INTERNATIONAL ASSOCIATION OF JUDGES
SECOND STUDY COMMISSION
Response of the United States Delegation to the 2014 Questionnaire
Hon. Allyson K. Duncan
United States Circuit Judge

Challenges for Civil Environmental Law

Attached please find the Report of the United States to the Second Study Commission.
The cited references are generally available on the internet. Thank you.
1) Briefly set out the key environmental legislation and regulatory authorities in your jurisdiction both in the field of civil law as well as administrative law. Are there specialized courts (civil and/or administrative) that exclusively handle cases of environmental law?

Answer: The central federal authority concerned with environmental regulation is the Environmental Protection Agency (EPA). The EPA administers the United States’ primary environmental statutes and promulgates the regulations for enforcement responsibilities delegated to states and other agencies. The National Environmental Policy Act (NEPA), administered by the EPA, obligates all federal agencies to consider and account for the potential environmental impacts of their programs. The EPA also administers and in some case enforces the Clean Air Act, Clean Water Act, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Resource Conservation and Recovery Act (RCRA), and others. Some notable exceptions to the EPA’s administration of major environmental statutes are the Endangered Species Act, administered by the Department of the Interior, and the various nuclear regulatory acts, administered by the Nuclear Regulatory Commission. Unless we indicate otherwise, our discussion is limited to the federal sector.

Although there are no civil or criminal courts dedicated exclusively to environmental law, the EPA does maintain an administrative court to hear enforcement and permitting cases
arising from environmental legislation. The EPA Administrative Law Judges are subject matter experts in environmental law and only consider cases arising from the statutes administered by the EPA.\(^1\) Appeals from decisions of the Administrative Law Judges may be taken to the Environmental Appeals Board, as discussed in the response to Question 4.

2a) To what extent are environmental requirements enforced by regulators in your jurisdiction?

**Answer:** Enforcement of environmental statutes is divided among the EPA, state government agencies, and private individuals and entities. Although the EPA administers the major environmental regulatory regimes, enforcement authority is in many cases delegated to the states to pursue in their own jurisdictions. As discussed in question 6 below, many of these statutes also permit “citizen suits” which allow non-governmental individuals and entities to compel compliance with environmental regulations through the courts.

The EPA can enforce its regulations directly through administrative proceedings in the Office of Administrative Law Judges, or through civil and criminal actions in federal court. The agency is typically aggressive in enforcing regulations against major violators. In 2013, the EPA’s combined civil and criminal penalties for violators totaled more than $5.5 billion. The EPA website maintains publicly available data on enforcement and compliance, at the federal and state level, including settlements and criminal prosecutions.\(^2\)

2b) What enforcement powers do environmental regulators have in connection with the violation of environmental regulation?

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\(^1\)“Office of Administrative Law Judges,” [http://www.epa.gov/oalj](http://www.epa.gov/oalj)

\(^2\)“Enforcement: Data and Results,” [http://www2.epa.gov/enforcement/data-and-results](http://www2.epa.gov/enforcement/data-and-results)
Answer: The EPA can bring a civil enforcement action to require compliance with environmental regulations through its own administrative process. Through this process, the EPA can issue a notice of violation to a polluter, or a more forceful administrative order, sometimes including penalties, directing a polluter to come into compliance.

The EPA also has recourse to the federal courts. In civil cases, the EPA may file a formal lawsuit against a polluter in federal court pursuant to a statutory violation or a failure to comply with an administrative order. These cases seek injunctive relief and, frequently, monetary penalties. If an environmental harm is discovered after the cessation of polluting activities, either the administrative or the judicial processes can also be used to impose clean up obligations or costs on polluters.

In cases of severe violations, particularly in instances where the action is knowing or willful, the EPA can elect to pursue criminal prosecutions against polluters in federal court. If convicted, violators may be subject to fines and imprisonment.

3) Is there an integrated permitting regime or are there separate regimes for different types of emissions? Can companies apply for a single environmental permit for all activities on a site or do they have to apply for separate permits?

Answer: Environmental permits are not integrated. In the majority of cases, permitting requirements are established and administered independently by each state, within the parameters of regulations promulgated by the EPA. When the EPA has direct authority, permitting is also segmented. For example, for a proposed project, the EPA requires separate permits for air

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3 Environmental cases in federal court are litigated by the Department of Justice on behalf of the EPA.

4 See generally, “EPA Enforcement,” [http://www2.epa.gov/enforcement/enforcement-basic-information](http://www2.epa.gov/enforcement/enforcement-basic-information)
polluting\textsuperscript{5} and water polluting activities\textsuperscript{6}. Hazardous waste disposal is also subject to independent permitting requirements.\textsuperscript{7} However, suspension or revocation proceedings for all types of EPA permits may be heard by the Office of Administrative Law Judges.\textsuperscript{8}

NEPA performs a function analogous to permitting for major federal agency projects, such as construction of infrastructure. Under NEPA, federal agencies are required to consider the potential environmental impacts of their proposed actions and to produce either Environmental Assessments or more comprehensive Environmental Impact Statements.\textsuperscript{9} Private entities frequently assist in the NEPA process when the proposed government action is the issuance of a permit to that entity.\textsuperscript{10} The EPA has authority to review these assessments, although NEPA does not impose specific obligations on agencies beyond considering environmental impacts. Individuals and entities who believe that their interests will be harmed by a government project may challenge the agency’s NEPA compliance for that project in court.\textsuperscript{11}

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

\textsuperscript{5}“Operating Permits,” http://www.epa.gov/oaqps001/permits/

\textsuperscript{6}“NPDES Permitting Program Basics,” http://cfpub.epa.gov/npdes/home.cfm

\textsuperscript{7}“Hazardous Waste – Treatment, Storage, and Disposal,” http://www.epa.gov/osw/hazard/tsd/permitting.htm

\textsuperscript{8}See 40 C.F.R. 22.

\textsuperscript{9}“NEPA Basic Information,” http://www.epa.gov/compliance/basics/nepa.html


\textsuperscript{11}See, e.g., Webster v. USDA, 685 F.3d 411 (4th Cir. 2012) (rejecting plaintiffs’ claim that the Natural Resources Conservation Service failed to satisfy the procedural requirements of NEPA in approving construction of a dam).
Answer: Parties may appeal initial decisions of the EPA to the Environmental Appeals Board. The Board is an independent division of the EPA that serves as the final decision maker on appeals arising from the statutes administered by the agency. Parties may then appeal the final administrative ruling in federal court. Federal judicial review of an Environmental Appeals Board decision begins at a district court, unless the applicable federal environmental statute establishes a different procedure. For example, the United States Court of Appeals for the D.C. Circuit has exclusive jurisdiction of judicial review for Environmental Appeals Board decisions relating to all matters from the Oil Pollution Act.¹²

5a) What types of liabilities can arise when there is a breach of environmental laws and/or permits?

Answer: As discussed in question 2 above, violators may be subject to either civil or criminal liability. Injunctions and civil penalties can be imposed by the EPA in administrative proceedings or by the courts in formal civil lawsuits. Violators may also be subject to criminal prosecution resulting in fines and restitution payments. In certain cases, violators are sentenced to imprisonment for severe violations of environmental laws.

5b) Can an operator be liable for environmental damage notwithstanding that the polluting activity is operating within permit limits?

Answer: Typically a polluter operating within the limits of a permit will not be liable for environmental damage because the burden rests with the permitting authority to properly assess the environmental impact of the activity. However, if an entity misrepresents the nature of its activities in order to secure a permit, it can subsequently be held liable for creating pollution that would otherwise have fallen within the terms of the permit. There is also at least one situation in which liability can be assessed later for activities that were legal at the time they were conducted. Under CERCLA, owners and operators may be held liable for remediation of contaminated sites even if their polluting activities took place before the enactment of the statute in 1980 and were technically lawful at the time. Although this kind of liability is strongly disfavored in the U.S. legal system, courts have held that the clean up reimbursement obligations imposed by CERCLA do not operate as a punishment and therefore do not violate constitutional prohibitions on ex post facto laws and retroactive liability.

6) Are groups or class actions available for pursuing environmental claims, and are penal or exemplary damages available?

Answer: If they meet the procedural requirements for certification, plaintiffs injured by a defendant’s environmentally damaging actions can pursue class action relief under tort law. An award of punitive damages may be available. A well known example is Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008), in which a class of victims of the Exxon-Valdez oil spill received

13 See, e.g., S. Appalachian Mt. Stewards v. A & G Coal Corp., No. 13-2050, 2104 U.S. App. LEXIS 13217 (4th Cir. 2014) (holding that the “permit shield” defense to CWA liability was unavailable where defendant failed to disclose the presence of a specific pollutant in a permit application).


15 See United States v. Monsanto Co., 858 F.2d 160, 173-75 (4th Cir. 1988).
both compensatory and punitive damages for their financial losses caused by the defendants’ recklessness.

A number of environmental statutes also include provisions permitting private groups and individuals to bring “citizen suits” to enforce the statutes in the government’s stead. These provisions are less common in other areas of American regulatory law. Plaintiffs in a citizen suit may sue a private person or entity for violating an environmental regulation, or a government agency for failing to perform a non-discretionary duty required by a regulation. The relief granted in suits of this kind is typically injunctive. Despite the special provisions, individuals or groups bringing citizen suits must still satisfy basic requirements such as standing.\textsuperscript{16} To establish standing, a plaintiff must prove that he has suffered or is imminently threatened with a concrete and particularized injury, that the injury is fairly traceable to the actions of the defendant, and that the injury is likely to be redressed by a favorable decision.\textsuperscript{17}

7) Do regulators keep public registers of environmental information? What is the procedure for a third party to search those registers?

Answer: The EPA collects and maintains environmental data subject to an Executive Order on “Open Data Policy.” As a result, the agency keeps detailed and freely available registers of certain types of environmental information. For example, through its Clean Air Markets Program, concerning reduction of airborne pollutants, internet users are able to search and analyze industry emissions data on the EPA’s website.\textsuperscript{18} The EPA also maintains a searchable


\textsuperscript{17} See, e.g., \textit{Lexmark Int’l, Inc. v. Static Control Components, Inc.}, 134 S. Ct. 1377, 1386 (2014).

\textsuperscript{18} “Air Markets Program Data,” [http://ampd.epa.gov/ampd](http://ampd.epa.gov/ampd)
register dedicated specifically to greenhouse gas emissions\textsuperscript{19} and one for vehicle emission and fuel economy test data\textsuperscript{20}. Internet users can access the EPA’s “Data Finder” to search available records by category of environmental concern.\textsuperscript{21}

8) Briefly describe any proposals of new policy/national plans/regulation/or reform.

\textbf{Answer}: On June 2, 2014, President Obama announced a new Climate Change Action Plan. The three primary objectives of the plan are to reduce carbon pollution from United States sources, prepare communities, infrastructure, and industry for the effects of climate change, and to take a leading role in international efforts to combat climate change.\textsuperscript{22} Implementation of the plan will require cooperation across many sectors of government and industry. Examples of early stage implementation are: 1) proposed carbon emission standards for new and existing power plants; 2) comprehensive national climate assessments; and 3) spearheading the Climate and Clean Air Coalition.

9a) Are there any national targets or legal requirements for reducing greenhouse gas emissions, increasing the use of renewable energy and/or increasing energy efficiency? Is there a national strategy on climate change, renewable energy and/or efficiency?

\textbf{Answer}: Several years ago, the Supreme Court overruled the EPA’s position that it did not have authority to regulate greenhouse gas emissions and held that the agency was obligated to do so

\textsuperscript{19} “Facility Level Information on Greenhouse Gases Tool,” http://ghgdata.epa.gov/ghgp/main.do

\textsuperscript{20} “Emission and Fuel Economy Test Data,” http://www.epa.gov/otaq/testdata.htm

\textsuperscript{21} “Data Finder,” http://www.epa.gov/datafinder/

\textsuperscript{22} “Climate Change and President Obama’s Action Plan,” http://www.whitehouse.gov/climate-change
under the Clean Air Act. In the years since that ruling, the EPA has published scientific findings to support development of federal regulations and national cooperative programs to reduce GHG emissions. The EPA and the National Highway Traffic Safety Administration (NHTSA) finalized a national program in 2010 to cut GHG emissions and increase fuel economy in cars and light trucks manufactured from 2012-2025. There is not yet a binding set of regulations for GHG emissions, but the EPA will begin to introduce more regulations, like its proposed carbon emissions standard for new power plants, in the near future.

The EPA also supports programs that promote renewable energy and energy efficiency. For example, through the Energy Star program, favorable tax treatment is available for consumers using energy efficiency household appliances. Similar tax credit programs are available through the Department of Energy for electric cars.

9b) Is your jurisdiction party to the United Nations Framework Convention on Climate Change (UNFCCC) and/or the Kyoto Protocol? How have the requirements under those international agreements been implemented?

Answer: The United States is a party to the UNFCCC and submits quadrennial National Communications to report domestic and international efforts to implement the convention and


25 Id. at 6.

26 Id. at 11. This proposal is currently in the administrative law notice and comment process.

27 Id. at 12.

address climate change. In the most recent National Communication, the U.S. reported its investment in energy efficiency and clean energy development, improved techniques for climate change assessment and research, and it Greenhouse Gas Inventory, detailing changes in emissions. The U.S. has also implemented numerous domestic initiatives to encourage private sector participation and international partnerships to provide financial assistance and technology transfers. As part of its implementation, the U.S. has also taken part in subsequent multilateral negotiations within the Framework Convention and is a party to further accords such as the Cancun Agreements and the Doha Climate Gateway.29

The United States signed but has never ratified the Kyoto Protocol.

10) Do the usual rules of causation and statute of limitations apply in toxic tort cases?

Answer: There is considerable debate in the United States about the extent to which causation is or should be different from traditional rules in toxic tort cases. Unlike in an ordinary case, where the link is usually obvious, in a toxic tort, the plaintiff must first prove that the substance at issue is capable of causing his injury (general causation). He must then show that the level of the toxic substance he was exposed to by the defendant was capable of causing the injury (specific causation). If there are multiple possible sources of exposure, the plaintiff must prove that the defendant’s conduct was a substantial factor in causing the injury. Unlike in many torts, where causation is apparent, substantial expert testimony is necessary to prove general and specific

causation in toxic torts. However, although the manner of proof is costlier and more difficult, the theory of causation and the burden of proof are no different than in a typical case.

Toxic tort actions are governed by the “discovery rule.” Although this is the ordinary rule for some causes of action in some jurisdictions, in the case of toxic torts it preempts all other statutes of limitation. Under CERCLA, no statute of limitation for an action for personal injury or property damage caused by a hazardous material or contaminant will begin to run until the plaintiff discovers or reasonably should have discovered that the harm was caused by the contaminant. Although CERCLA preempts all statutes of limitation, the Supreme Court recently held that it does not preempt statutes of repose, which prevent a plaintiff from bringing suit against a defendant beyond a specified period of time after the defendant’s last culpable act.

11) Can an individual bring legal action against a polluter, owner, or occupier?

Answer: Yes, as discussed in Question 6 above, individuals can bring actions against a polluter, owner, or occupier either in tort or through the citizen suit provisions of many environmental statutes.

12a) In what circumstances can a buyer inherit pre-acquisition environmental liability in an asset sale or sale of a company (share sale)?

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32 CTS Corp. v. Waldburger, 189 L. Ed. 2d 62, 70 (U.S. 2014)
**Answer:** Under generally accepted principles of U.S. corporate law, a buyer in a share sale steps into the shoes of a predecessor company and therefore inherits that company’s environmental liabilities. By contrast, the buyer in an asset sale is an independent entity and does not inherit the seller’s liability unless: 1) the successor, expressly or by implication, assumes the liabilities; 2) the sale is a de facto merger; 3) the successor is a mere continuation of the previous owner; or 4) the transaction is fraudulent. In the specific context of CERCLA, there is a circuit split on the question of whether state or federal law should determine a successor’s liability for environmental harms.

12b) **In what circumstances can a seller retain environmental liability after an asset sale or a share sale?**

**Answer:** Under CERCLA, the primary remedial U.S. environmental statute, all past owners and operators potentially retain liability for environmental harms caused by pollutants on a given site. CERCLA imposes strict joint and several liability on any entities that are potentially responsible for the release or threatened release of hazardous materials from a facility resulting in clean up costs to a third party. It is clear that a polluter cannot escape responsibility by merely passing its polluting activity to another entity.

12c) **Does a seller have to disclose environmental information to the buyer in an asset sale/a share sale?**

**Answer:** There is no universal obligation to disclose such information. However, under traditional common law rules, a buyer would be responsible for any environmental liabilities of

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34 See, e.g., *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161 (4th Cir. 2013)
which he was aware or reasonably should have been aware, and a seller could not fraudulently
conceal environmental information in order to make the sale. In the case of real property, the
seller would also have a duty to not make material misrepresentations and to disclose any latent
defects of which he was aware but the buyer could not reasonably discover. Different states may
impose more specific requirements or require remediation of certain environmental defects as a
condition of sale.

13) What is the environmental liability of a company after it dissolved?

Answer: There is no universal rule defining environmental liability for dissolved corporations.
The incorporation of a company and the ability of a corporate entity to sue and be sued is a
question of state law that varies widely among different jurisdictions. In most jurisdictions
corporations continue to be liable to suit for some period of time after dissolution. There is an
ongoing debate as to whether CERCLA’s exceptionally broad liability provision should preempt
state incorporation statutes.

14) Could you please indicate whether in your jurisdiction landmark judgments have been
rendered by the (supreme or highest) courts in which –

a) The principle known as “the polluter pays” is accepted?

Answer: The Supreme Court has recognized the liability of polluters for their environmental
harms in numerous CERCLA cases. For example, in Burlington N. & Santa Fe Ry. Co. v.
United States, the Supreme Court ruled that a railroad company was liable for nine percent of the
EPA's eight million dollar cleanup costs for toxic contamination on the railroad’s property. 556 U.S. 599, 619 (2009).

b) Class actions have been successful in cases of infringement of environmental law and in which compensation has been awarded to the persons who sustained he damage?

**Answer:** As discussed above, in an action for violation of environmental statutes, the appropriate relief is generally an injunction and statutorily determined penalties or restitution. However, such relief does not necessarily preclude an award punitive damages for class action tort claims arising from the same polluting events.\(^{35}\)

c) In cross border cases, problems of identification of the applicable law have been solved?

**Answer:** The Supreme Court has not answered this question, however the United States has agreements with its immediate neighbors, Canada and Mexico, to address these concerns.\(^{36}\)


\(^{36}\) See, e.g., “Transboundary Air Pollution,” http://www2.epa.gov/international-cooperation/transboundary-air-pollution