste management regulations, guidelines and best practices to ensure compliance and effective waste management. Waste operators must comply with all relevant waste management regulations, including the proper handling, storage, transportation and disposal of waste, adhering to the conditions set out in their permits and licences.

They are obliged to take all reasonable measures to prevent pollution and environmental degradation, implementing measures to minimise waste generation, promote recycling, and ensure the safe disposal of hazardous waste. Waste operators must maintain accurate records of their waste management activities and submit regular reports to the relevant authorities, including information on the types and quantities of waste handled, as well as any incidents or non-compliance issues.

They must also have emergency response plans in place to address any incidents or accidents that may occur during waste management activities, including measures to contain and mitigate the impact of spills, leaks or other environmental hazards.

Breaching waste management obligations can result in significant fines and penalties, suspension or revocation of permits, legal action, and reputational damage.

17. Environmental Disclosure and Information

17.1 Self-Reporting Requirements

In South Africa, there are requirements to self-report environmental incidents or damage to regulators and, in some cases, to the public.

These requirements are outlined in various environmental laws and regulations, including NEMA and NEMWA. Environmental incidents, such as spills, leaks or emissions, must be reported to the relevant regulatory authorities immediately. This includes providing detailed information about the incident, its impact, and the measures taken to mitigate the damage.

Companies, especially those listed on JSE, are required to disclose their environmental impacts, compliance records and liabilities in their annual reports. This ensures that shareholders and the public are informed about the company's environmental performance.

Public participation is a key principle in South Africa's environmental laws. Companies and developers must engage with local communities and stakeholders during the EIA process and disclose any potential environmental impacts of proposed projects. Failure to comply with these reporting requirements can lead to significant legal consequences, including criminal sanctions, fines and imprisonment.

17.2 Public Environmental Information PAIA and NEMA

In South Africa, the public can obtain environmental information from public authorities and bodies under several circumstances, primarily guided by the Promotion of Access to Information Act (PAIA) and NEMA.

PAIA provides the public with the right to access information held by public and private bodies. It aims to promote transparency and accountability by ensuring that information is available to the public, especially when it concerns the environment and public health.

NEMA emphasises the importance of public participation and access to information in environmental decision-making processes. It mandates that environmental information, such as EIAs and environmental management plans, be made available to the public.

EIAs

During the EIA process, public participation is a key requirement. This involves consultations with interested and affected parties, public hearings and comment periods to ensure transparency and stakeholder involvement.

Public Authorities and Bodies

Public authorities and bodies are broadly defined for these purposes. They include government departments, provincial and local authorities, and any other entities that perform public functions or provide public services.

This definition ensures that a wide range of entities are covered, promoting greater transparency and accountability in environmental matters.

17.3 Corporate Disclosure Requirement

Corporations in South Africa, especially those listed on the JSE, are required to disclose environmental information in their annual reports. This requirement ensures that shareholders and the public are informed about the company's environmental performance, compliance records, and liabilities.

The disclosure typically includes information on the company's environmental impacts, measures taken to mitigate these impacts, and any environmental violations or penalties incurred. The King Code also emphasises the importance of ESG considerations in corporate governance. It encourages companies to integrate these prin-

ciples into their business strategies and to report on their ESG performance.

17.4 Green Finance

Green finance arrangements are primarily guided by the South African Green Finance Taxonomy. This taxonomy provides a classification system that aligns with global standards while addressing local priorities. It defines a minimum set of assets, projects and sectors that qualify as "green" or environmentally friendly, thereby supporting sustainable development and climate change mitigation efforts.

The taxonomy aims to enhance the credibility and transparency of green investments, making it easier for investors to identify and support environmentally sustainable projects.

The national treasury plays a pivotal role in the development and oversight of the Green Finance Taxonomy. It is responsible for monitoring and enforcing these arrangements to ensure that green finance initiatives are effectively implemented and contribute to the country's environmental and sustainability goals.

18. Transactions

18.1 Environmental Due Diligence

Environmental due diligence is typically conducted on mergers and acquisitions, finance, and property transactions in South Africa.

This process is crucial for identifying potential environmental liabilities and ensuring compliance with environmental laws and regulations. Environmental site assessments involve evaluating the environmental condition of a property to identify any existing contamination or environmental issues.

Environmental Site Assessments (ESAs)

This includes Phase I Environmental Site Assessments (ESAs), which involve a review of historical records, site inspections, and interviews with current and past property owners. If potential contamination is identified, a Phase II ESA may be conducted, involving soil and groundwater sampling and analysis. A regulatory compliance review involves reviewing the target company's compliance with environmental laws and regulations. It includes examining permits, licences, and any past or ongoing enforcement actions or violations.

Environmental Management System (EMS)

This helps to identify any potential legal liabilities and ensure that the company is operating within the legal framework. Evaluating the target company's environmental management system (EMS) ensures that it has effective policies and procedures in place for managing environmental risks.

This includes reviewing environmental audits, monitoring reports, and incident response plans. Identifying any contingent liabilities related to environmental issues, such as pending litigation or regulatory actions, is also crucial. This includes assessing any ongoing or future remediation obligations that the target company may have.

Sustainability and ESG

Assessing the target company's sustainability practices and ESG performance is increasingly important. This includes evaluating the company's efforts to reduce its environmental footprint, manage climate risks, and promote sustainable practices.

Conducting thorough environmental due diligence helps purchasers make informed deci-

sions, negotiate indemnities or adjustments to the purchase price, and mitigate potential environmental risk.

18.2 Disclosure of Environmental Information

In South Africa, a seller is required to disclose environmental information to a purchaser. This requirement is primarily governed by NEMA and NEMWA. These laws mandate that sellers provide accurate and comprehensive information about any environmental issues or liabilities associated with the property or assets being sold.

The disclosure typically includes information on any known contamination or pollution on the property, compliance with environmental regulations and permits, any ongoing or past environmental investigations or enforcement actions, and details of any environmental management plans or remediation efforts.

Failure to disclose such information can result in legal consequences, including potential claims for misrepresentation or breach of contract.

18.3 Key Issues in Environmental Due Diligence

Several common environmental legal issues can arise within the context of transactions in South Africa, particularly in mergers and acquisitions, finance, and property transactions. One of the most significant concerns is the presence of contaminated land.

Buyers need to be aware of any existing contamination and the associated remediation obligations. This includes understanding the extent of contamination, the costs of clean-up, and any ongoing monitoring requirements. Ensuring that the target company or property complies with

all relevant environmental laws and regulations is crucial. This includes obtaining and maintaining necessary permits and licences, adhering to waste management regulations, and complying with air and water quality standards. Identifying potential environmental liabilities is a key aspect of due diligence. This includes assessing any past or ongoing environmental litigation, fines or penalties that the target company may face. It also involves understanding any contingent liabilities related to environmental issues.

For companies involved in the production of goods, EPR regulations require them to take responsibility for the entire life cycle of their products, including post-consumer waste management. This can impact the financial and operational aspects of a transaction. Increasingly, transactions are scrutinised for their impact on

climate change and sustainability. This includes evaluating the target company's carbon footprint, energy efficiency, and compliance with climate-related regulations. Investors and stakeholders are placing greater emphasis on ESG factors. Transactions involving land or natural resources may need to consider biodiversity and conservation issues. This includes assessing the impact on protected areas, endangered species and ecosystems.

Compliance with biodiversity laws and regulations is essential to avoid legal and reputational risks. Ensuring transparency and public participation in environmental decision-making processes is a legal requirement. This includes disclosing potential environmental impacts and engaging with local communities and stakeholders during the EIA process.

Trends and Developments

Contributed by:

Rui Lopes and Mfihlakalo Kubeka

Lopes Attorneys Inc

Lopes Attorneys Inc is a leading boutique law firm based in Johannesburg, South Africa. Known for its innovative and client-centred approach, the firm has gained recognition for its pioneering solutions and expertise in various legal fields. Lopes Attorneys offers a wide range of legal services, encompassing environmental law, sustainability, natural resources, information and media law, and dispute resolution. The firm has received multiple accolades, such as the Specialist Law Firm of the Year in the African

Legal Awards for 2022 and 2024. With a team of skilled lawyers led by Managing Director Rui Lopes, the firm is committed to providing sustainable and pragmatic solutions that meet clients' needs in a commercially viable manner. Lopes Attorneys is also part of the Legal-Netlink Alliance, giving it access to law firms in over 35 countries and 143 cities globally, further enhancing its ability to execute complex mandates.

Authors



Rui Lopes is the equity principal at Lopes Attorneys Inc, a leading boutique law firm based in Johannesburg, South Africa.

Rui has rapidly become one of the leading experts in

environmental and animal welfare law in South Africa. With a background in dispute resolution, animal law and environmental law, Rui has built a reputation for providing innovative and client-centred legal solutions. He has extensive experience advising clients on regulatory compliance, business rescue proceedings, and various legal matters, including cannabis, broadcasting, and data privacy matters. Rui's commitment to excellence and his ability to navigate complex legal landscapes have made him a respected figure in the legal community.



Mfihlakalo Kubeka is a dedicated associate at Lopes Attorneys Inc, based in Johannesburg. Mfihlakalo has developed expertise in various fields, including environmental

law, animal welfare, ESG compliance, anti-bribery and corruption, data protection, dispute resolution, cannabis compliance, employment law, and labour disputes. He has played a key role in advocating for fair treatment of animals and access to information for NGOs, often facing powerful opponents. His commitment to social justice and environmental protection, combined with his leadership in diversity and inclusion, underscores his dedication to fostering an inclusive workplace and delivering impactful legal solutions.

Lopes Attorneys Inc

4th Floor, West Wing
Rosebank Corner
191 Jan Smuts Avenue
Rosebank
Johannesburg
South Africa

Tel: +27 11 568 6837
Email: Rui.lopes@lopesattorneys.com
Web: www.lopesattorneys.com



Introduction

South Africa's environmental law landscape is evolving rapidly, driven by the need to address pressing environmental challenges and align with global sustainability goals. This section provides an overview of the key trends and developments in South African environmental law, focusing on regulatory changes, enforcement mechanisms, and emerging issues that are shaping the legal, political and socio-economic contexts.

Regulatory Framework and Legislative Changes

Climate Change Act, 2024

The Climate Change Act, 2024 is a landmark piece of legislation that aims to develop an effective climate change response and facilitate a long-term transition to a low-carbon and climate-resilient economy. The act mandates national adaptation and the development of mitigation strategies, including the allocation of carbon budgets to major greenhouse gas (GHG) emitters. This legislation underscores South Africa's commitment to meeting its Nationally Determined Contributions (NDCs) under the Paris Agreement and achieving net-zero carbon emissions by 2050.

Carbon Tax Act

The Carbon Tax Act, which came into effect in June 2019, imposes a tax on carbon emissions to incentivise businesses to reduce their GHG emissions. The initial rate was set at ZAR120 per tonne of carbon dioxide equivalent (tCO₂e) and has been subject to periodic increases. As of 2022, the rate is ZAR144 per tCO₂e. The tax is implemented in phases to allow industries time to adapt, with the first phase starting in 2019, including significant tax-free allowances to ease the transition for businesses.

Extended Producer Responsibility (EPR) Regulations

The EPR Regulations, issued under the National Environmental Management: Waste Act, 2008 (NEMWA), mandate that producers take responsibility for the entire life cycle of their products, including post-consumer waste management. This regulatory framework aims to promote recycling, reduce waste generation, and ensure the environmentally sound disposal of products. The regulations apply to various product categories, including packaging, electronics, and hazardous materials.

Enforcement Mechanisms and Compliance *Environmental Management Inspectorate (EMI)*

The Environmental Management Inspectorate (EMI), also known as the “Green Scorpions”, plays a crucial role in enforcing environmental laws and regulations in South Africa. The EMI has the authority to investigate environmental crimes, enter premises, conduct searches, seize evidence, and take samples for analysis. The EMI’s enforcement actions have been instrumental in addressing non-compliance and ensuring that environmental standards are upheld.

Compliance notices and directives

Regulatory authorities can issue compliance notices and directives to individuals or companies that violate environmental laws. These notices require the offender to take specific actions to remedy the breach and prevent further harm. The use of compliance notices and directives has increased, reflecting a more proactive approach to enforcement.

Administrative penalties and legal proceedings

Authorities can impose administrative penalties for non-compliance and initiate legal proceedings against violators. This includes substantial fines and imprisonment for serious offences. The imposition of administrative penalties serves as a deterrent to non-compliance and reinforces the importance of adhering to environmental regulations.

Emerging Issues and Challenges

Climate change and adaptation

Climate change remains a significant challenge for South Africa, with increasing temperatures, changing rainfall patterns, and more frequent extreme weather events. The Climate Change Act, 2024 and the Carbon Tax Act are critical

components of the country’s strategy to mitigate climate change impacts and promote adaptation. However, the implementation of these measures requires robust enforcement and collaboration across various sectors.

Biodiversity conservation

South Africa’s rich biodiversity is under threat from habitat loss, pollution, and climate change. The National Environmental Management: Biodiversity Act, 2004 (NEMBA) provides a framework for the conservation and sustainable use of biodiversity. Recent developments include the establishment of protected areas, the implementation of biodiversity management plans, and efforts to combat wildlife trafficking.

Waste management and the circular economy

The shift towards a circular economy is gaining momentum in South Africa, driven by the need to reduce waste generation and promote recycling. The EPR Regulations are a key component of this shift, requiring producers to take responsibility for the entire life cycle of their products. The focus on waste minimisation, recycling, and the safe disposal of hazardous waste is essential for achieving sustainable development goals.

Water resource management

Water scarcity and pollution are critical issues in South Africa, necessitating effective water resource management. The National Water Act, 1998 (NWA) provides a framework for the sustainable use and protection of water resources. Recent developments include the implementation of water conservation measures, the rehabilitation of polluted water bodies, and efforts to improve water-quality monitoring.

Animal welfare and accountability

There is an increased focus on animal welfare and accountability in South Africa, driven by growing public awareness and advocacy for the humane treatment of animals. The Animal Protection Act, 1962 provides the legal framework for animal welfare, prohibiting cruelty and ensuring the proper care of animals. Recent developments include stricter enforcement of animal welfare laws, increased penalties for violations, and the establishment of animal welfare organisations to monitor and report on compliance. The inclusion of animal welfare considerations in environmental impact assessments (EIAs) and the promotion of ethical practices in industries such as agriculture and research are also gaining traction. This heightened attention to animal welfare reflects a broader commitment to ethical and sustainable practices in environmental management.

Conclusion

The trends and developments in South African environmental law reflect the country's commitment to addressing environmental challenges and promoting sustainable development. The implementation of new legislation, enhanced enforcement mechanisms, and a focus on emerging issues such as climate change, biodiversity conservation, waste management, water resource management, and animal welfare are shaping the legal landscape. As South Africa continues to navigate these challenges, the role of environmental law in ensuring a sustainable future remains paramount.

SWEDEN



Law and Practice

Contributed by:

Tove Andersson, Anders Linnerborg, Sunniva Rosqvist and Ellen Lewin

Setterwalls

Contents

1. Regulatory Framework and Law p.426

1.1 Environmental Protection Policies, Principles and Laws p.426

2. Enforcement Authorities and Mechanisms p.426

2.1 Regulatory Authorities p.426

2.2 Co-operation p.426

3. Environmental Protections p.426

3.1 Protection of Environmental Assets p.426

3.2 Breaching Protections p.427

4. Environmental Incidents and Permits p.427

4.1 Investigative and Access Powers p.427

4.2 Environmental Permits/Approvals p.427

4.3 Regulators' Approach to Policy and Enforcement p.428

4.4 Transferring Permits/Approvals p.428

4.5 Consequences of Breaching Permits/Approvals p.428

5. Environmental Liability p.428

5.1 Key Types of Liability p.428

5.2 Disclosure p.428

6. Environmental Incidents and Damage p.429

6.1 Liability for Historical Environmental Incidents or Damage p.429

6.2 Reporting Requirements p.429

6.3 Types of Liability and Key Defences p.429

7. Corporate Liability p.430

7.1 Liability for Environmental Damage or Breaches of Environmental Law p.430

7.2 Environmental Taxes p.430

7.3 Incentives, Exemptions and Penalties p.430

7.4 Shareholder or Parent Company Liability p.430

7.5 ESG Requirements p.430

7.6 Environmental Audits p.431

8. Personal Liability p.431

8.1 Directors and Other Officers p.431

8.2 Insuring Against Liability p.431

9. Insurance p.431

9.1 Environmental Insurance p.431

10. Lender Liability p.431

10.1 Financial Institutions/Lender Liability p.431

10.2 Lender Protection p.431

11. Civil Liability p.432

11.1 Civil Claims p.432

11.2 Exemplary or Punitive Damages p.432

11.3 Class or Group Actions p.432

11.4 Landmark Cases p.432

12. Contractual Agreements p.432

12.1 Transferring or Apportioning Liability p.432

12.2 Environmental Insurance p.432

13. Contaminated Land p.433

13.1 Key Laws Governing Contaminated Land p.433

13.2 Clearing Contaminated Land p.433

13.3 Determining Liability p.433

13.4 Proceedings Against Polluters p.433

13.5 Investigating Environmental Accidents p.433

14. Climate Change and Emissions Trading p.433

14.1 Key Policies, Principles and Laws p.433

14.2 Targets to Reduce Greenhouse Gas Emissions p.434

15. Asbestos and Polychlorinated Biphenyls (PCBs) p.434

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs p.434

16. Waste p.434

16.1 Key Laws and Regulatory Controls p.434

16.2 Retention of Environmental Liability p.434

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods p.435

16.4 Rights and Obligations Applicable to Waste Operators p.435

17. Environmental Disclosure and Information p.435

17.1 Self-Reporting Requirements p.435

17.2 Public Environmental Information p.435

17.3 Corporate Disclosure Requirement p.435

17.4 Green Finance p.435

18. Transactions p.436

18.1 Environmental Due Diligence p.436

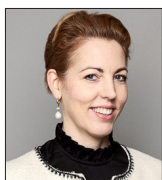
18.2 Disclosure of Environmental Information p.436

18.3 Key Issues in Environmental Due Diligence p.436

Setterwalls is a leading full-service law firm providing world-class advice across all areas of commercial law through its 315 employees in Stockholm, Gothenburg and Malmö. The environmental team works in all aspects of environmental law, advising clients on how to prevent and eliminate environmental law problems and risks related to developments, acquisitions, etc. Clients include Swedish and international companies of all sizes as well as public bodies. The firm's experience includes representing Eyrasalt Offshore AB, owned by Skyborn Re-

newables, in a permit proceeding for a new offshore wind farm with up to 286 wind turbines at a maximum height of 370 m; representing RES Renewable in a permit proceeding for a large-scale hydrogen production plant; representing Sydvatten in responding to a possible claim of EUR100–300 million in relation to community damage caused by extreme flooding; and representing Aura Energy and its Swedish subsidiary Vanadis Battery Metals on its application for a mining concession for vanadium.

Authors



Tove Andersson is a partner at Setterwalls who has worked in the field for over 20 years. She has extensive and widely recognised experience in large-scale environmental law

matters such as permit proceedings in different industries, as well as transactions in environmental and energy law matters. The energy sector, not least the wind power industry, is one of her prime focuses, including also solar power, hydrogen and grid. Further, Tove assists clients in the rock material, mining and waste sectors, among others. She has particular experience and knowledge of issues relating to species protection. Tove is a board member of Sweden's industry association for rock material (SBMI).



Anders Linnerborg is a partner at Setterwalls who has worked in the field for about 35 years. He has vast experience and is renowned for his work relating to industry, energy, water,

infrastructure, materials and minerals, etc. His work includes permit processes, legal advice in relation to questions on environmental liability and advice in commercial transactions. Notably, Anders has unique and unmatched experience and knowledge when it comes to legal issues relating to contaminated land and water supply. He is today one of the most experienced lawyers in the minerals industry field, where he has been a key figure since early 2000.

Contributed by: Tove Andersson, Anders Linnerborg, Sunniva Rosqvist and Ellen Lewin, **Setterwalls**



Sunniva Rosqvist has been an associate at Setterwalls since 2017 and a member of the Swedish Bar Association since 2024. She works in all matters concerning environmental law, advising clients on environmental risk in M&A, environmental permit and notification procedures, and supervisory matters, and answering general questions of legal and strategic importance. As a member of Setterwalls' environmental law team, Sunniva regularly advises clients in the energy, waste, rock material, infrastructure and food industries, to name a few. She is a member of the board of a non-profit association for young professionals in the environmental sector (Föreningen för unga inom miljö).



Ellen Lewin is an associate at Setterwalls who has worked in the field for about four years. Ellen helps clients with permit applications and notifications under Swedish environmental law; assists in issues related to contaminated land, waste management, and chemicals, etc; conducts liability assessments; engages in contract drafting and interpretation; and provides legal guidance in other aspects of environmental law.

Setterwalls

PO Box 4501
203 20 Malmö
Sweden

Tel: +46 10 690 04 00
Fax: +46 10 690 04 70
Email: malmö@setterwalls.se
Web: www.setterwalls.se



SETTERWALLS

1. Regulatory Framework and Law

1.1 Environmental Protection Policies, Principles and Laws

At the centre of Swedish environmental legislation is the Swedish Environmental Code (*miljöbalken*), which regulates key policies and principles for environmental protection. There are a large number of ordinances and regulations (*förordningar och föreskrifter*) under the code. Besides this core environmental legislation, there is sectoral legislation which regulates specific areas, such as physical planning, extraction of natural resources, transportation, and ionising radiation. Additionally, there are laws and general legal principles that do not regulate the environment directly but still have an impact on its quality (eg, rules relating to property protection and right of public access).

2. Enforcement Authorities and Mechanisms

2.1 Regulatory Authorities

In Sweden, laws are enacted by parliament, while ordinances are issued by the government, and environmental regulations are issued by authorities such as the Swedish Environmental Protection Agency (*Naturvårdsverket*).

Several authorities are responsible for environmental supervision but the county administrative board (*länsstyrelsen*) or the municipality is often the main supervisory authority for environmentally hazardous activities (*miljöfarlig verksamhet*).

Certain, less impactful, environmental activities are often reviewed by the environmental permit office at the county administrative board (*miljöprövningsdelegationen inom länsstyrelsen*) or by the municipality.

Within the general courts, there are special land and environmental courts that handle the more impactful environmental activities, including water activities (*vattenverksamhet*) as well as general environmental law cases. The final and precedent-setting instance for environmental law cases is often the Land and Environmental Court of Appeal, but in some cases the Supreme Court or government.

2.2 Co-operation

The authorities collaborate and co-ordinate in various ways to optimise environmental supervision and to effectively handle complex environmental issues. They share information, co-ordinate and streamline supervisory measures, and strive to unify policy development. Both in legislative matters as well as consultation processes for specific activities and measures, various authorities with different areas of expertise are normally heard.

3. Environmental Protections

3.1 Protection of Environmental Assets

There are laws and rules that specifically aim to protect various environmental assets, such as the area and species protection rules. There are also environmental quality standards (*miljökvalitetsnormer*) which regulate the quality of land, water, air and the environment. Further, activities that can impact or alter the environment have to undergo permit, notification or consultation procedures and may require special approvals and/or exemptions before initiation. Through such procedures, their impact on the environment can be reviewed and regulated on a case-by-case basis.

3.2 Breaching Protections

Violations of law may result in administrative legal consequences such as revocation of permits, environmental sanction fees (*miljösanktionsavgifter*), injunctions or prohibitions (*förelägganden och förbud*). Certain breaches could lead to criminal penalties or an obligation to pay damages.

4. Environmental Incidents and Permits

4.1 Investigative and Access Powers Supervisory Authorities

Supervisory authorities have broad authority to investigate and address environmental incidents and breaches of laws or permits. However, the supervision must aim to ensure the purpose of the applicable rules, and any measures taken must always be proportionate. Supervisory powers include conducting inspections, accessing sites, collecting samples, reviewing records, and issuing orders to cease harmful activities or take corrective actions.

It should be noted that the supervisory authority is obliged to report violations of the law immediately to the police or the public prosecutor's office, if there is reason to believe that a crime has been committed.

Permitting Authorities

Permitting authorities do not have hands-on investigative powers in the same sense as supervisory authorities do, but can reconsider and amend or revoke permits (eg, if a permit has not been followed). Permit reconsiderations cannot lead to amendments that are so intrusive that the permitted operation cannot be carried out, or its performance is made significantly more difficult. Revocation of a permit can be partial or

full. Any decision to amend or revoke a permit must always be proportionate. Since reconsideration of a permit is less intrusive for the operator than revocation, reconsideration should first be assessed.

Regulatory bodies can introduce new rules to address identified problems but cannot target specific activities and/or incidents.

4.2 Environmental Permits/Approvals Permit Requirements

There are different types of permits and approvals for different types of activities, but the main permit type is an environmental permit required for an operation or other activity classified as environmentally hazardous (*miljöfarliga verksamheter*). The permit requirement is regulated in the Environmental Assessment Ordinance (2013:251) (*miljöprövningsförfordningen*) and the Ordinance (1998:899) on Environmentally Hazardous Activities and Health Protection (*förfordningen om miljöfarlig verksamhet och hälsoskydd*). Permits are obtained through an application process that includes consultations with the public and an environmental impact assessment (EIA).

Appealing a Permit

A permit can be appealed by a natural or legal person whom the judgment or decision concerns, if the decision goes against them. This includes both the person to whom the decision is addressed and people in the surrounding area that are affected by the decision. Environmental organisations and other organisations have the right to appeal permit decisions in accordance with the above and in accordance with the principles set out in the Aarhus Convention. A permit can also be appealed by authorities that are affected by the permitted activities, in accordance with the above, as well as by authorities

that have been given specific right to appeal by law. The right to appeal permit decisions is not affected by whether the person expressed an opinion in the decision-making process or argued the case in the first instance.

Government Review

There is currently a government review of how to make the environmental permit process shorter and more efficient in Sweden. The aim of the review is to achieve competitiveness and increase willingness to invest in and promote an effective industrial climate transition, which contributes to the achievement of the country's climate and environmental goals. The assignment is to be reported by 15 December 2024.

4.3 Regulators' Approach to Policy and Enforcement

Legislation, self-control, supervision and guidance from the relevant authorities are the key tools used to enforce environmental policy and to achieve its purpose in Sweden.

4.4 Transferring Permits/Approvals

Environmental permits/approvals can be transferred to another person or legal entity.

If an activity which is subject to a permit or notification requirement is conducted by a new person or entity, the new operator (*verksamhetsöware*) must inform the supervisory authority of the changed circumstances as soon as possible according to Section 32 of the Ordinance (1998:899) on Environmentally Hazardous Activities and Health Protection.

Only permits can be transferred. Supervisory decisions are issued and directed to specific operators and do not apply to new operators. Such decisions can therefore not be transferred. Instead, the supervisory authority can issue a

new decision to a new operator upon receipt of notification of transfer of the operation in accordance with the above. The new decision may be identical to the previous decision, or it may include new precautionary measures.

4.5 Consequences of Breaching Permits/Approvals

Violations of environmental permits or approvals can lead to supervisory review and supervisory injunctions and prohibitions which can limit the operator's ability to carry out the permitted or approved activities. However, injunctions and prohibitions must always be proportionate and may not limit a permit that has legal force (*rättskraft*).

In serious cases, issued permits can be revoked entirely, see 4.1 Investigative and Access Powers.

Violations may also lead to environmental sanction fees, penalties and/or obligation to pay damages.

5. Environmental Liability

5.1 Key Types of Liability

There are three types of liability:

- civil liability for damages;
- administrative liability for non-compliance with regulations, permits or supervisory decisions; and
- criminal liability for certain violations.

5.2 Disclosure

Besides general corporate reporting obligations, the following should be mentioned:

- Issues may need to be disclosed in connection with environmental control, for example, if the supervisory authority requests certain information during an inspection. Non-disclosure could lead to administrative sanctions or criminal liability for obstruction of environmental control (*försvårande av miljökontroll*).
- Environmental reports (*miljörapport*) must be submitted by 31 March each year on operations and activities covered by environmental permits, and certain issues may have to be disclosed. An annual report (*årsrapport*) may also be required on activities covered by notification requirements. In the event of a missing or overdue environmental report, an environmental sanction fee will be imposed.
- According to the Ordinance (1998:901) on Self-Control (*förordningen om verksamhetsutövers egenkontroll*), a certain self-control is required for operations and activities covered by environmental permits or notification requirements. The ordinance requires that if an operational disruption or similar event occurs in the business that may lead to inconvenience for human health or the environment, the operator must immediately notify the supervisory authority of this. This is linked to criminal liability.

6. Environmental Incidents and Damage

6.1 Liability for Historical Environmental Incidents or Damage

New operators and landowners can be liable for historical environmental incidents or damage but can direct recourse claims against previous operators. The main legislation regarding this can be found in Chapter 10 of the Environmental Code.

6.2 Reporting Requirements

The requirement to submit an annual environmental report (or annual report) is the main environmental reporting requirement, see 5.2 Disclosure.

6.3 Types of Liability and Key Defences

Persons or entities responsible for environmental incidents or damage can be liable to perform investigations and to carry out remediation and restoration measures. They can suffer administrative consequences such as revocation of permits, prohibitions and environmental sanction fees. Certain breaches could lead to criminal penalties or an obligation to pay damages.

Environmental Damages Under Chapter 10 of the Environmental Code

Environmental damages which, through contamination of a land or water area, groundwater, a building or a facility, can cause damage or inconvenience to human health or the environment are covered by Chapter 10 of the Environmental Code. Past and previous operators and property owners have specific responsibilities for such damages. The person or entity responsible for this sort of environmental damage can argue that the responsibility should be limited or waived for some reason, for example, with regard to subjective and/or objective circumstances or that the responsibility should be adjusted (*jämkning*). Recourse claims can also be directed against other responsible parties, regarding their part in the incident or damage. It should be noted that the responsibility under Chapter 10 of the Environmental Code does not become statute-barred.

Civil Claims Under Chapter 32 of the Environmental Code

Besides claims for non-contractual damage compensation, affected parties can bring civil

claims for damages against parties responsible for contamination in accordance with Chapter 32 of the Environmental Code. In a civil claim, the affected party must show that damage has been caused by an activity on a property, that there is an adequate causal connection, and that the injury should not reasonably be tolerated if it is local or common (*orts- eller allmänvanlig*). A pure economic loss that has not been caused by a crime is compensated only if the injury is of some significance. Special rules apply for contamination caused by activities conducted in accordance with a permit for water operations. In these cases, the responsible party can argue that the responsibility should be limited or waived for other reasons than in a case regarding responsibility under Chapter 10 of the Environmental Code, for example, with regard to a prescriptive period (*preskriptionstid*).

7. Corporate Liability

7.1 Liability for Environmental Damage or Breaches of Environmental Law

Corporate entities are generally subject to the same rules as private individuals, see 6.3 **Types of Liability and Key Defences**.

If an environmental crime is committed during business activities, it is the company's management that is criminally liable (ie, the board and the director). However, a corporate fine (*företagsbot*) is often the only relevant consequence of a breach of environmental law. Normally, only in more serious cases or cases concerning an act that was committed intentionally, will individual personal liability for the management come into question. The corporate fine amounts to a minimum of SEK5,000 and a maximum of SEK10 million.

7.2 Environmental Taxes

In Sweden, primarily the following environmental taxes and fees apply:

- energy taxes – energy tax on electricity, carbon dioxide tax, tax on fuels, emission permits, and sulphur tax;
- transport taxes – vehicle tax, congestion tax, tax on air travel (proposed to cease to apply from 1 January 2025), and road charges;
- taxes on pollution – tax on chemicals, NOx fee, tax on waste, tax on insecticides, tax on chemicals, and fee for chemical products; and
- taxes on natural resources – natural gravel tax.

7.3 Incentives, Exemptions and Penalties

This is not applicable in Sweden.

7.4 Shareholder or Parent Company Liability

The “polluter pays” principle (PPP) is central in Swedish environmental legislation. The principle dictates that polluters should bear the costs for the effects of their pollution and for any measures required to prevent, limit and remedy these effects. In line with this principle, the entity primarily held responsible for environmental damage or breaches of environmental law is the operator of the business or activity that caused the damage or committed the violation. Parent companies and shareholders can be held responsible if they are considered operators.

7.5 ESG Requirements

Sweden's ESG requirements incorporate national and international legislation and voluntary guidelines to ensure corporate responsibility and promote sustainable development. There are several reporting requirements relating to ESG-requirements.

ESG reporting must be done in line with the Swedish implementation of the EU Corporate Sustainability Reporting Directive (CSRD), which requires certain companies to report and disclose ESG information as part of their annual accounts. The report must contain the information needed to understand the company's impact on sustainability issues and how these affect the company. The sustainability report must be prepared in accordance with EU reporting standards, the so-called European Sustainability Reporting Standards (ESRS). The Swedish Financial Supervisory Authority (*Finansinspektionen*), monitors compliance with the reporting requirements in Sweden. Administrative sanctions as well as criminal liability are possible consequences for non-compliance. As the reporting is part of the annual accounts, the board is responsible for the annual accounts being prepared in accordance with the reporting requirements.

7.6 Environmental Audits

The environmental law requirement to submit an annual environmental report (or in some cases, an annual report) is the main environmental audit requirement, see 5.2 Disclosure. There are general tax audit requirements related to environmental tax, but these are not labelled environmental audits.

8. Personal Liability

8.1 Directors and Other Officers

If an environmental crime is committed by a company during business activities, the company's management will be criminally liable, see 7.1 Liability for Environmental Damage or Breaches of Environmental Law.

8.2 Insuring Against Liability

Insurance can be taken out by companies for employees and representatives of the company. Several providers offer insurance subject to their individual terms and conditions.

9. Insurance

9.1 Environmental Insurance

Several providers offer insurance subject to their individual terms and conditions, but exemptions often apply when it comes to environmental law matters. Companies that seek legal advice from law firms can get assistance with applying for insurance coverage.

There is no compulsory environmental insurance. However, for certain activities, there are requirements to provide financial security (*ekonomisk säkerhet*). The aim of this is to protect society from having to bear the cost of remediation in situations where the responsible operator has gone bankrupt or for some other reason cannot fulfil their obligations.

10. Lender Liability

10.1 Financial Institutions/Lender Liability

The entity in actual and legal control of the business, that is, the operator, can be liable for environmental damage caused by the business. Consequently, a financial institution/lender cannot be liable for environmental damage or breaches of environmental law unless it has some form of actual or legal control of the business.

10.2 Lender Protection

Loan agreements typically include limitations of liability for the lender.

11. Civil Liability

11.1 Civil Claims

Civil claims for compensation or other remedies can be brought in cases where individual persons or legal entities have suffered damage due to environmental incidents or violations of laws. These claims may concern compensation for property loss or damage, health impacts, or economic losses. Affected parties can bring civil claims for non-contractual damage compensation. They can also bring civil claims for damages in accordance with Chapter 32 of the Environmental Code, see 6.3 Types of Liability and Key Defences.

11.2 Exemplary or Punitive Damages

This is not applicable in Sweden.

11.3 Class or Group Actions

This is possible when multiple plaintiffs have suffered similar damage from a common source of pollution or contamination.

11.4 Landmark Cases

There are several landmark cases that have shaped and developed environmental liability law in Sweden, for example, cases that address adequate causality, burden of proof, reasonableness assessment, and liability rules in contractual relationships. As these cases illustrate how different types of environmental damage and compensation for such damage have been handled in case law, they are central to understanding how environmental liability law is applied in Sweden.

In the Land and Environmental Court of Appeal's judgment on 18 January 2022, the court considered that the City of Stockholm, during the reconstruction of Slussen, caused a restaurant pure economic loss through noise, vibrations,

and accessibility disturbances. The disturbances were not considered to be such that they should reasonably be tolerated, given the conditions in the area or their general occurrence. The fact that the reconstruction project constituted a socially beneficial activity and that the municipality made significant efforts to minimise the negative effects of the disturbances did not mean that the restaurant should have to tolerate the disturbances that occurred and the damage caused by them. Therefore, the municipality was obliged to compensate the restaurant for the damage, which amounted to a total of SEK18,570,000.

12. Contractual Agreements

12.1 Transferring or Apportioning Liability

Asset transfer agreements or share purchase agreements usually include warranties and, if needed, specific indemnities in respect of environmental and permitting issues. Such indemnities concern specific issues and are usually contractually limited in time and amount. The responsibility in accordance with public law can, as such, not normally be altered, although agreements/indemnities are binding between the contractual parties.

12.2 Environmental Insurance

Several providers offer insurance subject to their individual terms and conditions. It can cover costs of judicial proceedings, contamination clean-up costs, third-party claims for damages, and regulatory fines, etc. However, exemptions often apply when it comes to environmental law matters. Companies that seek legal advice from law firms can get assistance with applying for insurance coverage.

13. Contaminated Land

13.1 Key Laws Governing Contaminated Land

The key legislation is Chapter 10 of the Environmental Code, which contains provisions that regulate the responsibility of operators and property owners for contaminated land. The general approach taken by regulatory authorities to remediation requirements is that the requirements should involve thorough assessment of the contamination, followed by the implementation of necessary measures to mitigate and remediate the contamination.

13.2 Clearing Contaminated Land

The main rule is that the one who conducts or has conducted the activity (the operator) or has taken an action that has contributed to the contamination, is responsible for investigation and remediation. A property owner can also be held responsible. The responsibility can be delegated to another party through contractual agreements but not always with certain effect in relation to the public, that is, criminal liability and regulatory law obligations.

13.3 Determining Liability

When more than one party has contributed to contamination, liability is finally determined based on the extent of each party's contribution to the contamination. The reviewing authorities assess the degree of involvement and the impact of each party's actions to apportion liability accordingly. This ensures that all responsible parties are held accountable for their respective contributions to the contamination. However, under certain circumstances, contractual agreements may be taken into account.

13.4 Proceedings Against Polluters

Any member of the public can initiate a supervisory matter which can lead to proceedings against polluters/landowners/occupiers by those affected by contamination. Anyone can also report an environmental crime and, if affected by the crime, be a plaintiff in a criminal case.

Affected parties can also bring civil claims for damages against parties responsible for contamination in accordance with Chapter 32 of the Environmental Code, see **6.3 Types of Liability and Key Defences**.

13.5 Investigating Environmental Accidents

Supervisory authorities play a key part in the investigation process. Investigations involve some form of incident reporting followed by site inspections or other investigations aimed at identifying causes and responsible parties while ensuring that corrective measures and/or preventative actions are taken accordingly. Chapter 26 of the Environmental Code contains provisions that can be applied by supervisory authorities to impose requirements for investigations and examinations of suspected contamination on those responsible.

14. Climate Change and Emissions Trading

14.1 Key Policies, Principles and Laws

Sweden adopted a climate policy framework in 2017, consisting of a Climate Act, a Climate Policy Council, and climate goals according to which Sweden is to achieve net-zero emissions by 2045. The Climate Act entails an obligation for the government to pursue a policy based on the climate goals and to regularly report on progress. According to the Climate Act, the gov-

ernment must develop a climate policy action plan every four years to show how its policies contribute to achieving the emission targets. The first climate action plan was submitted in 2019 and the second one in 2023.

As an EU member state, Sweden is part of the EU emissions trading system (EU ETS). ETS 1 regulates the trading of emission allowances for carbon dioxide emissions from manufacturing industries and installations that produce electricity and heat, as well as airline operators and shipping companies. The EU rules for ETS 2 have recently been decided and the Swedish law and regulation on ETS 2 came into force in November 2024. ETS 2 regulates the trade of emission allowances for carbon dioxide emissions from the combustion of fuels from road transport, residential, and commercial or public buildings. It also includes parts of the energy, manufacturing and construction industries that were not previously covered by the EU ETS. The trading of emission allowances under ETS 2 will start in 2027, but there will be requirements for permits for greenhouse gas emissions from 1 January 2025, and emissions must then also be monitored and reported. Under ETS 2, businesses requiring a permit must have submitted an application to the Swedish Environmental Protection Agency by 31 December 2024 at the latest, to be allowed to conduct their fuel operations after 1 January 2025.

14.2 Targets to Reduce Greenhouse Gas Emissions

The long-term goal is that Sweden should have no net emissions of greenhouse gases into the atmosphere by 2045 and thereafter achieve negative emissions.

15. Asbestos and Polychlorinated Biphenyls (PCBs)

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs

There is legislation aimed at minimising the use of and impact from asbestos and PCBs. Asbestos and PCBs are regulated by environmental and occupational health and safety laws. The regulation (2007:19) on PCBs, etc, prohibits the handling of PCB goods, with certain exceptions, and imposes requirements for the notification and decontamination of equipment containing PCBs. The municipalities, county administrative boards and the Swedish Environmental Protection Agency can guide operators on questions relating to PCBs and asbestos.

16. Waste

16.1 Key Laws and Regulatory Controls

There are several Swedish laws and regulatory controls governing waste. The main provisions on waste are found in Chapter 15 of the Environmental Code and the Waste Ordinance (2020:614) (*avfallsförordningen*)

16.2 Retention of Environmental Liability

There are situations in which a producer or consignor of waste can retain certain liability after waste has been disposed of by a third party. Producers of waste have specific responsibilities. Furthermore, according to Chapter 5 Section 18 of the Waste Ordinance, anyone who produces or handles waste in a professional activity must ensure that recipients of their waste have made the necessary notifications or hold the required permits for handling the waste. If the waste is not handed over to someone who is permitted to conduct such operations and assume responsibility for the waste, the original producer or

handler can remain responsible, for example, for pollution caused by the disposed waste.

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

There are several rules regulating the responsibilities of producers of goods. The rules are based on the “polluter pays” principle, but the requirements differ for different types of products. Certain rules require the producer to design and label their products in specific ways, others require the producer to collect products once they become waste and to ensure that they are recycled or otherwise disposed of accordingly. For some products, the producer is responsible for paying for collection in public systems.

16.4 Rights and Obligations Applicable to Waste Operators

Waste operators have a range of rights and obligations under waste management regulations. Operators must comply with regulations governing waste treatment activities which, among other things, ensure that their activities do not harm human health or the environment, and they must maintain accurate records and documentation. They must also obtain the necessary permits and authorisations, which regulate their specific rights and obligations. Violations can have several consequences, such as revocation of permits and authorisations, enforcement and remediation action, penalties or fines, lawsuits or criminal charges.

17. Environmental Disclosure and Information

17.1 Self-Reporting Requirements

See 5.2 Disclosure.

17.2 Public Environmental Information

The Freedom of the Press Act (*tryckfrihetsförordningen*) gives the public access to documents from public authorities, including documents containing environmental information, provided that they are not covered by the Public Access to Information and Secrecy Act (*Offentlighets- och sekretesslagen*). Public authorities are defined as any body within the state or regional organisation. Some bodies are considered authorities according to the Aarhus Convention, but not under Swedish national law. For these specific bodies, access to environmental information is provided through the Environmental Information from Certain Private Bodies Act (2005:181) (*lag om miljöinformation hos vissa enskilda organ*). The Swedish Environmental Protection Agency is responsible for providing the public with information on where to locate environmental information. Its web page ([Naturvårdsverket](#)) contains links to different government authorities’ web pages and explanations of what can be found on these pages.

17.3 Corporate Disclosure Requirement

Under the Annual Accounts Act (1995:1554) (*årsredovisningslagen*), corporations are required to include a sustainability report in their annual reports. The sustainability report must contain environmental information about the company’s impact on issues relating to the environment.

See also 5.2 Disclosure.

17.4 Green Finance

Loans or bonds can be labelled green loans/bonds if the proceeds are to be used for projects with environmental benefits. Such green labelling is often based on internal guidelines which are based on international market standards such as the Green Bond Principles established by the International Capital Market Association (ICMA).

To further promote green industrial investments, the Swedish National Debt Office has been mandated by the Swedish government to provide state credit guarantees to credit institutions that offer green loans meeting specific requirements.

In December 2024, the EU's European Green Bond Standard will start to apply for bond issuers who wish to use the designation "European Green Bond" or "EuGB" for their bond. The Swedish government has proposed introducing new legislation, among other things, to monitor compliance with the regulation.

Since 2020, the so-called "EU taxonomy" has applied to Swedish credit institutions.

In addition, there are several state and EU-funded grants earmarked for projects and businesses that support climate transition.

18. Transactions

18.1 Environmental Due Diligence

Whether environmental due diligence is conducted in connection with a transaction depends on the business of the target company. In Sweden, environmental due diligence is typically conducted in connection with transactions concerning energy and industrial projects (eg, wind, solar, water, hydrogen or battery projects, as well as industries) and properties, as well as bank financing contemplated for such projects.

The scope of legal environmental due diligence varies depending on the status of the project. Typically, the due diligence includes conducting a review of the project rights, that is, if all the necessary permits have been obtained for

the construction and operation of the business, and if the permit holder complies with such permits and environmental law. Depending on the scope and content of the purchase, liability issues relating to contamination of land would also be included.

18.2 Disclosure of Environmental Information

The Swedish Land Code (*Jordabalken*) and the Swedish Sale of Goods Act (1990:931) (*köplagen*) include a duty for a seller to inform a purchaser of certain information about the property/goods (*upplysningsplikt*), which could require a seller to disclose environmental information to a purchaser.

In addition, transaction agreements concerning the sale and purchase of shares/other assets typically include warranties pursuant to which the seller warrants that it has provided the purchaser with a complete and true picture of the target/property and its business, which, if relevant, includes the disclosure of environmental information.

18.3 Key Issues in Environmental Due Diligence

The most common environmental legal issues that arise in Sweden within the context of a transaction, concern processing errors in connection with the permit, issues and difficulties relating to permit fulfilment and compliance, as well as questions relating to contemplated operational changes after completion of the transaction (eg, increase of production or something similar). In addition, again depending on the transaction, liability issues relating to contamination of land might also be included.

USA – ARIZONA



Law and Practice

Contributed by:

Trevor Burggraff, Brandon Curtis, Eric Hiser and Matt Joy
Hiser Joy

Contents

1. Regulatory Framework and Law p.441

1.1 Environmental Protection Policies, Principles and Laws p.441

2. Enforcement Authorities and Mechanisms p.441

2.1 Regulatory Authorities p.441

2.2 Co-operation p.441

3. Environmental Protections p.442

3.1 Protection of Environmental Assets p.442

3.2 Breaching Protections p.442

4. Environmental Incidents and Permits p.442

4.1 Investigative and Access Powers p.442

4.2 Environmental Permits/Approvals p.442

4.3 Regulators' Approach to Policy and Enforcement p.443

4.4 Transferring Permits/Approvals p.443

4.5 Consequences of Breaching Permits/Approvals p.443

5. Environmental Liability p.444

5.1 Key Types of Liability p.444

5.2 Disclosure p.444

6. Environmental Incidents and Damage p.445

6.1 Liability for Historical Environmental Incidents or Damage p.445

6.2 Reporting Requirements p.445

6.3 Types of Liability and Key Defences p.445

7. Corporate Liability p.446

7.1 Liability for Environmental Damage or Breaches of Environmental Law p.446

7.2 Environmental Taxes p.446

7.3 Incentives, Exemptions and Penalties p.446

7.4 Shareholder or Parent Company Liability p.446

7.5 ESG Requirements p.446

7.6 Environmental Audits p.446

8. Personal Liability p.446

8.1 Directors and Other Officers p.446

8.2 Insuring Against Liability p.447

9. Insurance p.447

9.1 Environmental Insurance p.447

10. Lender Liability p.447

10.1 Financial Institutions/Lender Liability p.447

10.2 Lender Protection p.447

11. Civil Liability p.448

11.1 Civil Claims p.448

11.2 Exemplary or Punitive Damages p.448

11.3 Class or Group Actions p.449

11.4 Landmark Cases p.449

12. Contractual Agreements p.449

12.1 Transferring or Apportioning Liability p.449

12.2 Environmental Insurance p.449

13. Contaminated Land p.449

13.1 Key Laws Governing Contaminated Land p.449

13.2 Clearing Contaminated Land p.449

13.3 Determining Liability p.450

13.4 Proceedings Against Polluters p.450

13.5 Investigating Environmental Accidents p.450

14. Climate Change and Emissions Trading p.450

14.1 Key Policies, Principles and Laws p.450

14.2 Targets to Reduce Greenhouse Gas Emissions p.450

15. Asbestos and Polychlorinated Biphenyls (PCBs) p.451

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs p.451

16. Waste p.451

16.1 Key Laws and Regulatory Controls p.451

16.2 Retention of Environmental Liability p.451

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods p.451

16.4 Rights and Obligations Applicable to Waste Operators p.452

17. Environmental Disclosure and Information p.452

17.1 Self-Reporting Requirements p.452

17.2 Public Environmental Information p.452

17.3 Corporate Disclosure Requirement p.452

17.4 Green Finance p.452

18. Transactions p.452

18.1 Environmental Due Diligence p.452

18.2 Disclosure of Environmental Information p.453

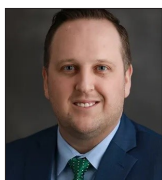
18.3 Key Issues in Environmental Due Diligence p.453

Contributed by: Trevor Burggraff, Brandon Curtis, Eric Hiser and Matt Joy, **Hiser Joy**

Hiser Joy is an environmental law firm focusing on permitting, compliance, litigation and sustainability. Based in Phoenix, AZ, **Hiser Joy** assists clients across North America. **Hiser Joy** serves client needs in environmental, administrative/regulatory law, environmental litigation and sustainability. Whether clients are in the initial stages of project planning and permitting, in mid-production or seeking continuing compliance education for their teams, **Hiser Joy** provides the legal guidance and direction necessary to address these matters. While the

firm's goal is to provide legal advice to avoid administrative hearings or litigation, its attorneys have extensive experience before numerous hearing boards and courts around the country and can assist at all stages. **Hiser Joy** has provided national and international representation for, among others, Nucor Corporation, ASARCO, Inc, Lhoist North America, Hudbay, Arizona Electric Power Cooperative and Arizona Utilities Group, as well as local representation for Maricopa County, the City of Phoenix and the City of Mesa.

Authors



Trevor Burggraff is a partner with **Hiser Joy** and leads the sustainability and compliance audit practice groups. Trevor practices in the areas of environmental compliance,

permitting and litigation, as well as advising on federal, state and local air programmes; stormwater and SPCC compliance; and hazardous waste. He has appeared in administrative appeals and state and federal courts, and has advised local administrative boards. Trevor assists clients with internal auditing and continuing education programmes. He is the past chair of the state Bar's Environmental and Natural Resources Law Section and a member of Arizona State University Law School's Council on Law and Sustainability Studies.



Brandon Curtis is a partner with **Hiser Joy** and practices in environmental and natural resource law. He represents clients in the steel manufacturing, mining and

electric utility industries, and focuses on assisting clients through the full breadth of the air permitting process. Brandon's practice includes developing emission inventories, compiling applications, negotiating with regulatory bodies, responding to public comment and litigating permitting decisions before administrative tribunals. Brandon's practice also includes developing customised environmental training designed to improve competency across a corporation and satisfy regulatory obligations on various subjects, including CAA, CWA, RCRA, TSCA, EPCRA and HMR.

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Eric Hiser is a partner with Hiser Joy and practices in environmental, natural resources and administrative law. He regularly represents clients, ranging from government

agencies to Fortune 100 corporations, in permitting, compliance counselling and planning, environmental auditing and assessment, permit appeals and enforcement defence. He has participated in over 200 PSD and Title V permitting actions; developed state implementation plans for criteria pollutants and regional haze litigation; developed NPDES and storm water permit applications under the CWA; assisted in RCRA corrective action clean-ups and resolutions and RCRA recycling determinations at complex facilities; and aided in permittee defence matters.



Matt Joy is a partner with Hiser Joy and practices in environmental, natural resources and water quality litigation, focusing on water, waste and clean-up issues. For almost 20

years, he has advised clients in developing permitting strategies, ranging from routine to novel and complex strategies, and has obtained agency approval for hundreds of Clean Water Act permits, including discharge and “dredge and fill” permits. Matt has extensive experience in defending against and, where appropriate, negotiating settlements in, multimillion-dollar enforcement and toxic tort cases.

Hiser Joy

5080 N 40th Street
Ste 245
Phoenix
AZ 85018
USA

Tel: +480 505 3900
Fax: +480 505 3901
Email: Tburggraff@hiserjoy.com
Web: www.HiserJoy.com



HISER JOY

1. Regulatory Framework and Law

1.1 Environmental Protection Policies, Principles and Laws

Arizona administers a variety of federal and state laws designed to protect the environment. Regarding federal laws, the Environmental Protection Agency (EPA) has delegated authority to Arizona to administer the Clean Air Act, the Safe Drinking Water Act, the Clean Water Act National Pollutant Discharge Elimination System and the Resource Conservation and Recovery Act (RCRA) framework (Arizona Revised Statutes (ARS) Title 49). Arizona is required to meet minimum federal requirements but has implemented more stringent state standards. For example, in 2023, Arizona implemented a state Surface Water Protection Program (SWPP) to protect surface waters not covered by the federal “waters of the United States” definition (ARS Title 49, Chapter 2, Article 2).

At the state level, Arizona regulates state surface water appropriation and groundwater use to protect water availability and quality (ARS Title 45). Arizona also manages the Water Quality Assurance Revolving Fund (WQARF) to clean up soil and groundwater contaminated with hazardous substances (ARS Title 49, Chapter 2, Article 5). Lastly, in 2006, Arizona adopted the Renewable Energy Standard and Tariff (REST), which requires regulated electric utilities to generate 15% of their energy from renewable resources by 2025.

2. Enforcement Authorities and Mechanisms

2.1 Regulatory Authorities

The Arizona Department of Environmental Quality (ADEQ) manages and provides enforcement for three key environmental programmes:

- air quality;
- water quality; and
- waste.

In addition, the Arizona Department of Water Resources (ADWR) manages and enforces water use and permitting. Regarding renewable energy, the Arizona Corporation Commission (ACC) regulates electric utilities and enforces some aspects of energy policy. Finally, the Arizona State Land Department (ASLD) and the Arizona Game and Fish Department play an important role in protecting state-owned lands, natural resources and wildlife, and may bring civil enforcement actions through the State Attorney General's Office (AGO) environmental enforcement section.

2.2 Co-operation

ADEQ conducts periodic inspections to educate regulated parties and help prevent instances of environmental non-compliance. If an inspection reveals non-compliance or ADEQ receives complaints of alleged deficiencies, the agency will typically resolve these issues with informal tools such as a Notice of Opportunity to Correct Deficiencies (NOC) or a Notice of Violation (NOV). For special districts with limited resources, ADEQ provides additional help through its Small Communities Environmental Compliance Assistance Program.

Parties may also voluntarily co-operate with environmental protection efforts in several ways.

For example, property owners and other parties may participate in the Voluntary Remediation Program (VRP) to clean up contaminated sites and avoid ADEQ enforcement (ARS Title 49, Chapter 1, Article 5). Arizona businesses and organisations may also join ADEQ's tiered Voluntary Environmental Stewardship Program to achieve environmental compliance above state requirements in exchange for certain benefits (ARS Title 49, Chapter 5, Article 7).

3. Environmental Protections

3.1 Protection of Environmental Assets

Arizona has established a variety of statutes, regulations and agencies to protect its diverse landscapes and rich natural habitats. In addition to key air, water and waste laws, the ASLD is responsible for conserving and preserving natural resources, wildlife habitats and wilderness areas within public lands (ARS Title 37, Chapter 5, Article 1). To manage agricultural lands and protect soil health, Arizona established 41 Natural Resource Conservation Districts (ARS Title 37, Chapter 6). Furthermore, the Arizona Game and Fish Department develops and implements policies related to conservation management of over 800 native wildlife species throughout the state (ARS Title 17).

3.2 Breaching Protections

If a party breaches a federal environmental law administered by the state, EPA Region 9 shares enforcement authority with Arizona. At the state level, ADEQ has the authority to issue NOCs, NOVs, consent orders, compliance orders, abatement orders and stop-use orders. ADEQ, the ASLD, the Arizona Game and Fish Department and other state agencies administering environmental laws may also pursue civil and criminal enforcement through the AGO. Penalties

vary but may include monetary damages for restoration or for unlawfully gained economic advantages.

4. Environmental Incidents and Permits

4.1 Investigative and Access Powers

In general, Arizona agencies have broad authority to perform investigations if required procedures are followed (ARS Title 41, Chapter 6, Article 1). For example, ADEQ is authorised to perform regular announced and unannounced inspections of regulated parties. Furthermore, if ADEQ receives a complaint identifying potential violations of environmental laws, regulations or permit conditions, ADEQ may perform an inspection or refer the complaint to a more appropriate agency.

4.2 Environmental Permits/Approvals

Arizona requires environmental permits for a variety of activities. Some important activities that must be permitted include the following.

- Aquifer discharges: any party discharging pollutants that migrate into groundwater must obtain an aquifer protection permit (APP) from ADEQ (ARS Title 49, Chapter 2, Article 3).
- Surface water discharges: any party discharging pollutants into surface waters must obtain a permit from ADEQ (ARS Title 49, Chapter 2, Article 3.). Depending on the type of industry, the discharging entity may require an Arizona Pollutant Discharge Elimination System (AZPDES) general or individual permit.
- Surface water use: any party intending to obtain the right to use surface water must apply for a permit from the ADWR (ARS Title 45, Chapter 1, Article 5).

- Groundwater use: inside a state-designated active management area, any party intending to pump groundwater must obtain a groundwater withdrawal permit, unless the party is pumping from an exempt well (ARS Title 45, Chapter 2, Article 7).
- Air pollutant emissions: industrial facilities that will emit pollutants exceeding the permitting threshold must obtain an air permit from ADEQ before construction and operation (ARS Title 49, Chapter 3, Article 2).
- Hazardous waste disposal: facilities that treat, store or dispose of hazardous waste must obtain a permit from ADEQ (ARS Title 49, Chapter 5, Article 2).

ADEQ administers general permits for some common activities with relatively low potential for environmental impact. To obtain a general permit, a facility usually must submit a notice of intent (NOI) and agree to conform its conduct to pre-established limits.

ADEQ also administers individual permits for complex activities with a relatively high potential for environmental impact. To obtain an individual permit, an applicant should first meet with ADEQ to explain its plans for the facility, determine which permits are required and ask any questions. Next, an applicant will submit an application for the relevant activities. Once ADEQ receives the application, the agency will perform a substantive review of the information provided, draft a permit and issue a preliminary decision. ADEQ will then provide notice of the draft permit and preliminary decision to allow the public at least 30 days to comment. After receiving public input, ADEQ will issue a final permit or deny the permit.

If ADEQ denies a permit application, the applicant may appeal the decision through Arizona's

established administrative hearing procedures (ARS Title 41, Chapter 6, Article 10).

4.3 Regulators' Approach to Policy and Enforcement

ADEQ established and follows a substantive compliance and enforcement policy. In general, ADEQ prefers to resolve compliance issues with informal tools that help regulated entities return to compliance quickly. However, if a party poses a significant threat to public health or repeatedly violates environmental laws, regulations or permit conditions, ADEQ may require formal enforcement tools. Furthermore, if a party intentionally violates a law or attempts to deceive the agency, ADEQ is authorised to refer cases for criminal prosecution. To learn more about ADEQ's enforcement policies and procedures, visit the ADEQ Compliance Handbook.

4.4 Transferring Permits/Approvals

In general, environmental permits may not be transferred from one location to another, or from one source to another. However, with approval from ADEQ, environmental permits may be transferred from one person to another. To obtain approval, the permittee must notify ADEQ in writing and in accordance with requirements established by ADEQ. ADEQ will then determine whether the transferee can operate the facility in compliance with the existing permit as well as state laws and regulations. Denials of permit transfers are appealable under ARS Title 41, Chapter 6, Article 10.

4.5 Consequences of Breaching Permits/Approvals

If a regulated party breaches its environmental permit, ADEQ will generally perform an on-site investigation, determine the severity of the breach and choose an appropriate enforcement mechanism. If a permit violation causes sub-

stantial and imminent harm to public health, ADEQ may seek a temporary restraining order. For minor alleged deficiencies with relatively low environmental risk, however, ADEQ will use informal enforcement tools. Violations of permit conditions are considered minor by default.

5. Environmental Liability

5.1 Key Types of Liability

Operators, polluters or landowners who violate environmental laws or cause environmental damage may face administrative, civil or criminal liability. If an owner or operator intentionally misrepresents information, intentionally acts unlawfully, causes harm to human health or repeatedly violates environmental laws, regulations or permit conditions, ADEQ is authorised to issue penalties up to the statutory maximum (typically USD25,000 per day per violation). As part of a settlement, ADEQ may also require owners and operators who commit violations to complete a supplemental environmental project (SEP) to further restoration efforts. When a violation persists or presents a substantial threat to public health or the environment, ADEQ may refer the matter to the AGO for civil enforcement, which may result in a variety of remedies. ADEQ may also refer the matter to the AGO for criminal enforcement when the violation constitutes a crime.

Regarding hazardous substances, landowners are not responsible for performing or paying for clean-up for hazardous sites. However, landowners may be liable when their actions have caused or threatened the release of a hazardous substance (ARS Title 49, Chapter 2, Article 5). Landowners, owners and operators who fail to notify ADEQ of hazardous releases may be subject to civil penalties of up to USD10,000.

5.2 Disclosure

Arizona may require or encourage disclosure of environmental issues in a variety of situations, including the following.

- **Hazardous substance release:** if a facility releases a listed extremely hazardous substance, the owner or operator must immediately orally notify the community emergency co-ordinator for the local emergency planning committee of any area likely to be affected by the reportable release. Within 30 days of the release, the facility must provide a written report disclosing response actions (ARS Title 49, Article 128).
- **Water pollution:** if a facility exceeds its permitted discharge limitations but discloses the upset to ADEQ within 24 hours, the permittee may have an affirmative defence to any administrative, civil or criminal enforcement action (ARS Title 49, Chapter 2, Article 3.1).
- **Air pollution:** if a facility exceeds its permitted emissions limitations, the facility must report the excess to ADEQ. Prompt disclosure may provide an affirmative defence to any administrative, civil or criminal enforcement action (Arizona Administrative Code (AAC) § 18-2-310.01).
- **Underground storage tank release:** if an owner or operator of an underground storage tank identifies a release or a suspected release from the tank, the owner or operator must disclose the release orally or in writing to ADEQ within 24 hours. The initial disclosure must be followed by a written report within 14 days (ARS Title 49, Chapter 6, Article 1).
- **Property transactions:** property owners that have been subject to soil remediation efforts must provide written notice to the purchaser, unless the remediation attains standards for residential uses (ARS Title 33, Chapter 4, Article 3).

- Compliance audits: in general, facilities that conduct environmental audit reports can assert privilege, such that the report is not admissible as evidence or subject to discovery. However, under certain circumstances, a court or administrative judge may require disclosure of a portion of the report. Furthermore, the privilege does not apply to information required to be reported by any regulatory agency or environmental law (ARS Title 49, Chapter 10, Article 1405).

6. Environmental Incidents and Damage

6.1 Liability for Historical Environmental Incidents or Damage

The Comprehensive Environmental Response Compensation, and Liability Act (CERCLA), also known as Superfund, places responsibility for the clean-up of contaminated properties squarely on the current owner or operator (EPA). Liability is tethered to current ownership, reflecting a commitment to ensuring environmental remediation. Individuals who owned or operated a facility during the occurrence of an environmental incident bear this responsibility. Moreover, liability extends to those who owned or possessed hazardous substances and organised their disposal or transport. Certain exemptions exist for property owners if they were not engaged in hazardous substance activities, did not permit such activities, and were unaware of substances at the time of acquisition. Property owners cannot be liable if hazardous substances migrated from neighbouring properties (ARS 49-283).

6.2 Reporting Requirements

ADEQ requires that businesses report their environmental emissions and waste generation. The reporting requirements include standard federal

and state reports such as Tier II, the Toxic Release Inventory (TRI), an annual air emissions inventory, Title V Annual Compliance Certification and semiannual monitoring reports, as well as incident and other site-specific reports.

Air

Sources subject to permit requirements need to complete and submit an inventory questionnaire annually to the director of ADEQ:

- sources requiring a Class I permit under AAC R18-2-302(B) need to complete the questionnaire no later than 1 June of each year; and
- sources requiring a Class II permit under R18-2-302(B) need to complete the questionnaire no later than 1 June every three years.

Water

The Industrial Stormwater multisector general permit (MSGP) requires that data be reported to ADEQ, and the APP requires that permittees submit a NOV to ADEQ within five days of becoming aware of the incident and follow up with a written report within 30 days.

6.3 Types of Liability and Key Defences

In Arizona, liability for environmental damages can arise in the form of administrative, civil and criminal liability. Defences will depend on specific circumstances, but some common defences include the following:

- lack of knowledge – the defendant was unaware of the environmental harm;
- lack of intent – the defendant did not intend to cause environmental harm;
- act of God – the environmental damage was caused by an unforeseeable natural event, such as a hurricane or earthquake; and

- statute of limitations – if the plaintiff waits too long to file a lawsuit, the defendant may be able to avoid liability.

7. Corporate Liability

7.1 Liability for Environmental Damage or Breaches of Environmental Law

In Arizona, a corporation is generally treated as a separate legal entity unless sufficient evidence exists to disregard the corporate form (*Dietel v Day*, 492 P.2d 455, 457-58 (Arizona Court of Appeals 1972)).

7.2 Environmental Taxes

Arizona does not impose a specific environmental tax. However, the state does impose various other fees and specific taxes. For example, Arizona imposes an excise tax on underground storage tanks. The tax is levied at one cent per gallon of regulated substances placed in a tank. Exemptions exist for government-operated tanks and specific substances. Refunds are available for eligible purchasers of taxed fuels stored in non-taxable tanks, and refund claims can be assigned (ARS 49-1031). Also, owners and operators of a Class 1 Title V source permit are subject to an annual administrative fee and an emissions-based fee to ADEQ.

7.3 Incentives, Exemptions and Penalties

ADEQ has established a voluntary environmental stewardship programme that recognises and awards incentives to Arizona businesses – and other organisations – that have a good history of environmental compliance and strive to go beyond what is legally required to protect public health and the environment.

7.4 Shareholder or Parent Company Liability

Arizona generally follows traditional corporate standards for piercing the corporate veil. However, shareholders of closely held corporations can be liable for environmental damage under CERCLA.

7.5 ESG Requirements

As of today, Arizona has no ESG requirements. In 2023, Governor Katie Hobbes vetoed Senate Bill 1500, an anti-ESG measure that, if enacted, would have required the state treasurer to list all state investments by name on a public site so that all investments might be made in “the sole interest of the beneficiary taxpayer”. It is likely that Arizona will see many more anti-ESG measures.

7.6 Environmental Audits

Arizona does not have a state law that requires companies to undergo environmental audits. However, Arizona has enacted laws that stipulate elements of audit privilege in the context of encouraging environmental management systems (ARS 49-113).

8. Personal Liability

8.1 Directors and Other Officers

It is possible for directors and other officers to be personally liable for environmental damage or breaches of environmental law committed by the company if the corporate veil has been pierced, or if it has been found that an officer has breached their fiduciary duties or acted negligently, or an officer personally exercised substantial control and supervision over the project in question (ARS Title 49). Also, some federal statutes, including the Clean Air Act, specifically state that an “operator” or “responsible corpo-

rate officer” may be liable for routine environmental violations.

8.2 Insuring Against Liability

Directors and officers may obtain D&O insurance in Arizona. D&O insurance is designed to protect directors and officers from personal liability arising from their actions on behalf of the company. This insurance can cover legal fees, settlements and judgments that arise from lawsuits against directors and officers.

9. Insurance

9.1 Environmental Insurance

Although not compulsory, environmental insurance (or commercial general liability insurance policies) is available in Arizona. Also, according to ARS 49-183, insurance cannot be refused to an insured solely because the insured is participating in the voluntary clean-up programme outlined in Chapter 2, Article 5 of Title 49. Voluntary remediation programmes are available to property owners who commit to work with ADEQ to clean up a contaminated site in an expedited manner.

10. Lender Liability

10.1 Financial Institutions/Lender Liability

Lenders who hold a “security interest” in property are generally exempt from liability for environmental contamination on a property as long as they do not participate in the management of the facility and do not add to or make the contamination worse (ARS 49-283). CERCLA has also established a carve-out for lenders where the lender holds indications of ownership to pro-

tect a security interest, without participating in management of the secured asset.

10.2 Lender Protection

As a lender looking to avoid liability risk, it is important to follow best practices as outlined in Title 49. Some examples include the following.

- Maintain an indicia of ownership for security interest only:
 - (a) ensure that your ownership interest in the property is solely for the purpose of protecting a security interest; and
 - (b) do not participate in the management of the facility - clearly define and limit your role to securing your financial interest.
- Avoid intentional misconduct or gross negligence:
 - (a) exercise due diligence and adhere to ethical standards to avoid intentional misconduct or gross negligence; and
 - (b) implement robust risk management practices and policies to prevent any actions that could contribute to environmental issues.
- Disclosure of the presence of hazardous substances:
 - (a) if you are aware of the presence of hazardous substances, disclose this information to the facility’s purchaser during the sale or divestiture of the property or security interest.
- Environmental assessment:
 - (a) conduct a Phase I environmental assessment of the facility in accordance with standards adopted by a rule pursuant to subsection K of ARS 49-283; and
 - (b) ensure that the assessment is completed at the time of or a reasonable time before foreclosure, particularly for non-residential properties.
- Co-operate with regulatory authorities:

- (a) provide reasonable access to the regulatory authorities for necessary remedial actions; and
- (b) undertake reasonable steps to control access to areas with known hazardous substances to protect public health, welfare and the environment.
- Diligent sale or divestment:
 - (a) act diligently to sell or otherwise divest property within two years of the lender's possession or ownership, whichever is earliest.
- Fiduciary appointments:
 - (a) if acting as a fiduciary, ensure that your appointment is not for the sole purpose of avoiding liability under the article; and
 - (b) avoid intentional misconduct or gross negligence that contributes to the release or threatened release of hazardous substances.
- Avoid conflict of interests:
 - (a) if you are a fiduciary, avoid being both a fiduciary and a grantor of the same fiduciary estate.

11. Civil Liability

11.1 Civil Claims

There are some circumstances in which civil claims for compensation or other remedies can be brought. Depending on the issue, environmental lawsuits may be brought in federal or state court. State or federal environmental statutes could be at issue, or lawsuits could be against state or federal government agencies or private entities (like corporations). The major requirement that must be met to bring an environmental lawsuit is legal standing. "Legal standing" means the party has the right to challenge an action in court. The US Supreme Court established the constitutional test for legal standing in environ-

mental cases in *Lujan v Defenders of Wildlife* (1992). In this case, the Court established three elements for standing:

- the plaintiff must experience an actual, concrete injury-in-fact;
- there must be causation between the plaintiff's injury and the defendant's conduct; and
- the plaintiff's injury must be one that the Court can redress.

This test is fairly strict and is the primary test for determining whether claims can be brought.

11.2 Exemplary or Punitive Damages

Exemplary or punitive damages may be awarded in a lawsuit in situations where a defendant's acts were malicious, violent, oppressive, fraudulent, wanton or grossly reckless. Punitive damages may be awarded in environmental cases, although not often. One example is that punitive damages may be sought when Superfund money has been spent as a result of non-compliance with an administrative order. The US Supreme Court has held that there may be situations in which punitive damages are so excessive that the US Constitution is violated. The Court established a test to determine this in *BMW of North America, Inc. v Gore* (1996). The first element is "the degree of reprehensibility" of the conduct, determining how offensive or undesirable the conduct was. The next element is the ratio between the punitive damages and the compensatory damages awarded to the plaintiff. The third and final factor is the amount of civil or criminal penalties that could be imposed on a party for similar misconduct. Arizona law makes it very difficult to sue for punitive damages in most cases. The current standard in Arizona to decide whether a plaintiff may receive punitive damages is determining whether the per-

son responsible was acting with an “evil mind”, which amounts to a malicious intent.

11.3 Class or Group Actions

An environmental class-action lawsuit allows a larger group of individuals, who have all separately suffered the same or similar harm from the same or similar cause, to sue those parties responsible. For example, a community that has experienced health issues from air pollution may file suit together against the polluter in a single legal action.

11.4 Landmark Cases

There is no applicable information in this jurisdiction.

12. Contractual Agreements

12.1 Transferring or Apportioning Liability

Indemnities and other contractual agreements can be used to transfer or apportion liability for incidental damage or breaches of law. An indemnification clause is required in all state contracts so that the responsibility for claims that may arise out of the course and scope of the contract shall be transferred to the contractor. Indemnity and insurance provisions may apply to certain co-operative parties when a statewide contract is used.

More information can be found in the [Insurance and Indemnification Guidelines for State of Arizona Contracts](#).

12.2 Environmental Insurance

There are multiple firms offering environmental insurance in Arizona. Environmental insurance (also known as pollution insurance or pollution coverage) provides coverage for loss or dam-

ages resulting from unexpected releases of pollutants typically excluded in general liability and property insurance policies. The losses or damages covered by environmental insurance usually arise in the form of claims against insureds for bodily injury, property damage, clean-up costs and business interruption. Standard general liability and property insurance policies exclude most losses connected to pollution, with very few exceptions. Environmental insurance can be particularly helpful if a company faces long-term risks, such as historic contamination that resulted from business operations in the past but can cause damage now. Many environmental insurance policies also cover the costs of defending claims, regardless of whether they result in a damages award.

13. Contaminated Land

13.1 Key Laws Governing Contaminated Land

“Contamination” is a negative impact on any person, object or area caused by a hazardous substance, hazardous waste or petroleum products. ADEQ is the main agency managing various state and federal programmes related to air quality, water quality, solid waste and hazardous waste. ADEQ is responsible for administering state environmental laws and shares regulatory responsibility for certain federal programmes delegated to the state from the US EPA. The management of hazardous waste is governed by the RCRA. Federal and state hazardous waste management regulations apply to most businesses that generate hazardous waste.

13.2 Clearing Contaminated Land

ADEQ is responsible for investigating and overseeing the clean-up of contaminated soil and groundwater, through the WQARF programme.

Several sections and units within the Waste Programs Division of ADEQ are also involved in coordinating and overseeing contaminated soil and groundwater investigations and clean-ups.

13.3 Determining Liability

In cases where more than one party has contributed to the contamination, liability is determined by EPA and ADEQ policy and statutes. The EPA and ADEQ maintain a policy of not requiring residential homeowners to perform or pay for clean-up actions at state or federal Superfund sites. However, homeowners may be held liable for the clean-up where their own actions have led to a release or threatened release of hazardous substances requiring a clean-up of their property, or where the property is used for non-residential purposes (ARS § 49-283). Liability that applies to an owner of property does not apply to any other person who is not an owner of the property simply because they hold some right, title or interest in the property. Under Arizona law, a person is not responsible for hazardous substances located on or beneath their property if the substance is present solely because it migrated from property that is not owned or occupied by that person (ARS § 49-283(E)).

13.4 Proceedings Against Polluters

There are no Arizona-specific locus standi requirements for bringing proceedings against polluters/landowners/occupiers of those affected by contamination.

13.5 Investigating Environmental Accidents

A Phase I environmental audit is the first step in analysing property to determine if any contamination exists. This is a preliminary examination to discover if contamination is present. Next, a recognised evaluator performs a Phase II audit to identify the type and extent of the con-

tamination. Finally, the Phase III environmental site assessment (ESA) represents the remedial phase of the process.

14. Climate Change and Emissions Trading

14.1 Key Policies, Principles and Laws

The Arizona Department of Health Services (ADHS) developed the 2017 Arizona Climate and Health Adaptation Plan as a participating agency in the Climate Ready States and Cities Initiative of the US Centers for Disease Control and Prevention (CDC). The plan includes strategies to guide adaptation with the intention to support public health preparedness related to climate-sensitive hazards in Arizona. The plan is organised around ten essential public health services that serve as the framework for the National Public Health Performance Standards (CDC 2014). Another study related to climate change in Arizona is the Extreme Weather, Climate and Health Profile Report, which aims to address and plan for climate-related health impacts in Arizona (specifically the impact of air pollution and rising temperatures). The City of Phoenix will be providing a Climate Action Plan Progress Report that will detail actions and progress since the 2021 Climate Action Plan was approved by city council.

14.2 Targets to Reduce Greenhouse Gas Emissions

Arizona has joined the US Climate Alliance, a bipartisan coalition of 25 governors committed to securing America's net-zero future by advancing state-led, high-impact climate action. One of the key collective commitments is reducing collective net greenhouse gas (GHG) emissions by at least 26–28% by 2025 and 50–52% by 2030, both below 2005 levels, and collectively achiev-

ing overall net-zero GHG emissions as soon as practicable and no later than 2050.

15. Asbestos and Polychlorinated Biphenyls (PCBs)

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs

Asbestos is a non-combustible, naturally occurring mineral that was used in a wide variety of commercial products from the early 1900s to the late 1970s before it was linked to severe health problems caused by differing amounts of exposure. Arizona has asbestos regulations in place, along with those established by the federal government. The Asbestos National Emission Standard for Hazardous Air Pollutants (NESHAP) Program is meant to protect public health from exposure to regulated asbestos-containing material (RACM). NESHAP facility renovation/demolition activities – and asbestos removal, transport and disposal – are closely monitored for proper notification and asbestos emissions control. The Clean Air Act gave the US EPA the responsibility for enforcing asbestos regulations and allows the US EPA the authority to delegate responsibility to a state or local agency. The US EPA Region 9 Asbestos NESHAP co-ordinator has sole jurisdiction over all 25 tribal lands in Arizona. ADEQ's Asbestos NESHAP Program does not have any additional requirements apart from the federal standard. In Arizona, Maricopa County, Pima County and Pinal County have delegated authority from the US EPA to enforce the Asbestos NESHAP within their respective jurisdictional boundaries, including tribal lands.

16. Waste

16.1 Key Laws and Regulatory Controls

In Arizona, waste is regulated by the Waste Programs Division of ADEQ. The Waste Programs Division regulates facilities and generators of solid and hazardous waste, issues permits, conducts inspections and oversees remediation of contaminated sites. Some programmes managed by the Waste Programs Division to reduce the risk associated with waste management, contaminated sites and regulated substances include:

- the Brownfields Program;
- Solid and Hazardous Waste Inspections and Compliance, Pollution Prevention (P2) and the VRP;
- the WQARF, federal Superfund sites and the Underground Storage Tank (UST) Program; and
- the Recycling Program.

16.2 Retention of Environmental Liability

Parties may be held responsible even when the waste is outside of their care, custody or control. Parties are responsible for their hazardous waste from the moment it is generated to the moment it is properly disposed of. Merely transporting the waste off-site does not rescind liability. The RCRA of 1976 gives the EPA the authority to control hazardous waste from cradle to grave. This includes the generation, transportation, treatment, storage and disposal of hazardous waste. The RCRA also set forth a framework for the management of non-hazardous solid wastes.

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

Extended producer responsibility (EPR) is a policy approach that assigns producers greater

responsibility for the end-of-life management of the products they introduce to the market and encourages innovations in product design. EPR helps to shift financial responsibility from municipalities and taxpayers and addresses the environmental impacts of waste disposal. While there are no current EPR regulations in Arizona, different cities have discussed how promoting these policies would be beneficial and remain open to passing policies related to EPR in the future.

16.4 Rights and Obligations Applicable to Waste Operators

ADEQ is tasked with preparing and updating a statewide solid waste management plan that establishes standards for solid waste facilities in co-operation with facility owners or operators, local governments and management agencies (ARS § 49-721). A facility owner or operator shall not treat, store, dispose of, transport or offer for transportation hazardous waste without having received an EPA identification number from ADEQ (AAC § 18-8-264).

17. Environmental Disclosure and Information

17.1 Self-Reporting Requirements

Regarding self-reporting requirements, see 5.2 Disclosure.

17.2 Public Environmental Information

ADEQ provides Arizona-specific environmental information through an online portal called “My Community”. For additional information, the public may also request a public record from “any person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public

body” (ARS Title 39, Chapter 1, Article 2). The request may be made in person, over the phone or through the online portal at any point during office hours. The agency may deny a public records request under certain circumstances, including when the information has been made confidential or privileged by statute or court order. However, if the request is denied, the requesting party may appeal the decision in the Arizona Superior Court.

17.3 Corporate Disclosure Requirement

The ACC does not require any disclosure of environmental information in a corporation’s annual reports. Publicly traded entities must disclose environmental information in accordance with the rules established by the federal Securities and Exchange Commission (SEC).

17.4 Green Finance

Arizona does not have a state-led “green financing” programme, but the state does provide a state tax credit of 25% of the total system cost, up to USD1,000, for every resident who installs solar panels in their residence. This credit is applicable to state income taxes. Homeowners who installed solar panels on their homes during 2021 may qualify for this credit.

18. Transactions

18.1 Environmental Due Diligence

Environmental due diligence is typically conducted on M&A, finance and property transactions in Arizona. This usually includes the following:

- Phase I ESA – this is a standard practice where a qualified environmental professional assesses the property’s history, current use and potential environmental risks.

- Phase II ESA – if issues are identified in Phase I, a Phase II assessment will then involve more detailed testing and analysis to determine the extent of contamination.

18.2 Disclosure of Environmental Information

Most real estate transactions in Arizona will include a seller's property disclosure statement (SPDS), which states that sellers can voluntarily disclose information about the condition of the property. Arizona law requires that sellers disclose material facts about property. This includes any known environmental issues with drainage, soil, fissures and dampness/moisture.

18.3 Key Issues in Environmental Due Diligence

No response has been provided in this jurisdiction.

Trends and Developments

Contributed by:

Trevor Burggraff, Brandon Curtis, Eric Hiser and Matthew Joy
Hiser Joy

Hiser Joy is an environmental law firm focusing on permitting, compliance, litigation and sustainability. Based in Phoenix, AZ, the firm has an international presence and assists clients across North America and globally. Collectively, the team at Hiser Joy has for decades delivered expert legal knowledge and client-centred services in the areas of environmental and administrative/regulatory law and environmental litigation. Maintaining positive client interactions, fostering effective communication and delivering favourable results play an instrumental role

in sustaining long-lasting relationships and engaging new clients. Whether clients are in the initial stages of a project, in mid-production or seeking continuing compliance education for their own team, Hiser Joy is committed to providing the guidance and direction necessary to address legal matters. Should a case reach a hearing or litigation, the attorneys have experience before numerous hearing boards and courts around the country, and can assist at all stages.

Authors



Trevor Burggraff is an accomplished lawyer and partner at Hiser Joy. He practises in the areas of environmental compliance, permitting, litigation and

corporate sustainability. Trevor advises clients on topics including federal, state and local air programs; stormwater and SPCC compliance; and waste and hazardous waste management. He has appeared in administrative appeals, and in state and federal courts, as well as advising local administrative boards during appeals. Trevor assists clients with internal auditing and continuing education programs, and presenting seminars and classes. He is the past chair of the State Bar of Arizona's Environmental and Natural Resources Law Section.



Brandon Curtis practises in the areas of environmental and natural resource law as a partner at Hiser Joy. He represents clients in the steel manufacturing, mining and

electric utility industries and focuses on assisting clients through the full breadth of the air permitting process. Brandon's practice includes developing emission inventories, compiling applications, negotiating with regulatory bodies, responding to public comment and litigating permitting decisions before administrative tribunals. Mr Curtis's practice also includes developing customised environmental training designed to improve competency across a corporation and satisfy regulatory obligations on a variety of subjects, including CAA, CWA, RCRA, TSCA, EPCRA and HMR.

USA – ARIZONA TRENDS AND DEVELOPMENTS

Contributed by: Trevor Burggraff, Brandon Curtis, Eric Hiser and Matthew Joy, **Hiser Joy**



Eric Hiser practises in the areas of environmental, natural resources and administrative law as owner and partner at Hiser Joy. He regularly represents clients, ranging from

government agencies to Fortune 500 corporations, in permitting, permit appeals, compliance counselling and planning, environmental auditing and assessment, and enforcement defence. He has participated in over 200 PSD and Title V permitting actions; developed state implementation plans for criteria pollutants and regional haze litigation; developed NPDES and storm water permit applications under the CWA; assisted in RCRA corrective action cleanups and resolutions and RCRA recycling determinations at complex facilities; and aided in permittee defence matters.



Matthew Joy is an experienced litigator and partner at Hiser Joy. He practises in the areas of environmental, natural resources and water quality litigation, focusing on water, waste and

cleanup issues. For almost 20 years, he has advised clients on developing permitting strategies, ranging from routine to novel and complex strategies, and has obtained agency approval for hundreds of Clean Water Act permits, including discharge and “dredge and fill” permits. Matthew has extensive experience in defending against and, where appropriate, negotiating settlements in, multimillion dollar enforcement and toxic tort cases.

Hiser Joy

5080 N 40th Street
Ste 245
Phoenix
AZ 85018
USA

Tel: +480 505 3900
Fax: +480 505 3901
Email: Tburggraff@hiserjoy.com
Web: www.HiserJoy.com



HISER JOY

Navigating the Challenges of Ozone Nonattainment: the Phoenix-Mesa Nonattainment Area

Introduction

The Clean Air Act (CAA) requires the Environmental Protection Agency (EPA) to set national ambient air quality standards (NAAQS) for six major pollutants, known as “criteria pollutants”. Criteria pollutants regulated by NAAQS include carbon monoxide (CO), lead (Pb), particulate matter (PM), ozone (O₃), nitrogen dioxide (NO₂) and sulphur dioxide (SO₂). These pollutants are common in outdoor air, pose risks to public health and the environment, and originate from a variety of sources. NAAQS are designed to protect the public and the environment by setting standards for ambient air quality. Primary NAAQS aim to safeguard public health with an adequate margin of safety while secondary NAAQS address public welfare. The CAA mandates that the EPA review and, if needed, update the NAAQS every five years.

The EPA, in collaboration with states and tribes, classifies regions based on their compliance with NAAQS. Areas that meet the criteria for pollutant NAAQS are designated as attainment areas. In contrast, nonattainment areas are regions where air quality monitoring indicates that pollutant levels exceed the NAAQS established by the CAA.

States or local agencies approved by a state must develop a state implementation plan (SIP) detailing actions to improve air quality in nonattainment areas according to the area’s classification. SIPs outline the state’s strategies for implementing emissions limitations and control standards to attain and maintain the NAAQS. The EPA reviews and approves SIPs that meet the requirements of the CAA. SIPs are typically enforced by the state, but the EPA has the authority to intervene and enforce federally

approved SIPs if necessary. Additionally, the public retains the right to file citizen suits under the CAA to address SIP violations by sources or inaction by the EPA.

If a nonattainment area fails to submit a SIP, the EPA can impose two types of sanctions: (1) a 2:1 emission offset requirement and (2) the loss of non-safety-related federal highway funds. If the SIP deficiency has not been resolved, the emission offset sanction applies 18 months after the effective date of the triggering action. Similarly, if the SIP deficiency has not been resolved, federal highway funding sanctions apply 24 months after the effective date of the triggering action.

Four of Arizona’s 15 counties have areas designated as nonattainment for ozone. In general, ozone nonattainment areas are classified based on the severity of pollution into the following categories: marginal (three years to attain), moderate (six years to attain), serious (nine years to attain), severe (15 or 17 years to attain) and extreme (20 years to attain). This article focuses on the issues surrounding the Phoenix-Mesa Ozone nonattainment area, which covers parts of Gila, Maricopa and Pinal counties.

Phoenix-Mesa ozone nonattainment area

In 2022, the EPA changed the Phoenix-Mesa ozone nonattainment area classification from marginal to moderate, indicating increased severity of ozone pollution. The region was given until 1 January 2023 to submit a plan showing that emission controls would bring ozone levels down to the stricter 2015 standard of 70 parts per billion or less by August 2024. However, because the attainment deadline falls in the middle of the 2024 summer ozone season, the EPA requires air quality data from 2021 to 2023 to prove compliance.

On 18 October 2023, the EPA found that Arizona had failed to submit a complete SIP for the Phoenix-Mesa nonattainment area. In the Federal Register notice, the EPA indicated that sanctions would be suspended if, within 18 months of the effective date of the finding, the state has submitted a complete SIP addressing the identified deficiencies. Furthermore, if the state submits the required SIP and the EPA approves it within two years of the effective date of the finding, the EPA will not need to implement a federal implementation plan (FIP) for the Phoenix-Mesa nonattainment area.

According to the EPA's finding of failure to submit, the following moderate nonattainment area SIP elements are still required: nonattainment major new source review, reasonable further progress (RFP), ozone attainment demonstration (modelling), reasonably available control measures (RACM), contingency measures, and a basic motor vehicle inspection and maintenance programme. Considering that Arizona has thus far failed to submit a complete moderate area SIP, it is on track to be redesignated as a serious nonattainment area no later than February 2025. When this happens, the state will need to submit a complete serious nonattainment area plan to the EPA by April 2025 to prevent the imposition of sanctions. Failure to meet this deadline could result in sanctions, which may negatively affect local industries and reduce federal funding for the region.

Moving forward

In addition to potential sanctions issues, reclassification of the Phoenix-Mesa nonattainment area from moderate to serious nonattainment will undeniably impact Arizona industries and organisations. Upon reclassification, sources in the Phoenix-Mesa ozone nonattainment area will become subject to more stringent permit

requirements for ozone precursors such as volatile organic compounds (VOCs) and nitrogen oxides (NO_x). The major source threshold for VOCs and NO_x emissions will be reduced from 100 tons per year to 50 tons. The significant emissions increase threshold for the Nonattainment New Source Review (NNSR) will drop from 40 tons/project to 25 tons/aggregated over five years. Additionally, the emission offset ratio will increase from 1.15:1 to 1.2:1. These changes make it harder for industry to build facilities in the nonattainment area.

These requirements can also make it more difficult for existing major sources to add to or modify their facilities. Any modification increasing emissions by 25 tons or more will trigger NNSR requirements, including the higher offset ratio and the installation of the lowest achievable emission rate (LAER) controls (the most stringent controls available). Existing sources with a potential to emit (PTE) between 50 and 100 tons per year will be required to reduce their PTE below 50 tons or apply for a Title V permit within 12 months of the reclassification. Existing and new sources with a PTE less than 50 tons per year will not immediately face new requirements. New sources with a PTE over 50 tons per year will need to secure offsets at the new ratio and adhere to NNSR and LAER controls.

Overall, the reclassification of the Phoenix-Mesa nonattainment area to "serious" under the 2015 ozone NAAQS will lead to stricter permit requirements for sources of ozone precursors. Increased regulatory requirements may hinder business growth in the area. Facilities that would like to build in the area will be limited by the reduced emissions thresholds and the increased offset ratio. Both new and existing facilities may be limited by the increased costs to comply with regulations – emissions offsets

and LAER control technology can be expensive. Further, the limited availability of offsets in the nonattainment area will reduce sources' ability to make "major" modifications to their operations. In addition, there is an increased risk that the area will be reclassified to "severe" if an approvable serious-area SIP is not submitted, or the SIP is submitted but not approved by the EPA. With each redesignation, permitting requirements continue to become more stringent and costly. The best solution for the area would be to submit an approvable serious-area SIP to the EPA in the required timeframe and create offset programmes, such as the recently conditionally approved Maricopa County Rule 205, to allow for the growth of both new and existing sources in the area. Timely submittal of an approvable serious-area SIP would terminate the sanctions clocks and prevent imposition of a FIP.

The impact of Sackett v EPA on Arizona

Introduction

The Clean Water Act (CWA) prohibits the unpermitted discharge of pollutants into "waters of the United States" (WOTUS). The definition of WOTUS determines whether the CWA (and state programmes operated pursuant to the CWA) requires permitting of discharges (discharges under either CWA Section 402 (the National Pollutant Discharge Elimination System (NPDES) programme) or CWA Section 404 (the "dredge and fill" programme)) into specific water features and provides jurisdiction to federal and state agencies over those features. The definition has been at issue for decades and, in the past several years, has undergone significant revisions – often swinging from one extreme to another. This has left the regulated community with uncertainty when determining whether agencies will require permits for certain activities in waters, especially in projects affecting intermittent or ephemeral features.

The 2023 Supreme Court decision in *Sackett v EPA* ("Sackett") has changed the definition once again and attempts to provide clarity to the regulated community. As a result, the EPA and the US Army Corps of Engineers have promulgated regulations attempting to conform the regulatory language to Sackett. The new definition, combined with a patchwork of legal challenges throughout the country, raises uncertainty in states like Arizona, where unique hydrological features such as intermittent and ephemeral streams are crucial for the state's ecology and water management. As the legal landscape shifts, Arizona faces the challenge of navigating these federal changes while striving to protect its vital water resources and ensuring the sustainable management of its diverse waterways.

Rapanos v United States

Before the most recent Supreme Court ruling in Sackett, courts and agencies relied, in large part, on the Supreme Court's plurality decision in *Rapanos v United States* ("Rapanos"). In that decision, four justices held that water features are WOTUS only if they are "relatively permanent, standing, or continuously flowing bodies of water" connected to traditionally navigable waters or wetlands with a continuous surface connection to such waterbodies (*Rapanos v United States*, 547 U.S. 715, 739 (2006)). The justices opined that the term "relatively permanent" is a matter of "common sense" but that it does not include "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall". *Id.*

In his concurring opinion, Justice Kennedy relied on a separate test established by earlier Supreme Court cases – the "significant nexus" test – in determining whether wetlands constituted WOTUS. *Id.* at 780. According to Kennedy's concurrence, a significant nexus exists when

wetlands demonstrate physical, chemical or biological functions valued by society and maintain a physical, chemical or biological connection to traditional navigable waters. *Id.* Essentially, the test determines whether there is a meaningful physical, chemical or biological connection between the wetland and WOTUS. For a wetland to be classified as navigable waters under the CWA, it must possess a significant nexus to waters that are, were or could reasonably be made navigable.

As a result of the Supreme Court's plurality decision in *Rapanos*, the EPA and the US Army Corps of Engineers issued guidance establishing a two-pronged approach to determine whether a waterbody (other than traditionally navigable water) was a WOTUS. Under this approach, the EPA would determine whether the feature met the relatively permanent test or the significant nexus test. Further, the agencies would apply this approach to all waterbodies, not only wetlands. The result was that the universe of water features determined to be WOTUS was expanded to include ephemeral and intermittent features. This expansive interpretation informed jurisdictional determinations for over a decade.

The January 2023 WOTUS Rule

After several agency revisions to the definition of WOTUS, including one in 2015 and another in 2021 (both of which were challenged in court by numerous stakeholders), the EPA and US Army Corps of Engineers issued a "Revised Definition of 'Waters of the United States'" rule, published on 18 January 2023 and taking effect on 20 March 2023. The January 2023 rule effectively maintained the agencies' discretion to use either the relatively permanent standard or the significant nexus test in jurisdictional determinations, albeit with some limitations.

Even though the January 2023 rule attempted to provide clarity to the regulated community, it faced legal challenges almost immediately after its adoption. On 19 March 2023, a Texas district court issued a preliminary injunction that impacted both Texas and Idaho. This injunction was subsequently expanded by a North Dakota district court, on 12 April 2023, to encompass 24 additional states including Alabama, Florida and West Virginia. On 10 May 2023, the Sixth Circuit Court of Appeals granted a stay pending appeal for Kentucky, temporarily reverting the state to pre-2015 standards. However, this stay was lifted on 23 September 2024, allowing the amended 2023 rule to take effect in Kentucky, except where other court injunctions remained in place.

Sackett v EPA

On 25 May 2023, the Supreme Court published a landmark CWA opinion in *Sackett* limiting the scope of the CWA. Although the January 2023 rule was not directly at issue, the Court evaluated the jurisdictional standards outlined in that rule, specifically the *Rapanos* plurality's relatively permanent standard and Kennedy's significant nexus standard. The Court determined that the *Rapanos* plurality was correct in stating that the CWA defines "waters" as only those "relatively permanent, standing, or continuously flowing bodies of water that are typically recognized as streams, oceans, rivers, and lakes" (*Sackett v EPA*, 598 U.S. 651, 678 (2023)). The Court also found the significant nexus test to be inconsistent with the CWA. *Id.* at 679–681. Furthermore, the Court agreed with the plurality's determination that only wetlands with a "continuous surface connection" to other WOTUS could themselves be considered WOTUS. *Id.* at 684.

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The September 2023 Amendment to the January 2023 WOTUS Rule

In September 2023, the agencies amended the January 2023 rule in an attempt to conform with the holding in Sackett. The September 2023 rule eliminated the significant nexus test and modified the definition of “adjacent”, as both were deemed invalid under the Supreme Court’s Sackett decision. The revised rule removed references to the significant nexus test in jurisdictional determinations. In addition, the rule revised the definition of “adjacent” such that, for wetlands to be considered adjacent to other waters, there had to be a “continuous surface connection” between the wetland and the water feature.

In short, the conforming rule limited the definition of WOTUS to tributaries that are relatively permanent, standing or continuously flowing and wetlands with a continuous surface connection to traditionally navigable waters or such tributaries.

Status of the revised WOTUS definition

Currently, states are divided on which legal regime governs the definition of WOTUS in their jurisdiction. The conforming 2023 rule is in effect in 24 states, the District of Columbia, and US territories, while the remaining 26 states continue to adhere to a previous regulatory approach (often referred to as the “pre-2015 regulatory regime”). For those states following the conforming rule, the definition of WOTUS relies on the relatively permanent test and requires that wetlands have a continuous surface connection to such relatively permanent features. In those states subject to the pre-2015 regulatory regime, the agencies have stated that they will implement the pre-2015 regulations in a manner generally consistent with the regime’s approach to the

Rapanos plurality decision but also consistent with the recent Sackett decision.

Impact of Sackett on intermittent streams in Arizona

Arizona is one of the 24 states that applies the conforming 2023 WOTUS Rule. Because the conforming 2023 rule limits the definition of WOTUS to tributaries that are relatively permanent, standing or continuously flowing, the rule excludes ephemeral drainages and intermittent streams from CWA protection.

In 2021, the Arizona legislature identified the need for a “local control approach” to manage the state’s water resources, and the Arizona Governor and Legislature granted the Arizona Department of Environmental Quality (ADEQ) authority to establish a state Surface Water Protection Program (SWPP). ADEQ conducted rule-making to develop the SWPP in 2022, and the rules took effect on 20 February 2023. Under the adopted rules, waters that are not classified as WOTUS under the current federal definition may still be regulated as non-WOTUS protected surface water through the SWPP if the waters meet the criteria for state-protected surface water as defined in Arizona Revised Statutes §49-221(G). However, under HB 2691, ADEQ is prohibited from establishing rules for discharges into non-WOTUS protected surface waters that are more stringent than those outlined in the CWA.

Ultimately, the 2023 rule will likely reduce the number of permits required under the CWA throughout the country and in Arizona. As a result, the regulated community operating in Arizona may experience changes in their regulatory obligations. These changes will depend on whether an activity falls under federal or state permitting requirements and whether a water body is classified as WOTUS under fed-

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eral definitions or as a “water of the State” under Arizona’s SWPP.

Conclusion

The legal landscape for water protection in Arizona reflects the complex interplay between federal and state regulations following the Sackett decision and the amended 2023 WOTUS Rule. While the updated rule narrows the scope of federal protections, particularly affecting ephemeral and intermittent streams in the context of CWA Section 404 dredge and fill activities, Arizona has established the SWPP to manage state water resources, particularly in the context of Section 402 NPDES discharges. Moving forward, Arizona’s regulated community must determine whether its proposed activity could potentially trigger permitting under two separate jurisdictional definitions, a challenge complicated by the large number of intermittent and ephemeral drainages throughout the state.

USA – NEW YORK



Trends and Developments

Contributed by:

David P Flynn, Shengkai Xu and Benjamin Sugarman
Phillips Lytle LLP

Phillips Lytle LLP is a pre-eminent law firm that has offices across New York State, as well as in Chicago, IL; Washington, DC; and Ontario, Canada. Phillips Lytle attorneys serve a multinational client base, including Fortune 1000 companies, global and regional financial institutions, not-for-profit organisations, middle-market companies, startups, entrepreneurs and individuals on important matters affecting their businesses and personal wealth. Phillips Lytle is a national leader in environmental law with more than 50 years of environmental experience. The firm's attorneys have a broad

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Authors



David P Flynn is a partner at Phillips Lytle LLP, leader of the firm's environmental law practice team and co-leader of its energy and renewables industry team and cryptocurrency and

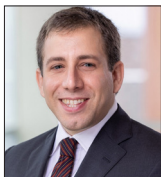
blockchain practice team. His practice is concentrated in the areas of environmental law, energy and emerging technologies. With respect to environmental law, David concentrates on regulatory compliance, brownfield redevelopment and sediment remedial projects. He was involved in the first successful conversion of a former industrial brownfield into a modern manufacturing facility in New York State.



Shengkai Xu is an attorney at Phillips Lytle LLP and focuses his practice on environmental law, as well as energy and renewables. Shengkai represents clients in a host of

environmental matters related to tax credit eligibility through brownfield cleanup, eminent domain, zoning, other due diligence obligations and aspects of regulations that affect environmental and energy clients.

Contributed by: David P Flynn, Shengkai Xu and Benjamin Sugarman, **Phillips Lytle LLP**



Benjamin Sugarman is an attorney at Phillips Lytle LLP and brings his experience in the private and public sectors to land, environment and energy matters. He has handled

property rights negotiations, contract preparation and compliance work. Benjamin's background includes work related to development projects that relied on tax credits and HUD programmes.

Phillips Lytle LLP

One Canalside
125 Main Street
Buffalo
New York 14203
USA

Tel: +716 847 8400
Fax: +716 852 8100
Email: info@phillipslytle.com
Web: www.phillipslytle.com



Phillips Lytle LLP

Climate Change and Environmental Justice

The Climate Leadership and Community Protection Act (CLCPA) was signed into law on 18 July 2019 and went into effect on 1 January 2020. Among its many ambitious goals, the CLCPA requires the New York State Department of Environmental Conservation (NYSDEC or the “Department”) to promulgate regulations establishing statewide greenhouse gas (GHG) emissions limits for the years 2030 and 2050 equal to 60% and 15%, respectively, of 1990 emissions. NYSDEC has estimated that statewide GHG emissions in 1990 were 409.78 million metric tons of carbon dioxide equivalent. The CLCPA further requires state agencies to invest at least 35% of related statewide programmatic resources in disadvantaged communities, which were identified using the criteria established by the Climate Justice Working Group, an advisory body created under the CLCPA.

In its unconsolidated sections, the CLCPA mandates that state agencies take certain steps to limit GHG emissions. Section 7(2) requires state agencies to consider whether an administrative decision (including permit issuance, contract and grant execution, and other administrative approval) is consistent with the attainment of the statewide GHG emissions limits. Section 7(3) requires that such administrative decisions do not disproportionately burden disadvantaged communities, and that state agencies prioritise reduction of GHG emissions and co-pollutants (ie, hazardous air pollutants from GHG emissions sources) in those communities.

A 22-member Climate Action Council was created to develop a scoping plan detailing how the state would reach its emissions reduction goals. The final scoping plan, released on 19 December 2022, provided estimates of statewide GHG emissions across major economic sectors. It

used these estimates to recommend actions to achieve emission reductions for each sector.

Post-CLCPA NYSDEC Guidance

On 14 December 2022, NYSDEC released two policy guidance documents: Commissioner Policy 49 (CP-49/Climate Change and DEC Action) and Division of Air Resources Policy 21 (DAR-21/The CLCPA and Air Permit Applications).

CP-49 requires NYSDEC to incorporate climate change considerations into departmental activities. CP-49 applies to applications, modifications and renewals of a variety of environmental permits, including water supply, air pollution control, liquefied natural gas and petroleum gas, solid waste and hazardous waste management, and the construction of energy production, generation, transmission and storage facilities. CP-49 provides examples of activities that would be deemed inconsistent with the statewide GHG reduction goals (eg, an action that directly reduces the market demand or market access for GHG emissions-reducing technologies) and offers examples of acceptable justifications under the CLCPA Section 7(2) analysis (eg, absence of the project will impact the safety and reliability of energy systems).

DAR-21 provides guidance for preparing and reviewing CLCPA analyses for Title V and Air State Facility permit applications. It provides that, for the purposes of a Section 7(2) consistency determination, applicants must analyse GHG and carbon dioxide equivalent emissions from upstream sources (attributable to the production, transmission and use of fossil fuels and imported electricity). It also lists the minimum requirements for such analysis (eg, accounting for indirect emissions, such as from truck traffic increases associated with a project). Under DAR-21, if an analysis finds the project to be

inconsistent with the CLCPA's goals, then the applicant would discuss the lack of feasibility of alternatives (eg, using an electric heater instead of a natural gas-fired boiler would require the construction of a substation with significant costs) and undertake mitigation measures.

New Environmental Permitting Requirements

On 30 December 2022, Governor Hochul signed new legislation concerning environmental permitting decisions for projects imposing disproportionate pollution burdens on disadvantaged communities. On 3 March 2023, the Governor signed additional legislative amendments. This environmental justice legislation is codified in Section 70-0118 of the Environmental Conservation Law (ECL), pursuant to which NYSDEC will be prohibited from issuing a new permit “if it determines that the project will cause or contribute more than a de minimis amount of pollution to a disproportionate pollution burden on [a] disadvantaged community”. N.Y. Env't Conserv. Law Section 70-0118(3)(b). A similar prohibition will also apply to permit modifications and renewals that “would significantly increase the existing disproportionate pollution burden on [a] disadvantaged community”. N.Y. Env't Conserv. Law Section 70-0118(3)(c)-(d). Additionally, ECL Section 70-0107, which governs NYSDEC's permitting procedures, was amended to require consideration of cumulative pollution impacts on disadvantaged communities. The cumulative impacts include impacts from all forms of pollution as defined in ECL Section 1-0303(19). These changes will take effect after 30 December 2024.

On 8 May 2024, NYSDEC's Division of Environmental Permits issued a new policy, DEP 24-1/ Permitting and Disadvantaged Communities, to implement CLCPA Section 7(3). DEP 24-1 requires NYSDEC staff to screen whether a facility seeking a covered permit would likely affect

a disadvantaged community. This would include facilities that are outside a disadvantaged community but have pollution impacts on it. DEP 24-1 requires an impact study of areas within a half-mile radius of a proposed facility. If NYSDEC finds a likelihood of impact on a disadvantaged community, then the permit applicant is required to provide a disproportionate burden analysis and seek enhanced public participation.

CLCPA Case Law

Thus far, there has been limited case law interpreting the reach of CLCPA Sections 7(2) and 7(3). In *Danskammer Energy, LLC v New York State Department of Environmental Conservation*, 76 Misc. 3d 196 (Sup. Ct. Orange Cnty. 2022), the New York State Supreme Court upheld NYSDEC's denial of an application for a Title V air permit to construct and operate a natural gas-fired power plant. The Department's denial was based partly on Section 7(2). The Court affirmed that Section 7(2) not only requires NYSDEC to consider whether its issuance of a permit will be consistent with the attainment of the statewide GHG emissions limits, but also authorises NYSDEC to deny a permit when issuance thereof would be inconsistent or interfere with the attainment of such limits.

NYSDEC has also denied a natural gas-fired electric-generating plant's application to renew its Title V air permit, where the plant had begun providing behind-the-meter generation for cryptocurrency mining operations and had significantly increased its actual and projected emissions since its permit was initially issued. The NYSDEC regional director's decision upholding the denial concluded that NYSDEC's authority pursuant to Section 7(2) extends to permit renewals as well as new applications. The decision further concluded that, under Section 7(2), an administrative decision that is inconsistent

with or would interfere with the statewide GHG emissions limits only requires a statement justifying NYSDEC's decision, not a statement finding that the project or facility seeking approval is justified. Accordingly, a finding that a project or facility is justified would not compel NYSDEC to issue a decision that is inconsistent with or will interfere with attainment of the statewide GHG emissions limits. NYSDEC's denial of the permit renewal under Section 7(2) is currently being challenged in New York State Supreme Court (*Greenidge Generation LLC v New York State Dep't of Env't Conservation*, Index No. 2024-5221 (Sup. Ct. Yates Cnty. filed Aug. 15, 2024).

Freshwater Wetlands Regulations

In July 2024, NYSDEC officially released its proposed regulations that will implement the 2022 amendments to the Freshwater Wetlands Act, codified in ECL Article 24. The regulations arrive just as two of the major 2022 amendments are set to take effect on 1 January 2025. First, NYSDEC's regulatory authority will no longer be limited to the wetlands mapped on the department's freshwater wetlands maps, which have historically put landowners on notice that state-regulated wetlands are located on their property. Second, NYSDEC will now have regulatory authority over wetlands of any size that meet one of 11 new criteria for "wetlands of unusual importance". The third major amendment will see the threshold size of NYSDEC-regulated wetlands decrease from 12.4 acres to 7.4 acres, and will take effect on 1 January 2028. NYSDEC is required to have regulations implementing these amendments in effect by 1 January 2025, and they are currently being finalised following the public comment period.

New Jurisdictional Determination Procedures

Extending NYSDEC's jurisdiction to unmapped wetlands will create a rebuttable presumption

that any area meeting the ECL's definition of freshwater wetland is covered by the law and subject to its permitting requirements. As a result, the state programme will begin to resemble the federal wetlands programme administered by the US Army Corps of Engineers; most landowners will now have to obtain a wetlands delineation and request a jurisdictional determination (JD) from NYSDEC. Upon request, the department will have 90 days to provide a JD, subject to weather and ground conditions. However, in a change from an earlier draft of the regulations, if NYSDEC fails to provide a JD within 90 days plus an additional ten days following notice of its failure, then the department must waive its jurisdiction over the parcel's wetlands for five years.

Wetlands of Unusual Importance

Unlike at the federal level, where wetland of any size can be regulated, wetlands generally have to be at least 12.4 acres to come under NYSDEC's jurisdiction. However, the 2022 amendments introduced 11 new criteria by which a wetland will be regulated regardless of its size. These include wetlands:

- located in a watershed that has experienced significant flooding in the past, or is expected to experience significant flooding in the future from severe storm events related to climate change;
- located in or partially within an urban area, as defined by the United States Census Bureau;
- containing a plant species occurring in fewer than 35 sites statewide or having fewer than 5,000 individuals statewide;
- containing a habitat for an essential behaviour of an endangered or threatened species, or a species of special concern or listed as a species of greatest conservation need in New York's wildlife action plan;

- classified as a Class I wetland;
- previously classified and mapped by the department as a wetland of unusual local importance;
- that are vernal pools known to be productive for amphibian breeding;
- located in a Federal Emergency Management Agency (FEMA)-designated floodway;
- previously mapped by NYSDEC as a wetland on or before 31 December 2024;
- with wetland functions and values that are of local or regional significance; and
- that have been determined by the NYSDEC Commissioner to be of significant importance for protecting the state's water quality.

N.Y. Env't Conserv. Law Section 24-0107(9).

Of these, the urban area criteria will likely have the most significant impact. Census-defined urban areas are expansive and, particularly in western, central and upstate New York, can include areas that outwardly appear suburban or even rural. The urban area criteria could also bring under NYSDEC jurisdiction small "accidental wetlands" that materialise on undeveloped parcels due to poor stormwater management. And even more suburban wetlands will become jurisdictional under NYSDEC's proposed criteria for watersheds that have or are expected to experience significant flooding.

Grandfathering

A key component of the proposed regulations are grandfathering provisions for projects that are already in the planning or permitting stages. If a project receives a freshwater wetlands permit from NYSDEC prior to 1 January 2025, then the project can proceed under its existing JD, and many of the new regulations will not apply.

Additionally, certain projects that do not require a freshwater wetlands permit under the existing regulations can delay the application of the new regulations. These include:

- projects in which the lead agency accepts a Final Environmental Impact Statement pursuant to the State Environmental Quality Review Act (SEQRA) prior to 1 January 2025.
- type I actions that receive a negative declaration pursuant to SEQRA prior to 1 January 2025; and
- projects that receive written site plan approval from a local government.

Depending on whether these projects are considered "major" or "minor" under existing NYSDEC regulations, the proposed wetlands regulations will not affect the project parcel for two to three years.

The Sackett Effect

The forthcoming freshwater wetlands regulations will significantly expand the number of state-regulated wetlands just as the number of federally regulated wetlands seemingly shrank in the wake of the United States Supreme Court's decision in *Sackett v Environmental Protection Agency*, 598 US 651 (2023). In *Sackett*, the Supreme Court eliminated the broader of two tests used to determine federal jurisdiction over wetlands pursuant to the Clean Water Act. The Environmental Protection Agency and United States Army Corps of Engineers subsequently amended the regulatory definition of "waters of the United States", though the extent to which the new definition conforms to the *Sackett* opinion has been questioned and is already the subject of litigation in North Carolina. Whatever reprieve *Sackett* may have offered to landowners and developers at the federal level might now be offset by these forthcoming state regulations,

under which vast acres of wetlands that were previously unregulated by the state will now be subject to permitting requirements.

Limiting 1,4-Dioxane in Cleaning, Personal Care and Cosmetic Products

In 2020, the New York State legislature amended Articles 35 and 37 of the ECL to establish limits on the amount of 1,4-dioxane that can be present in household cleaning, personal care and cosmetic products sold or offered for sale in the state. For household cleaning and personal care products, the maximum allowable concentration was not to exceed 2 parts per million by 31 December 2022, and was not to exceed 1 part per million by 31 December 2023. For cosmetic products, the allowable concentration was not to exceed 10 parts per million by 31 December 2023. NYSDEC, in consultation with the New York State Department of Health (NYSDOH), will reevaluate those limits by 1 May 2025, and every two years thereafter.

In September 2024, NYSDEC finalised regulations at 6 NYCRR Part 352-1. Pursuant to 6 NYCRR Section 352-1.4, a manufacturer may apply for a one-year waiver, up to two times, from compliance with the above maximum allowable concentrations. Applicants must prove they have taken steps to reduce the presence of 1,4-dioxane in an individual product and are unable to comply with the applicable limit on the product. A list of currently granted waivers is updated monthly on NYSDEC's website.

Banning Intentionally Added Per- and Polyfluoroalkyl Substances in Food Packaging

Effective 31 December 2022, New York State prohibits the distribution, sale and offer for sale of food packaging containing intentionally added per- and polyfluoroalkyl substances, also known

as PFAS substances (defined as a class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom). This prohibition applies to chemicals that are added to serve an intended function in the product component. Retailers and food service establishments may rely on written certification from upstream manufacturers that the packaging components are in compliance with the prohibition.

Regulating Emerging Contaminants in Drinking Water and Its Sources

Effective 28 December 2022, NYSDOH regulations at 10 NYCRR Section 5-1.52 set forth the maximum contaminant levels (MCLs) for perfluorooctanoic acid (PFOA) (10 parts per trillion), PFOS (10 parts per trillion) and 1,4-dioxane (1 part per billion). These MCLs are enforceable limits describing the highest level of contaminants allowed in drinking water based on considerations of health risks, the technical feasibility of treatment and cost-benefit analysis.

On 15 March 2023, NYSDEC released final ambient water quality guidance values for PFOA, PFOS and 1,4-dioxane through an addendum to the Technical and Operational Guidance Series (TOGS) 1.1.1. The guidance values are derived from the procedures set forth in the regulation at 6 NYCRR Part 702. The guidance values for the protection of sources of drinking water are 6.7 parts per trillion for PFOA, 2.7 parts per trillion for PFOS and 0.35 parts per billion for 1,4-dioxane.

In February 2023, NYSDEC released two additional technical guidance documents. TOGS 1.3.7 informs NYSDEC's selection of analytical testing methods for monitoring emerging contaminants. TOGS 1.3.13 sets forth NYSDEC's prioritisation strategy for incorporating the guidance values for PFOA, PFOS and 1,4-dioxane

Contributed by: David P Flynn, Shengkai Xu and Benjamin Sugarman, **Phillips Lytle LLP**

into State Pollutant Discharge Elimination System (SPDES) permits for certain industrial facilities and wastewater treatment works. NYSDEC periodically updates a list of Standard Industrial Classification (SIC) codes that are potentially associated with emerging contaminants and requires additional monitoring for emerging contaminants as a permitting condition of certain SPDES permittees.

USA – TEXAS

Law and Practice

Contributed by:

Gerald J Pels, Gerald D Higdon, Elizabeth Corey and Brett A Miller

Locke Lord LLP



Contents

1. Regulatory Framework and Law p.474

1.1 Environmental Protection Policies, Principles and Laws p.474

2. Enforcement Authorities and Mechanisms p.474

2.1 Regulatory Authorities p.474

2.2 Co-operation p.474

3. Environmental Protections p.474

3.1 Protection of Environmental Assets p.474

3.2 Breaching Protections p.475

4. Environmental Incidents and Permits p.475

4.1 Investigative and Access Powers p.475

4.2 Environmental Permits/Approvals p.475

4.3 Regulators' Approach to Policy and Enforcement p.476

4.4 Transferring Permits/Approvals p.476

4.5 Consequences of Breaching Permits/Approvals p.476

5. Environmental Liability p.476

5.1 Key Types of Liability p.476

5.2 Disclosure p.476

6. Environmental Incidents and Damage p.477

6.1 Liability for Historical Environmental Incidents or Damage p.477

6.2 Reporting Requirements p.477

6.3 Types of Liability and Key Defences p.478

7. Corporate Liability p.478

7.1 Liability for Environmental Damage or Breaches of Environmental Law p.478

7.2 Environmental Taxes p.478

7.3 Incentives, Exemptions and Penalties p.478

7.4 Shareholder or Parent Company Liability p.478

7.5 ESG Requirements p.478

7.6 Environmental Audits p.479

8. Personal Liability p.479

8.1 Directors and Other Officers p.479

8.2 Insuring Against Liability p.479

9. Insurance p.479

9.1 Environmental Insurance p.479

10. Lender Liability p.479

10.1 Financial Institutions/Lender Liability p.479

10.2 Lender Protection p.480

11. Civil Liability p.480

11.1 Civil Claims p.480

11.2 Exemplary or Punitive Damages p.480

11.3 Class or Group Actions p.480

11.4 Landmark Cases p.480

12. Contractual Agreements p.480

12.1 Transferring or Apportioning Liability p.480

12.2 Environmental Insurance p.481

13. Contaminated Land p.481

13.1 Key Laws Governing Contaminated Land p.481

13.2 Clearing Contaminated Land p.481

13.3 Determining Liability p.481

13.4 Proceedings Against Polluters p.481

13.5 Investigating Environmental Accidents p.481

14. Climate Change and Emissions Trading p.482

14.1 Key Policies, Principles and Laws p.482

14.2 Targets to Reduce Greenhouse Gas Emissions p.482

15. Asbestos and Polychlorinated Biphenyls (PCBs) p.482

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs p.482

16. Waste p.482

16.1 Key Laws and Regulatory Controls p.482

16.2 Retention of Environmental Liability p.482

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods p.482

16.4 Rights and Obligations Applicable to Waste Operators p.483

17. Environmental Disclosure and Information p.483

17.1 Self-Reporting Requirements p.483

17.2 Public Environmental Information p.483

17.3 Corporate Disclosure Requirement p.483

17.4 Green Finance p.483

18. Transactions p.483

18.1 Environmental Due Diligence p.483

18.2 Disclosure of Environmental Information p.484

18.3 Key Issues in Environmental Due Diligence p.484

Locke Lord LLP is a full-service law firm with more than 600 lawyers and 20 offices. The firm has a history that spans more than 135 years. Locke Lord's environmental team includes dedicated practitioners who understand the many dimensions of environmental laws and the different ways these laws affect businesses and individuals. The lawyers' extensive environmental experience helps clients navigate and respond effectively to regulatory compliance is-

sues, environmental liability concerns, civil and criminal enforcement actions and litigation. The firm has one of the nation's leading practices representing developers, investors and lenders in onshore and offshore wind, solar, storage and other renewable energy projects, as well as other energy and infrastructure projects, in connection with the siting, permitting, compliance and management of utility-scale projects.

Authors



Gerald J Pels is chair of Locke Lord's environmental section – energy and industry and ESG practice and has been a leader in the Texas environmental legal community for over 30 years.

His diverse practice focuses on environmental compliance, permitting, counselling and enforcement defence as well as ESG programme development, risk mitigation and litigation. Gerry's experience includes agency negotiations; assessing and counselling on air, water, storm water and waste permit compliance; representing clients at contested permit, enforcement and other hearings; and internal environmental investigations. He also provides comprehensive assistance and representation to potentially responsible parties and steering committees at both state and federal Superfund sites.



Gerald D Higdon is an accomplished environmental lawyer at Locke Lord with 33 years of experience representing private and public parties towards avoiding, managing and

resolving environmental liabilities, and facilitating environmental sustainability solutions through brownfield redevelopment and the development and scaling of renewable energy. He regularly advises members of the energy industry regarding the management of environmental issues. Jerry routinely defends clients in state and federal environmental enforcement proceedings; develops and implements environmental permitting and planning strategies to facilitate a rapid response to changing business climates and growth opportunities; and assesses, structures and negotiates the allocation of environmental risk-affecting transactions.



Elizabeth Corey focuses her practice at Locke Lord on complex environmental matters impacting industrial concerns and the oil and gas industry, ranging from regulatory

compliance to permitting, litigation and transaction-related issues. She advises clients on a variety of issues involving, for example, permitting and regulatory compliance, site remediation, ESG programme development, reporting and risk mitigation, water resource development, complex international waste transportation and management issues, environmental compliance, facility auditing and TSCA compliance.



Brett A Miller dedicates his practice at Locke Lord to advising manufacturing, energy, petrochemical, refinery, chemical, and landfill companies in regulatory compliance,

litigation and transactional due diligence matters related to air emissions, water quality, and waste management issues under federal and state laws. He has represented clients in numerous state and federal enforcement disputes. Brett has diverse experience navigating complex compliance issues and securing permits for project development related to air emissions, waste water discharges, water rights and waste management.

Locke Lord LLP

JPMorgan Chase Tower
600 Travis
Suite 2800
Houston
TX 77002
USA

Tel: +713 226 1200
Email: gpels@lockelord.com
Web: www.lockelord.com



1. Regulatory Framework and Law

1.1 Environmental Protection Policies, Principles and Laws

Environmental regulation in Texas is pervasive. Texas has been delegated authority to implement most major federal programmes, including the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act. In many instances, however, Texas' regulatory programmes contain unique state-specific requirements. For example, Texas' Solid Waste Disposal Act (SWDA) goes beyond the liability framework for hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and extends to other solid wastes. Thus, when doing business in Texas, compliance considerations must go beyond mere compliance with federal programmes. Texas' regulatory programmes are prescriptive, and enforcement allows for assessment of per diem, per violation penalties. In addition to federal and state environmental programmes, certain larger local jurisdictions, including Harris County and the cities of Houston and Dallas, have enacted robust environmental ordinances and have strong independent enforcement arms.

2. Enforcement Authorities and Mechanisms

2.1 Regulatory Authorities

Myriad agencies administer environmental regulation in Texas. The Texas Commission on Environmental Quality (TCEQ) has jurisdiction over most traditional environmental programmes. The Texas Railroad Commission (RRC), however, administers certain environmental regulatory programmes involving the oil and gas industry. Other Texas agencies have jurisdiction over spe-

cific programmes including the Texas General Land Office (GLO), the Texas Parks and Wildlife Department and the Texas Department of State Health Services (DSHS).

2.2 Co-operation

Texas' regulatory programmes are generally prescriptive in nature, and its environmental agencies have active enforcement arms. Having said that, agency personnel are generally available, knowledgeable and open to discussing compliance issues on a blind or site-specific basis. Moreover, Texas has implemented effective programmes that foster compliance. For example, the TCEQ promulgated rules creating what is known as the Voluntary Clean-up Program (VCP). This programme allows parties to self-implement site clean-up under agency supervision, which – when complete – can afford immunity from clean-up liability to a landowner and even to a transferee.

A further example of co-operative compliance is the state's Environmental, Health, and Safety Audit Privilege Act ("Audit Act"), pursuant to which a regulated entity can secure immunity for violations identified by an environmental audit conducted in accordance with the Audit Act. While certain exceptions exist, immunity can be conferred when disclosure and corrective actions are completed in a timely manner.

3. Environmental Protections

3.1 Protection of Environmental Assets

Texas protects the environment through detailed statutes and regulations. Important statutes include the Texas Clean Air Act, the Texas Water Code and the Texas SWDA, which respectively govern the environmental mediums of air, water and waste management. Texas has detailed air,

water and waste permitting programmes, as well as detailed licensing programmes relating to naturally occurring radioactive materials and low-level radioactive waste. In addition to these programmes, Texas has state-specific endangered species and wetlands programmes.

3.2 Breaching Protections

Non-compliance in Texas can have significant consequences. Enforcement is layered. Each of state, federal and in some instances, local authorities may initiate enforcement. Texas statutory authority authorises civil, administrative and criminal enforcement. Per diem, per-violation penalties are authorised, and injunctive relief may be available. In addition to state authorities, Region 6 of the US Environmental Protection Agency (EPA) actively enforces environmental programmes in Texas. Many federal environmental statutes provide for direct “citizen suits” to enforce permit requirements in federal court.

4. Environmental Incidents and Permits

4.1 Investigative and Access Powers

Generally, Texas’ statutory authorities confer broad investigative authority. When potential violations are identified, typically there is prompt notice with an opportunity to confer before formal enforcement is initiated. In some instances, resolution may occur without formal enforcement. It is good practice for regulated entities to respond promptly in writing to any notice and document compliance efforts.

4.2 Environmental Permits/Approvals

Texas has a wide and varied permitting programme. A memorandum of understanding (MOU) between the TCEQ and RRC outlines

general divisions of jurisdiction over various oil and gas activities related to waste management, water quality, injection wells and incident reporting. Virtually all air emissions, as well as discharges to state waters and waste management activities, must be authorised. Texas has one of the most comprehensive air permitting programmes in the USA, and industrial companies should consult with technical consultants and counsel familiar with the state’s labyrinthine rules before and during facility planning.

In many instances, permitting will entail public notice, pursuant to which “affected persons” may object to the issuance of a permit. Such “protesters” may even have the right to a hearing before the State Office of Administrative Hearings to determine if a draft permit should be finalised and issued. This is tantamount to a mini-trial and may involve technical experts and legal counsel. Recent litigation has granted contested case hearing standing to protesters well beyond the TCEQ’s prior default threshold of a one-mile geographic radius from the facility.

Texas permitting often involves notice to affected parties and local officials, as well as site-specific postings and posting in local publications, including in alternative languages. The process has specific timelines. Certain permit actions require the applicant to prepare a public involvement plan, including disclosure of community and demographic information. If a permit is denied and administrative remedies are exhausted, a decision can be appealed to state court. The Texas legislature’s business courts initiative recently formed the Fifteenth Court of Appeals, which now has statewide exclusive jurisdiction over permitting challenges and enforcement actions involving industries regulated by the TCEQ and RRC, rather than Austin’s Third Court of Appeals.

4.3 Regulators' Approach to Policy and Enforcement

State agencies and the EPA each have detailed enforcement policies and/or matrices that can be reviewed to understand the basis for potential penalties. Generally, permitting liability is considered strict, meaning liability can be conferred without fault or intent to violate. Texas agencies, including the TCEQ, will typically share the basis for their penalty calculations. Texas penalty assessments will take into account the degree of environmental harm; however, the duration of the violation and other specific factors are also considered. Finally, in Texas, a regulated entity's compliance history can be considered in penalty assessment and permit renewal applications, which may subject facilities to higher enforcement penalties and stricter permit conditions. Compliance scores are publicly available.

4.4 Transferring Permits/Approvals

Whether an environmental permit is transferable is programme specific. In many instances, air permits may be transferred, while other permits may not. Each environmental permit should be reviewed for specific conditions that could affect transfer, and of course, statutory and regulatory provisions should be carefully reviewed. Sale or merger transactions involving changes in ownership, operation or identity often trigger permit transfer obligations. Permit transfers may have time restrictions related to agency approvals that are relevant to closing date requirements.

4.5 Consequences of Breaching Permits/Approvals

Breaching permit terms or operating without a permit can have significant consequences. Federal and state statutes authorise per diem fines and penalties, and the cost of challenging assessments that are not negotiated can be significant. In certain circumstances, criminal

enforcement can be sought, as can injunctive relief.

5. Environmental Liability

5.1 Key Types of Liability

Regarding liability, operators generally face strict liability for permit and other programmatic violations. In 2023, the Texas legislature approved penalties of up to USD40,000 per day for certain violations related to the release of pollutants. Fines and penalties vary based upon a violation's nature, and criminal liability can generally be imposed for knowing violations. In some instances, the amount of a penalty can be affected by the violator's size and profitability. Regarding clean-up, Texas generally imposes strict, joint and several liability as a starting point based upon "status". That is, clean-up liability exists for owners and operators, based upon that status. As under federal law, arranger and transporter liability also exists. The Texas SWDA, however, specifically authorises liability apportionment. Regarding liability for environmental contamination, plaintiffs may also seek common law recovery of property damages by alleging private causes of action such as negligence, nuisance and trespass. Personal injury claims may also seek recovery based on alleged exposure to environmental contaminants.

5.2 Disclosure

Texas generally follows federal law regarding mandating environmental disclosures. State-specific programmes should be considered for independent reporting requirements. For example, recent California laws require certain US-based companies (including those based in Texas) doing business in California at certain thresholds to publicly disclose their annual

greenhouse gas (GHG) emissions and prepare climate-related financial risk reports.

6. Environmental Incidents and Damage

6.1 Liability for Historical Environmental Incidents or Damage

In Texas, current landowners and operators can bear liability for historical contamination based upon their status as a current owner or operator. Prior owners and operators can bear liability if there was a release during their tenure at the facility. The Texas SWDA specifically recognises liability apportionment if a release is “divisible”. Divisibility generally assesses whether the waste released can be managed separately under a remedial action plan.

Clean-up liability can also exist under other Texas statutes depending on the nature of the substance or source of material released. Statutes to consider include the Texas Water Code, the Texas Natural Resources Code and the Oil Spill Prevention and Response Act, among others.

6.2 Reporting Requirements

Texas law contains broad and complex reporting requirements for releases of regulated materials. Regarding releases to state waters, the Texas Water Code provides that if a release causes or may cause pollution, notice within 24 hours must be provided by the person in charge of the facility or activity.

Jurisdiction for release reporting is not limited to a single agency. The general reporting requirements are set forth in the following. Facilities should have a thorough understanding of agency jurisdiction. These reporting requirements

are to the TCEQ and are within 24 hours, unless separately noted:

- petroleum/used oil products to state waters – existence of a sheen;
- petroleum products/used oil (not underground storage tanks (USTs)) – 25 gallons;
- crude oil to inland waters – existence of a sheen;
- crude oil to land – five barrels;
- hazardous substance to land – governed by federal reportable quantity (RQ);
- hazardous substance to state waters – the lesser of 100 pounds and the federal RQ;
- industrial solid waste to inland waters – 100 pounds;
- oil to coastal waters – actual or threatened discharge (immediate reporting, within one hour, to the Texas GLO);
- petroleum products from tanks onto the surface (USTs/aboveground storage tanks (ASTs)) – generally > 25 gallons; and
- petroleum products into the subsurface from underground tanks – generally any amount.

The RRC has additional reporting requirements for oil and gas facilities under its jurisdiction. Generally, immediate notice must be given of a fire, leak, spill or break. Notice is not required for releases of less than five barrels of crude oil. Notice is typically followed by a letter giving a full description of the event, including the volume of materials lost. General RRC reporting includes:

- crude oil to state waters – existence of a sheen;
- crude oil to land – five barrels;
- produced water to inland water – any amount; and
- hazardous substance – federal RQ.

The Texas GLO also requires reporting of certain releases:

- oil to coastal waters – actual or threatened discharge (immediate reporting, within one hour).

Additionally, TCEQ air emissions rules contain broad provisions requiring the reporting of specific air emission events.

6.3 Types of Liability and Key Defences

Texas provides for clean-up and incident response liability, as well as potential civil liability for injured parties. Enforcement liability exists for non-compliance and releases. Defences are fact specific and may, among other things, focus on causation, the party with a duty to comply and the divisibility of the harm. The SWDA incorporates defences that are similar, but not identical, to those found in the federal CERCLA statute. The TCEQ has specific procedures for entities claiming affirmative defences to unauthorised air emission events.

7. Corporate Liability

7.1 Liability for Environmental Damage or Breaches of Environmental Law

Generally, statutory laws in Texas do not differentiate liability based upon corporate status. Regarding penalties, some differentiation exists under Texas statutory law, which is a factor that may be considered in agency penalty policies. For instance, corporations that are “repeat violators” with “unsatisfactory” compliance history scores may receive increased penalty adjustments.

7.2 Environmental Taxes

Texas does not impose a specific environmental tax. By way of example, there is no carbon or GHG tax in Texas. While not specifically “taxes” per se, the state does collect significant fees associated with air emissions and air inspections. Annual air emission fees are applicable to major sources, based on tons of pollution emitted. Air investigation fees are based on the Standard Industrial Classification (SIC) code of a regulated entity. Other activity-specific environmental fees, which relate to other environmental programmes, are also assessed by the TCEQ.

7.3 Incentives, Exemptions and Penalties

While Texas does not impose material environmental taxes, it does offer broad incentives for the utilisation of property or equipment for pollution control. Under Texas law, a tax exemption may be obtained for real or personal property used wholly or partly as a facility, device or method for the control of air, water or land pollution, based upon a “positive use determination”. The nature of “qualifying property” is listed by rule. Other important tax incentives are available for certain renewable products.

7.4 Shareholder or Parent Company Liability

Texas generally follows traditional corporate standards for piercing the corporate veil. Regarding statutory liability, the degree of control exercised by officers, directors, shareholders, parents or affiliates can affect their risk for being deemed an “operator”. The US Supreme Court case of *U.S. v Best Foods* provides sound legal guidance on this issue.

7.5 ESG Requirements

At this time, there is no mandatory ESG reporting in Texas. Rather, reporting is market driven. Many public and private companies, howev-

er, prepare and publish ESG or sustainability reports. Companies should not overstate, but rather should be specific, consistent and use data to substantiate assertions related to recycling, climate change, sustainability and similar issues to avoid the risk and potential uncertainty associated with defending greenwashing claims.

7.6 Environmental Audits

Generally, there are no mandatory self-auditing requirements. Various environmental programmes, however, require inspection, reporting and corrective action. Similar provisions are also included within facility authorisations.

8. Personal Liability

8.1 Directors and Other Officers

Regarding statutory liability, the degree of control exercised by officers, directors and shareholders can affect their risk for being deemed an operator. The US Supreme Court case of *U.S. v Best Foods* provides sound legal guidance on this issue.

8.2 Insuring Against Liability

In some instances, a well-designed environmental liability insurance programme can address D&O liability for pollution events, typically in those situations where corporate liability could exist. Environmental insurance coverage is not static, and policies may often be manuscripted.

9. Insurance

9.1 Environmental Insurance

Reasonable insurance products are generally available in Texas on a site-specific basis. Pollution legal liability (PLL) policies are offered by a number of underwriters. These policies, among

other things, offer insurance protection against the discovery of pollution conditions. In some instances, coverage for pre-existing conditions may be available. Such PLL policies often have what is known as a “voluntary investigation exclusion”, which precludes coverage for sampling conducted outside of an agency directive. Furthermore, in a transactional context, in some instances representation and warranty insurance may be available. Each of these coverages will typically require diligence and disclosure to underwriters, usually with exclusions for known conditions. Other exclusions often include intentional acts, USTs, prior knowledge, assumed contractual liability of third parties, lead, asbestos, contamination from per- and poly-fluorinated substances (PFAS), failure to maintain controls and changed use, among others.

10. Lender Liability

10.1 Financial Institutions/Lender Liability

Lender liability for contaminated assets is governed by federal and state legislation. Under both federal and state law, a key touchstone is whether the lender constitutes an “owner” or “operator” of the secured collateral. The federal CERCLA statute has an established liability carve-out for lenders where the lender holds indications of ownership (eg, a mortgage) to protect a security interest, without participating in the management of the secured asset. Texas has adopted specific protections from liability arising under state clean-up regimes, which are largely consistent with the federal safe harbour. Texas has, however, certain criteria to define a safe harbour. First, the lender must sell, lease or undertake a government-approved clean-up within a “commercially reasonable time” after the foreclosure (or similar event). A presumption

of divestiture exists if the asset is listed or advertised within 12 months after title acquisition. The Texas safe harbour can be lost if pollution conditions arise after foreclosure.

10.2 Lender Protection

Touchstones exist to mitigate the potential for lender liability. First, there must be an awareness of the safe harbour. Second, due diligence of not only the asset to be taken as collateral, but also the borrower's environmental management team, is critical. Third, it is important to maintain an ongoing understanding of the asset during the term of a loan, as well as ensuring that loan documentation provides protections and assurances appropriate for the asset. Finally, experienced post-foreclosure staffing should have operational experience in the relevant industry to avoid environmental liability that could arise post-foreclosure and avert the Texas safe harbour.

11. Civil Liability

11.1 Civil Claims

Civil claims may be brought under several Texas environmental statutes, depending on the relevant facts. In addition, claims at common law may be brought under traditional common law theories, such as nuisance, negligence and trespass. Suits may also be brought in a transactional context based upon common law or statutory fraud, as well as breach of applicable contractual provisions.

11.2 Exemplary or Punitive Damages

These damages can be waived by contract, but otherwise may be available in cases where the plaintiff seeks recovery for damages resulting from "fraud, malice, or gross negligence". The basis for these damages must be proved by

"clear and convincing evidence". Under certain circumstances, these damages may be available in a statutory fraud case.

11.3 Class or Group Actions

Class actions or multi-plaintiff cases may be brought in Texas, including for alleged environmental harms.

11.4 Landmark Cases

Texas has been home to several landmark environmental cases. For example, *Cooper Industries, Inc. v Aviall Services, Inc.* addressed when CERCLA claims for cost recovery may be available. Upon remand to federal district court in Texas, it addressed the relationship between certain Texas statutory and contractual claims. Furthermore, the *Matter of Bell Petroleum, Inc.* was a Fifth Circuit Court of Appeals holding and allowed for the apportionment of CERCLA liability, utilising theories derived from the Restatement (Second) of Torts. Certain recent cases decided outside of Texas courts will certainly affect business in Texas. For example, in *Sackett v EPA*, the US Supreme Court recently held that jurisdictional "waters of the United States" must generally be relatively permanent or continuously flowing bodies of water. Further, in 2024, the US Supreme Court overruled the Chevron deference doctrine in *Loper Bright Enterprises v Raimondo*, which had provided a judicial review framework for statutory interpretations by federal agencies for 40 years.

12. Contractual Agreements

12.1 Transferring or Apportioning Liability

In Texas, liability for environmental matters may generally be allocated between a transaction's parties. Allocation mechanisms may include

indemnities, assumptions of liability and/or releases or covenants not to sue. The parties' allocation framework is not binding upon the regulatory authorities. Regarding indemnities for strict liability and similar provisions, it is good practice for the language to be conspicuous and expressly state the scope of the risk allocated.

12.2 Environmental Insurance

Limited insurance products are generally available in Texas. PLL policies are offered by a number of underwriters. These policies offer, among other things, insurance protection against the discovery of pollution conditions. In some instances, coverage for pre-existing conditions may be available. Such PLL policies often have a voluntary investigation exclusion, which precludes coverage for sampling conducted outside of a directive from a government authority. Furthermore, in some instances in a transactional context, representation and warranty insurance may be available.

13. Contaminated Land

13.1 Key Laws Governing Contaminated Land

The SWDA and its implementing regulations are the starting point in Texas to address site clean-up and responsibility. The Texas Natural Resources Code and its regulations apply to contamination caused by oil and gas operations. Texas rules allow risk-based closures based on site-specific factors and consider the actual risks caused by contaminants.

13.2 Clearing Contaminated Land

The persons responsible for clean-up generally mirror federal law:

- current owners and operators;

- prior owners and operators during periods where a release occurred;
- generators of waste; and
- persons transporting waste to the site in question.

Parties can contractually delegate these responsibilities, but contractual arrangements are not binding on regulatory authorities.

13.3 Determining Liability

Statutory clean-up liability is generally strict and joint and several, but the Texas SWDA allows for apportionment. Liability apportionment is fact specific, and the party seeking apportionment bears the burden of proof.

13.4 Proceedings Against Polluters

Regarding contaminated properties, the state is authorised under statutory authority to assert claims for clean-up liability against the four general classes of responsible parties under federal law. Texas law also gives responsible parties the right of contribution. Other Texas statutes authorise causes of actions to address clean-up and are programme and/or fact-specific.

13.5 Investigating Environmental Accidents

Releases of regulated materials are subject to detailed release reporting and response obligations. The TCEQ-RRC MOU provides notification and clean-up requirements for certain oil and gas activities. Under certain circumstances, Texas rules allow for the self-implementation of clean-ups. The state has a vibrant voluntary cleanup programme that allows parties to obtain a release upon site closure. Texas also has a state Superfund programme.

14. Climate Change and Emissions Trading

14.1 Key Policies, Principles and Laws

At this time, there are no specific laws addressing the issue of climate change. Local initiatives do exist, however, and many of Texas' major cities have established initiatives that should be considered in legal and business analyses relating to facility development and operations.

14.2 Targets to Reduce Greenhouse Gas Emissions

Texas currently does not have mandatory GHG emission reduction targets. Policy and emission reduction targets are largely being set at the local level by larger cities.

While Texas has not enacted statutory carbon emission targets, effective from 1 September 2023, the Texas legislature amended the Natural Resources Code to prohibit a state agency from assisting with or enforcing a federal law that purports to regulate state oil and gas operations, where Texas has already legislated. The effect of this legislation on federal GHG reduction efforts is unclear. Texas entities operating in California should also be aware of a new California law with disclosure requirements for entities making claims regarding the achievement of “net zero emissions”, “carbon neutrality” or “significant reductions” in GHG emissions.

15. Asbestos and Polychlorinated Biphenyls (PCBs)

15.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs

The Texas DSHS has responsibility to administer federal asbestos regulations and enforce the asbestos National Emission Standards for

Hazardous Air Pollutants (NESHAP) in Texas. The DSHS also implements the Texas Asbestos Health Protection Rules, which require licensing and registration for asbestos abatement workers or workers engaged in any asbestos-related regulated activity:

- abatement practices and procedures;
- operations and maintenance requirements;
- notification and record-keeping standards; and
- training requirements.

The TCEQ administers the industrial solid waste regulatory programme that governs polychlorinated biphenyls (PCB) waste generated by industrial activity in Texas. Further, the RRC governs PCB waste from oil and gas activities.

16. Waste

16.1 Key Laws and Regulatory Controls

The SWDA and the Texas Water Code create a framework generally consistent with federal environmental statutes. Requirements do not precisely mirror federal waste regulations, however – for example, Texas classifies waste streams in a more detailed manner.

16.2 Retention of Environmental Liability

Waste generators are generally liable for their waste, even after it is legally disposed of or transferred to another party.

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

Texas requires television and computer equipment manufacturers to offer consumers a used equipment collection and recycling programme under the computer recycling and TV recycling

programmes. Television and computer equipment retailers are also subject to these rules. Retailers may only sell labelled equipment and must order and sell equipment from manufacturers that are on the TCEQ's list of manufacturers with an approved recycling programme.

16.4 Rights and Obligations Applicable to Waste Operators

Waste generators and waste facility operators generally bear responsibility consistent with federal law. Texas, however, has a detailed waste classification system, which expands regulation to wastes based on classifications that differ from merely hazardous or non-hazardous.

17. Environmental Disclosure and Information

17.1 Self-Reporting Requirements

Texas law includes reporting requirements for spill release to numerous environmental media, including ambient air. Specific reporting requirements depend on the substance released and the nature of the source. In most instances, release reporting will be to the TCEQ. If, however, the source in question is an oil and gas facility, reporting will likely fall under RRC jurisdiction. Reporting requirements will vary depending on the media impacted as well as the nature of the material released (hazardous substance, crude oil, other petroleum product, etc).

17.2 Public Environmental Information

Texas provides a litany of resources whereby the public can obtain environmental information on regulated operations. State environmental agencies maintain an online database of relevant permitting and other documentation, by site or operator. These databases are developing, however, and do not always include all the relevant

documents. State environmental agencies are also subject to the Texas Public Information Act, which acts like a state version of the Freedom of Information Act (FOIA).

17.3 Corporate Disclosure Requirement

Publicly traded entities must disclose environmental information in accordance with the rules established by the federal Securities and Exchange Commission (SEC). Importantly, the SEC is currently considering reporting rules relating to climate change and GHG emissions.

17.4 Green Finance

Texas does not have traditional state-led "green financing", but does have programmes such as the Clean Water State Revolving Fund (authorised by the Texas Clean Water Act), which seeks to provide lower-cost financial assistance for the planning, acquisition, design and construction of waste water, waste water reuse and storm water infrastructure.

18. Transactions

18.1 Environmental Due Diligence

Environmental due diligence has a heightened focus in Texas because the state is home to so many industrial concerns. Phase I and Phase II assessments are common. Moreover, because so many transactions involve industrial concerns and Texas has very detailed regulatory programmes, it is especially important to conduct additional diligence relating to permitting and regulatory compliance. Furthermore, Texas is home to myriad endangered species, as well as wetlands, and in some areas, there are coastal-specific issues. These issues are important to consider, particularly with regard to project development.

18.2 Disclosure of Environmental Information

Texas law requires disclosure of certain environmental conditions depending on a transaction's nature. Disclosures required by statute include (i) the presence of USTs as well as (ii) the presence of a current or prior municipal solid waste landfill. Other, broader disclosures may include asbestos, flood zone status, lead paint, soil stability and methamphetamine use, as well as other risks depending on the nature of the transaction. In addition to statutory obligations, disclosure obligations should be considered to avert potential fraud claims. Texas has a specific statutory provision authorising statutory fraud claims specifically in stock and real estate transactions. The statute is broad and allows for fraud to be alleged in situations where a failure to disclose exists, in addition to a misrepresentation.

18.3 Key Issues in Environmental Due Diligence

The most common environmental legal issues arising in transactions in Texas involve (i) potential on-site liabilities associated with various pollution programmes and statutes, including the presence of hazardous substances, solid waste, petroleum contaminants, PFAS, asbestos, PCBs and USTs and (ii) issues relating to compliance with permits authorising air emissions, discharges to state water, and waste management activities. Texas has a robust oil and gas exploration and production industry, particularly in west Texas, and despite the division in authority between the RRC and TCEQ, some operators should put additional focus on TCEQ-related obligations for air emissions, recent EPA regulatory initiatives including the regulations known conversationally as Quad Ob and Quad Oc, and the federal waste emissions charge.

Trends and Developments

Contributed by:

Gerald J Pels, Gerald D Higdon, Elizabeth Corey and Brett A Miller

Locke Lord LLP

Locke Lord LLP is a full-service law firm with more than 600 lawyers and 20 offices. The firm has a history that spans more than 135 years. Locke Lord's environmental team includes dedicated practitioners who understand the many dimensions of environmental laws and the different ways these laws affect businesses and individuals. The lawyers' extensive environmental experience helps clients navigate and respond effectively to regulatory compliance is-

sues, environmental liability concerns, civil and criminal enforcement actions and litigation. The firm has one of the nation's leading practices representing developers, investors and lenders in onshore and offshore wind, solar, storage and other renewable energy projects, as well as other energy and infrastructure projects, in connection with the siting, permitting, compliance and management of utility-scale projects.

Authors



Gerald J Pels is chair of Locke Lord's environmental section – energy and industry and ESG practice and has been a leader in the Texas environmental legal community for over 30 years.

His diverse practice focuses on environmental compliance, permitting, counselling and enforcement defence as well as ESG programme development, risk mitigation and litigation. Gerry's experience includes agency negotiations; assessing and counselling on air, water, storm water and waste permit compliance; representing clients at contested permit, enforcement and other hearings; and internal environmental investigations. He also provides comprehensive assistance and representation to potentially responsible parties and steering committees at both state and federal Superfund sites.



Gerald D Higdon is an accomplished environmental lawyer at Locke Lord with 33 years of experience representing private and public parties towards avoiding, managing and

resolving environmental liabilities, and facilitating environmental sustainability solutions through brownfield redevelopment and the development and scaling of renewable energy. He regularly advises members of the energy industry regarding the management of environmental issues. Jerry routinely defends clients in state and federal environmental enforcement proceedings; develops and implements environmental permitting and planning strategies to facilitate a rapid response to changing business climates and growth opportunities; and assesses, structures and negotiates the allocation of environmental risk-affecting transactions.

USA – TEXAS TRENDS AND DEVELOPMENTS

Contributed by: Gerald J Pels, Gerald D Higdon, Elizabeth Corey and Brett A Miller, **Locke Lord LLP**



Elizabeth Corey focuses her practice at Locke Lord on complex environmental matters impacting industrial concerns and the oil and gas industry, ranging from regulatory

compliance to permitting, litigation and transaction-related issues. She advises clients on a variety of issues involving, for example, permitting and regulatory compliance, site remediation, ESG programme development, reporting and risk mitigation, water resource development, complex international waste transportation and management issues, environmental compliance, facility auditing and TSCA compliance.



Brett A Miller dedicates his practice at Locke Lord to advising manufacturing, energy, petrochemical, refinery, chemical, and landfill companies in regulatory compliance,

litigation and transactional due diligence matters related to air emissions, water quality, and waste management issues under federal and state laws. He has represented clients in numerous state and federal enforcement disputes. Brett has diverse experience navigating complex compliance issues and securing permits for project development related to air emissions, waste water discharges, water rights and waste management.

Locke Lord LLP

JPMorgan Chase Tower
600 Travis
Suite 2800
Houston
TX 77002
USA

Tel: +713 226 1200
Email: gpels@lockelord.com
Web: www.lockelord.com



One Year Into the EPA's Air Raid: Industry Responds to Quad Ob and Oc Regulations and the Ongoing WEC Challenge

Introduction

Calendar year 2024 brought new and increased challenges to the fossil fuel industry regarding air emissions compliance. The breadth of these challenges will be ongoing and significant in both the near and distant future. It will affect not only operations, but also business planning, budgeting, management and reporting structures. Due to recent rule-making, the energy industry is currently in the midst of withstanding a period of heightened emissions accounting, greater operational controls, increased enforcement efforts, and increased record-keeping and reporting obligations. It is certain that affected companies will face challenges not only in preparing for and implementing these rules, but also in monitoring prospective compliance.

The consequences of these challenges are derived in many ways from new federal programmes promulgated by the US Environmental Protection Agency (EPA). The EPA's new rules packages regulate, for the first-time, certain emissions from oil and gas operations and also expand on programmes already in place. Several mechanisms are at the forefront of EPA's most recent push to achieve its politically charged and ambitious climate change mitigation goals.

First, the EPA has issued an expansive rules package that puts in place new source performance standards (NSPS) and emission guidelines (EGs) for certain oil and gas operations. Second, the EPA has proposed changes to the Greenhouse Gas Reporting Program (GHGRP) that would require additional reporting for certain industry segments. Third, the EPA has proposed the first-ever direct charge or tax on methane emissions, beginning in reporting year 2024.

These elements are discussed in more detail below. Finally, compounding these challenges, the oil and gas industry should also expect continued and focused enforcement, including ongoing enforcement associated with the EPA's fly-over/optical gas imaging (OGI) initiative used to identify potentially unauthorised emissions.

The EPA's rule-making expands exploration and production (E&P) air emissions regulations

Quad Ob/Oc: background

The EPA issued several rules packages in 2024 to institute NSPS and EGs for oil and gas operations, some of which include regulation of previously unregulated equipment and operations. The rules apply to new oil and gas sources across the industry's production, processing, transmission and storage segments. The rules further target sources that have been subject to regulation, such as well sites, centralised production facilities, compressor stations and facility components used in production, processing, transportation and storage.

The EPA first proposed the Quad Ob/Oc rules in 2021, including provisions for methane-emission regulation, setting forth NSPS and EGs to reduce the emissions of greenhouse gases (GHGs), including methane and volatile organic compound (VOCs), from new and existing oil and natural gas sources.

In 2022, the EPA proposed supplemental rules to expand on the rules proposed in 2021. On 8 March 2024, the EPA published the final Quad Ob/Oc rules in the Federal Register. The current Quad Ob/Oc rules are grouped into NSPS at 40 CFR Part 60 Subpart OOOOb (Quad Ob) and EGs at Subpart OOOOc (Quad Oc). The Quad Ob rules became effective on 7 May 2024. Regarding Quad Oc, it is expected that most

EGs will go into effect in the future because states will need to develop implementation plans and receive approval from the EPA.

On 12 March 2024, various industry groups and certain states filed a petition for review challenging the Quad Ob/Oc rules in the United States Court of Appeals for the District of Columbia (DC Circuit). The petitioners argued, among other things, that the rules violated the Clean Air Act's (CAA) co-operative-federalism framework, and that the two-year deadline for state plans was arbitrary and capricious. On 4 October 2024, the Supreme Court of the United States (SCOTUS) denied motions to stay implementation of the Quad Ob/Oc rules. The specific challenges to Quad Ob/Oc are currently pending in the DC Circuit, and depending on the lower court's ruling, there is potential for SCOTUS granting certiorari to hear the case given the national significance of the Quad Ob/Oc rules.

NSPS Quad Ob and Eg, Quad Oc

The Quad Ob rules create rigid NSPS for methane and VOC emissions from new or newly modified oil and gas sources in the production, processing, transmission and storage segments of the oil and gas industry that were constructed, reconstructed or modified after 6 December 2022.

The Quad Oc rules require states to issue implementation plans, within two years, establishing and implementing standards of performance in states based on national presumptive standards for existing oil and gas sources constructed on or before 6 December 2022. In essence, states are required to prepare rules that reduce methane emissions from hundreds of thousands of existing sources nationwide for the first time. Generally, the standards set forth in Quad Ob are presumptive standards for Quad Oc. Facilities

must achieve compliance with state plans within 36 months after submission of the state plans, pending EPA approval. The EPA's presumptive standards detail specific technologies, processes and methods, arguably extending far beyond the "best system of emission reduction" standard, which states must employ to reach certain emission-reduction levels.

The Quad Ob/Oc rules also create a new Super Emitter Response Program for "super emitters", which are large leaks and emissions events caused by malfunctions or abnormal operating conditions including unlit flares and open thief hatches on storage tanks (eg, a methane leak with a quantified emission rate greater than 100 kg/h). Of particular interest, the EPA will empower non-governmental third parties to investigate, collect data using approved remote-sensing technologies and report significant methane release events. Upon analysing the super-emitter notifications provided by third parties, the EPA will make such reports public and notify the responsible operator of the super-emitter event.

Owners and operators will then be obligated to respond to the reports or potentially be subject to civil penalties and injunctive relief. Owners and operators must conduct an analysis within five days of notification to determine the event's cause, and then report these results to the EPA within 15 days after receiving the notification. Notably, environmental NGOs, like the Environmental Defense Fund, are actively planning to use their advanced automation satellite technology to support the Super Emitter Response Program.

The Quad Ob/Oc rules require stringent equipment standards and work practices for new and existing sources through several notable actions, as follows.

- **Associated gas-flaring restrictions:** As Quad Ob standards phase out routine gas flaring from new oil wells, effective 8 March 2026, well owners and operators must (i) recover and route gas into a sales line (ie, a pipeline for commercial use), (ii) use the gas as an onsite fuel source, (iii) use gas for another useful purpose or (iv) reinject recovered gas into the well.
- **Storage tanks:** For new and existing sources subject to federal emissions standards, threshold-triggering requirements are now based on aggregated emissions from storage tank batteries, rather than individual tanks. Tank batteries exceeding site-wide tank emissions of 6 tpy of VOCs or 20 tpy of methane must be equipped with closed vent systems and reduce emissions of VOCs and methane.
- **Leak detection and monitoring:** Routine monitoring and leak repair obligations at every well site and compressor station are mandated by the rules, although the rules allow for the use of advanced methane detection technology as alternatives to OGI, EPA Method 21 and other conventional methods.
- **Process controllers and pneumatic pumps:** The rules mandate zero methane and VOC emissions for process controllers and pumps at all facilities (excluding those in Alaska). Quad Ob facilities must comply with the zero emissions standard by 8 March 2025, whereas Quad Oc facilities may have up to 36 months after state plan submittal.
- **Compressors:** The Quad Ob standards affect compressors at centralised production facilities, institute requirements for dry seal centrifugal compressors as a new emission source and provide flow rate requirements for different types of compressors.
- **Well completion practices:** In addition to conducting comprehensive monitoring surveys for fugitive emissions under permanent

closure, well closure plans must now include a final OGI site survey.

- **Gas well liquids unloading:** During gas well unloading events, new and existing gas wells must implement techniques or technologies to minimise or eliminate venting emissions to the atmosphere.

The Methane Emissions Reduction Program of the Inflation Reduction Act (IRA) intensifies the burden on the oil and gas industry

The IRA's methane fee and reporting programmes are intended to work in tandem with the Quad Ob and Oc rules. The IRA's Methane Emissions Reduction Program, which includes increased reporting obligations and waste emissions charges, will place an additional and significant burden on the fossil fuel industry.

GHGRP

As required by the IRA, on 14 May 2024, the EPA published its final "Subpart W" rule amendments to further regulate, expand and revise the GHGRP's methane and other GHG reporting requirements for petroleum and natural gas systems. Certain components of this rule will cross-reference Quad Ob and Quad Oc. This rule has broad reach, includes substantial detail, and is applicable to a broad range of oil and gas facilities.

The revised GHGRP centres on empirical data, verifications and transparency, with the updates grouped into three main categories: (i) additional sources/industry segments; (ii) new/more detailed emissions calculation methodologies and (iii) change of ownership provisions. Regarding the additional sources/industry segments, the EPA's proposal would require additional methane reporting for some facilities, and additional total carbon dioxide, methane, and nitrous oxide emissions reporting for other facilities. Regard-

ing the new/more detailed emissions calculation methodologies, several of these methodologies will now require direct emissions measurements.

The rule requires methane emission reporting for nitrogen removal units, produced water tanks, mud degassing, crankcase venting and “other large release events” including storage wellhead leaks, well blowouts and other large, atypical release events. Further, the rule requires the reporting of total carbon dioxide, methane and nitrous oxide emissions from existing emission sources by additional industry segments, including:

- blowdown vent stacks at onshore petroleum and natural gas production facilities;
- dehydrator vents at onshore natural gas transmission compression stations;
- natural gas pneumatic device venting and blowdown vent stacks at natural gas distribution facilities; and
- equipment leaks at certain onshore natural gas transmission pipeline segments.

Regarding the change in ownership provisions, in the context of transactions involving emissions sources, the EPA clarified whether the buyer or seller should report for the year in which the transaction took place. The requirements vary based on whether the selling owner or operator would retain any emission sources, the number of purchasing owners/operators and whether the purchasing owners or operators already report to the GHGRP in the same industry segment and basin or state.

Waste emissions charge (WEC)

In January 2024, the EPA announced a proposed rule to institute the IRA’s methane WEC, which would collect an annual charge on reported methane emissions from petroleum and natural

gas facilities emitting more than 25,000 tpy of carbon dioxide equivalent per year (as reported under Subpart W of the EPA’s GHGRP described above). Notable elements of the WEC programme include (i) waste emission thresholds; (ii) netting emissions across different facilities and (iii) exemptions for certain emissions/facilities. The proposed WEC rule remained unfinalised until 12 November 2024, when the EPA publicly announced the final WEC rule. As a result of the gap in time between the proposed and final rule, the industry was left with a great deal of uncertainty as to the applicability and calculation methodology for charges due in 2025. That uncertainty has not been fully resolved, in part because the final rule remains somewhat opaque.

The WEC is applicable to the following industry segments meeting the threshold:

- offshore/onshore petroleum and natural gas production;
- onshore natural gas processing;
- onshore gas transmission compression;
- underground/liquefied natural gas storage;
- liquified natural gas import and export equipment;
- onshore petroleum and natural gas boosting; and
- onshore natural gas transmission pipelines.

Under the EPA’s final rule announced 12 November 2024, the EPA will impose and collect a charge on methane emissions that exceed the applicable waste emissions thresholds. Facilities with methane emissions below the thresholds would not be required to pay the WEC. Facilities with emissions above the thresholds, however, would be required to pay:

- 2024: USD900 per metric ton of methane above the threshold;
- 2025: USD1,200 per metric ton of methane above the threshold; and
- 2026 and beyond: USD1,500 per metric ton of methane above the threshold.

The final rule allows for the WEC charge to be paid by 31 August of the year after emissions have occurred, not 31 March as set forth in the proposed rule. The EPA's final rule contains some potentially important changes from the proposed rule. For example, netting will be allowed for WEC-applicable facilities under common ownership or control at the parent company level. Further, the finalised rule continues to allow emissions associated with three detailed exemptions to be potentially excluded from any emissions exceeding the thresholds prior to waste emissions netting calculations. These exceptions remain narrowly drafted, and their applicability will be limited. One change from the proposed rule will allow for an exemption to be potentially available for a party's regulatory compliance on a state-by-state basis and where "appropriate" federal plans have been approved. The proposed rule allowed for an exemption only after all states had approved plans in place. Having said that, under the final rule, qualifying for this exemption will remain challenging for industry and is likely years away from ever being a possibility.

The oil and gas industry faces significant compliance challenges

The EPA's heightened emissions standards and stringent requirements are nearly certain to increase the production costs of energy. Increased compliance costs will also be a significant consequence of the EPA's efforts. The capital requirements to comply with Quad Oc (as to existing sources) will likely be significant for

most operators. Further, the Quad Ob requirements will bring new equipment and operations deeper into the regulatory world, and as discussed above, heightened leak detection and repair (LDAR) and other requirements will emphasise the need for additional manpower, scalable monitoring and reporting requests, as increased investigations result in more response actions.

On the ground, the increased frequency of emissions monitoring industry-wide could influence the market availability of OGI equipment and service providers. In addition to significant capital costs, compliance timelines may be influenced by the availability of piping and associated equipment required to route emissions from compressors to control devices. Industry experts suggest that the capital costs of retrofitting process controllers alone could result in a considerable number of wells becoming potentially uneconomic.

In addition, third-party monitoring of super emitter events will likely lead to substantial new costs. Notices under the Super Emitter Response Program will be publicly available on the EPA's website, such that companies will necessarily need to account for new public relations costs.

What industry can be doing

These rules are lengthy and complex, and oil and gas source owners/operators covered by these rules should carefully review them to understand their compliance requirements. For instance, sources should conduct a detailed assessment regarding when associated gas may be routed to a flare or control device.

It is also important for oil and gas companies to understand the rule's costs so that capital and compliance costs can be appropriately consid-

ered in transactions where these sources are bought and sold. Facilities may want to consider auditing a representative subset of their facilities to understand potential compliance needs across the entirety of operations.

Given the EPA's focus on addressing climate change and environmental justice issues, oil and gas source owners/operators should expect additional scrutiny by the EPA and state agencies into CAA compliance at applicable facilities. This enhanced scrutiny could come in the form of on-the-ground inspections, remote sensing inspections (including fly-overs), information requests and, where violations are identified, the initiation of formal enforcement actions.

EPA fly-over enforcement of E&P facilities Enforcement trends

The EPA is making a concerted effort – through increased hiring, inspections, information requests and civil penalties – to significantly strengthen its enforcement and compliance presence nationwide. The EPA conducted 30% more inspections in FY 2023 compared with FY 2022. As precursors to or in tandem with on-site inspections, EPA regional offices have sent numerous information requests seeking broad and detailed information on issues related to air emissions. Some facilities have even endured multiple, repeat inspections, with each new information request probing deeper into additional compliance areas.

More specifically, over the last several years, the EPA has undertaken initiatives to identify potentially unauthorised emissions at E&P facilities. The EPA utilises OGI technology during fly-overs or direct on-the-ground observations to identify VOC/methane emission plumes from these facilities. At times, first “violations” can be resolved without material impact to facility operations

and with commensurate fines. Subsequent violations by the same or a related entity tend to carry much larger fines, which in some instances run into seven figures.

Resolution of these violations is typically accomplished through a broad consent agreement and final orders (CAFO) with ordering provisions encompassing multimedia inspections, facility permitting and engineering assessments, facility monitoring through OGI and detailed reporting. The EPA reserves its right to pursue enforcement for violations identified through these monitoring activities. Other CAFO provisions typically include comprehensive tank monitoring, and sometimes, monitoring of when pressures reach levels do not even attain the demonstrated leak point of pressure relief devices.

Ordering provisions may also include comprehensive LDAR obligations and requirements to provide video documentation of corrective action.

Industry implications

Regulated entities should expect these enforcement techniques to continue and expand. State authorities in any number of jurisdictions are following suit. NGOs have also initiated OGI “road-side” reviews of selected facilities, and often post videos on social media outlets in an effort to compel enforcement or create evidence for future citizen suits.

These “enforcement” efforts are likely to become more prevalent. Regulated entities face costly hurdles and evidentiary burdens when defending against direct OGI evidence. In short, the EPA's enforcement initiative has been effective. Penalties are being assessed, and more detailed permitting and emissions mitigation is occurring. Importantly, regulated entities should recog-

nise that the permitting and operations review called for by a CAFO can lead to the discovery of unauthorised equipment or sources, and an engineering review can identify operational or design deficiencies that may lead to the need for further permitting, and even expensive capital improvements in addition to potential fines for newly discovered violations.

Preparations

Given the EPA's "success" and the regulations affecting these sources, regulated entities should consider proactive steps, including:

- strongly considering self-auditing (and correction) under applicable state audit and immunity programmes, if available;
- reviewing existing CAFOs executed by the EPA for relevant provisions to prepare for regulator inspections and CAFO requests;
- undertaking a comprehensive facility review checking that (i) all sources are authorised and permitted in a timely manner; (ii) all monitoring records are in order and (iii) all permit and regulatory record-keeping is in order;
- reviewing valve maintenance and operations, as well as flanges, connectors, other emission points and pressure-relief devices for wear or the need for repair;
- evaluating the adequacy of tankage and other processes given current operations; and
- considering self-OGI monitoring to verify compliance status.

Any type of self-audit programme should take into account the need to address corrective actions identified and other evidentiary concerns that could impact subsequent regulatory inspections or enforcement actions.

Conclusion

The EPA's new air emissions programmes and heightened enforcement efforts have undoubtedly presented significant compliance challenges to the fossil fuel industry. The Quad Ob and Oc rules, combined with additional GHG reporting requirements and a first-ever direct charge or tax on methane emissions, highlight the EPA's increased focus on the energy industry. As operators adapt their business planning, budgeting, management and reporting structures, these rules will present expansive challenges for operators in the near and distant future.

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