

Environmental, Health and Safety Law Summary and Checklist

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INTRODUCTION

The United States has a complex system of environmental, health and safety laws (“EHS Laws”). The federal laws administered by the U.S. Environmental Protection Agency (“EPA”) and U.S. Occupational Safety and Health Administration (“OSHA”) provide the regulatory framework for most matters. Each state and local government may adopt its own legal requirements as well. The federal laws usually provide the minimum standards, while state or local laws may add extra or special requirements.

The failure to address requirements of EHS Laws may result in significant delays, fines, liabilities, remedial costs, unfavorable news stories and criminal sanctions.

This article provides a checklist of 39 specific questions for a manager to answer in order to assess when further action or inquiry may be required by EHS Laws. Each question is followed by the name of a relevant federal statute and a summary of relevant requirements. The questions and summaries have been arranged by the following areas:

- A. Regulated Products and Industries;
- B. Site Selection and Development;
- C. Hazardous Material Management;
- D. Occupational Safety and Health;
- E. Air Pollutant Emissions;
- F. Water Pollutant Discharges;
- G. Solid and Hazardous Waste Disposal; and
- H. Community Planning and Protection.

These categories provide a starting point for organizing a systematic management program for almost any organization, project, facility or site.

This summary and checklist is provided for general background purposes. It is not comprehensive, does not constitute legal advice and is no substitute for consultation with an attorney.

CHECKLIST OF ENVIRONMENTAL LAWS BY CATEGORY AND ACTIVITY

A. Regulated Products and Industries

1. Does your company manufacture or import a chemical substance?

Toxic Substance Control Act. No person may manufacture or import a new chemical substance, or conduct a significant new use of a chemical substance, without first providing notice 90 days in advance to EPA. Such a notification must contain specified test data concerning the substance's environmental and health effects and is known as a "premanufacturing notification." EPA is authorized to allow a new activity to occur, request more information, conduct studies or restrict any or all applications. Records must be kept and reports must be made to EPA regarding the harmful effects of a regulated substance.

Occupational Safety and Health Act. Chemical manufacturers and importers must prepare a Material Safety and Data Sheet ("MSDS") that is written in English for each hazardous chemical they produce or import. They must supply the MSDS to each purchaser at or before the first shipment to the purchaser. The MSDS must provide detailed information regarding hazards, acceptable exposure levels and handling precautions.

2. Does your company manufacture or import a vehicle, engine or fuel?

Clean Air Act. Vehicles, engines and fuels are subject to specifications regarding allowable emissions from motor operation and fuel storage, transfer and combustion.

3. Does your company manufacture or import a product that consumes energy?

Energy Policy and Conservation Act. Energy conservation standards and labeling requirements are applicable to numerous devices, including motors, boilers, furnaces, air conditioners, refrigerators and fluorescent lights. These are administered by the U.S. Department of Energy.

4. Does your company manufacture, distribute or import a food, drug, cosmetic, medical device or laser product?

Federal Food, Drug and Cosmetic Act. No person may manufacture, distribute or import a regulated product without registering with the U.S. Food and Drug Administration ("FDA"). Labeling, design, manufacturing and performance standards have been issued by FDA for many regulated products. FDA is authorized to restrict the use or handling of a regulated product.

5. Does your company manufacture or import a product that contains a volatile organic material?

Clean Air Act. Products that contain a volatile organic material are subject to maximum organic content specifications in order to limit evaporative emissions (which contribute to smog) during the storage, transfer and use of such products.

6. Does your company manufacture or import an ozone depleting substance or a product manufactured using an ozone depleting substance?

Clean Air Act. The production and sale of chlorofluorocarbons (“CFCs”) and hydrochlorofluorocarbons (“HCFCs”) have been limited because these substances are suspected of causing stratospheric ozone depletion. Also, if a product contains, or was manufactured by a process using, certain CFCs and HCFCs, then the product must have a warning label which identifies such content or process use.

7. Does your company manufacture or import a pesticide?

Federal Insecticide, Fungicide and Rodenticide Act. No person may distribute or sell a pesticide that is not registered with EPA. To register a pesticide, an applicant must submit a proposed label regarding its appropriate uses and detailed information regarding its composition, toxicity, fate and transport. EPA must approve the registration if the labeling is appropriate and the pesticide will not have unreasonable adverse effects on the environment. EPA is authorized to restrict the use or handling of the pesticide.

8. Does your company manufacture, distribute or import a product that contains a hazardous substance?

Hazardous Substances Act. Any product that contains a hazardous substance must bear a label which states: (i) the name and location of the manufacturer, packer, distributor or seller; (ii) the common name of any hazardous chemical; (iii) an appropriate signal word, such as “DANGER,” “WARNING” or “CAUTION;” (iv) the principal hazards; (v) first aid treatment; (vi) special handling instructions; and (vii) certain children protection instructions. These and related requirements are administered by the U.S. Consumer Product Safety Commission.

B. Site Selection and Development

1. Does development of the site involve any sponsorship, financing or approval from the federal government?

National Environmental Policy Act. The federal government must evaluate the environmental consequences of any new project that is conducted, financed, approved or granted an important permit by any federal agency. It must determine whether a comprehensive environmental impact study (“EIS”) is necessary for such a project. An EIS may take years to conduct and may show that a project is incompatible with federal environmental protection policies.

2. Does an endangered or threatened species inhabit the site?

Endangered Species Act. No person may harm or harass a species that has been listed as endangered or threatened by the U.S. Fish and Wildlife Service without obtaining a permit from the U.S. Department of Interior. This prohibits the alteration or destruction of habitat on private land that would injure or kill members of a protected species.

3. Does construction at the site require the dredging or filling of any water body or wetland?

Clean Water Act. No person may dredge or fill a water body or wetland without obtaining a permit issued by the U.S. Army Corps of Engineers. This is to protect both navigation and compliance with area water quality standards.

4. Will development of the site result in a new emission of an air pollutant?

Clean Air Act. No person may construct a “major” stationary source of an air pollutant or significantly modify an air emission source without obtaining a permit issued by EPA or the designated local agency. The applicable requirements constitute the New Source Review (“NSR”) program, which is intended to protect local compliance with national air quality standards. The definition of a major source or modification varies according to the local air quality; the worse the conditions, the smaller the sources that are regulated. If the existing conditions at a site are near or exceed the maximum allowable pollutant concentration levels, then a new facility may be permitted to emit few or no additional amounts of such pollutants.

5. Will development of the site result in a new discharge of wastewater?

Clean Water Act. No person may discharge a water pollutant to surface waters without obtaining a permit issued by EPA or the designated local agency. Persons who discharge to an industrial treatment works also may be subject to pretreatment and indirect discharge requirements imposed by the treatment works. The applicable rules constitute the National Pollution Discharge Elimination System (“NPDES”), which is intended to protect local compliance with water quality standards. If the existing conditions at a site are near or exceed the maximum allowable pollutant concentration levels, then a new facility may be permitted to discharge few or no additional amounts of such pollutants.

6. Will construction occur on a property that is larger than five acres?

Clean Water Act. No person may begin clearing, grading or construction activities on a property that is larger than five acres without obtaining a stormwater discharge permit issued by EPA or the designated local agency and a site-specific pollution prevention plan.

7. Will construction involve the alteration of a building in which asbestos containing materials are present?

Clean Air Act. The renovation or demolition of a structure at which asbestos containing materials are present is highly regulated. Such activities are subject to advance notification, emission control, exposure limitation and waste disposal requirements.

Occupational Safety and Health Act. Employee exposures to asbestos are subject to maximum levels and other OSHA requirements.

8. Will the facility be the primary source of drinking water for employees or visitors?

Safe Drinking Water Act. The operator of a public water supply system must comply with standards for the quality of drinking water. These are set by EPA and are known as maximum contaminant levels

("MCLs"). If a facility itself will directly provide drinking water for the employees and visitors, such as from a groundwater well rather than a local water utility, then it usually must comply with the MCLs.

C. Hazardous Material Management

1. Does your company transport a hazardous material or store containers of a hazardous material?

Hazardous Material Transportation Act. The U.S. Department of Transportation ("DOT") has set national standards for the shipment of hazardous materials by aircraft, rail cars, water vessels and motorized vehicles. DOT has issued a list of hazardous materials and designated a hazard classification for each material, such as combustible, corrosive, explosive, infectious, poisonous or radioactive. The general marking, labeling, packaging, handling and documentation of hazardous materials during transportation are subject to DOT regulations. Certain transporters must register and file reports with DOT.

2. Does your company own or operate an oil tanker?

Oil Pollution Act. Standards have been set regarding the personnel practices and construction of ocean-going petroleum tankers in order to minimize the probability and magnitude of oil spills in waterways.

3. Does the facility have an underground storage tank?

Resource Conservation and Recovery Act. An underground storage tank that is used for a petroleum or hazardous substance generally is subject to installation and operation requirements issued by EPA. Such tanks must have leak prevention and detection features. The tank owner or operator must register the tank, demonstrate the ability to pay for the cleanup of a leak, report evidence of a leak or spill and remediate any release.

4. Does the facility have an aboveground storage tank?

Clean Water Act. If a petroleum or hazardous substance could leak or spill from an aboveground storage tank or other vessel and possibly flow to a water body, then the tank owner or operator generally must prepare and implement a Spill Prevention, Control and Countermeasure Plan in order to minimize the probability of any leak or harm.

D. Occupational Safety and Health

1. Is any employee exposed or potentially exposed to a hazardous chemical or substance while at the workplace?

Occupational Safety and Health Act. If an employee is or may be exposed to a chemical that is a physical or health hazard, then the employer must prepare and implement a written hazard communication program. The employer must: (i) compile a list of hazardous chemicals present; (ii) ensure that hazardous chemical containers are identified with hazard warning labels or by other methods; (iii) maintain a copy of each MSDS in a location that is physically accessible to employees from their work

areas, (iv) specify appropriate methods that the employer will use to inform and train employees about chemical hazards; and (v) conduct and document efforts to educate employees about chemical hazards. In addition, OSHA has issued specific regulations regarding employee exposure to many particular chemicals or substances, including asbestos and lead. In some cases, an employer must conduct medical surveillance of exposed employees.

2. Is any employee exposed to an airborne contaminant while at the workplace?

Occupational Safety and Health Act. OSHA has set a Permissible Exposure Level (“PEL”) for each of many airborne contaminants. A PEL states a maximum average amount or maximum total amount of a substance to which an employee can be exposed from the air at a facility during a certain period. If the actual concentration exceeds the PEL, then the employer either must reduce the concentration or provide personal protective equipment for any exposed employee.

3. Have adequate precautions been taken regarding any highly hazardous chemical used at the workplace?

Occupational Safety and Health Act. OSHA has issued a list of many “highly hazardous” chemicals that are very toxic, reactive, flammable or explosive. If an employer uses a certain amount of such a chemical at a facility, then the employer must prepare and implement a Process Safety Management Program. The employer must: (i) conduct a workplace hazard assessment; (ii) establish a system regarding hazard prevention, hazard mitigation and emergency response; (iii) develop written operating, maintenance and quality assurance procedures; (iv) inform employees and contractors about process safety matters; and (v) investigate any major accident or near-accident in the workplace.

4. Does any employee conduct a hazardous waste or emergency response operation?

Occupational Safety and Health Act. If an employee conducts certain contamination cleanup activities or conducts operations at a hazardous waste treatment, storage or disposal facility, then the employer must implement a Site Safety and Health Program. The program must include: (i) hazard identification and control methods; (ii) personal protective equipment guidelines; (iii) decontamination methods; (iv) emergency response plans; and (v) medical surveillance procedures.

5. Has a hazard assessment, control and training program been implemented regarding first aid preparation, personal protective equipment (“PPE”), confined space entry, “lockout/tagout” of machines (to prevent accidental start-up during maintenance), “hot work” (to prevent fires from welding and cutting) and fork lift operation?

Occupational Safety and Health Act. OSHA has issued regulations that require, either specifically or effectively, an employer to assess the workplace regarding first aid, PPE, confined space entry, lockout/tagout, hot work and fork lift hazards or responsibilities. Depending upon the assessment results, an employer may be required to implement hazard control and training programs.

E. Air Pollutant Emissions

1. Is a permit required for the construction, significant modification or operation of a facility?

Clean Air Act. As explained above, no person may construct a major source or significantly modify an air pollutant source without first obtaining a construction permit pursuant to the NSR program. Similarly, no person may operate a major source or certain other air pollutant sources without obtaining a permit issued by EPA or the designated local agency. An operating permit may require a facility to comply with emissions limitation, monitoring, recordkeeping, reporting and other requirements. An air pollution control permit may restrict the flexibility of a Facility to change its processes, production rates or operating hours.

2. Does the facility include a new or newly reconstructed source of air pollutants?

Clean Air Act. Many types of new or reconstructed facilities are subject to a New Source Performance Standard (“NSPS”). This is a regulation issued by EPA which requires a significant category of sources to meet minimum levels of performance based upon current technologies. An NSPS is intended to limit emissions from ambient pollutant sources.

3. Is the facility subject to any special requirements because of a toxic air pollutant?

Clean Air Act. Many types of facilities are subject to a National Emissions Standard for Hazardous Air Pollutant if they emit one or more of 189 or so air pollutants that are considered to be particularly toxic. This generally requires a source to use, or perform at the level of, the Maximum Achievable Control Technology.

4. Does the facility emit a pollutant that causes acid rain, such as sulfur dioxide or nitrogen oxide?

Clean Air Act. A national maximum amount of sulfur dioxide emissions has been set for certain types of significant sources, such as fossil fuel-fired power plants. Each regulated source is allocated a certain amount of emission allowances by EPA. The affected sources then may sell, purchase or trade the allowances among themselves according to their individual needs. Also, EPA has issued emissions limitations for certain sources of nitrogen oxide emissions.

5. Does your company properly manage any refrigerant or ozone depleting substance?

Clean Air Act. No person may vent CFCs or HCFCs into the atmosphere. The servicing of consumer and industrial refrigeration systems is subject to refrigerant recycling and management standards.

F. Water Pollutant Discharges

1. Does the facility discharge wastewater to a water body or wetland?

Clean Water Act. As explained above, no person may discharge a pollutant to surface waters without obtaining a permit issued by EPA or the local designated agency pursuant to the NPDES. The

requirements differ for industrial and stormwater discharges as well as conventional and toxic pollutants. An NPDES permit may require a facility to comply with discharge limitation, monitoring, recordkeeping, reporting and other requirements. An NPDES permit may restrict the flexibility of a facility to change its processes, production rates or operating hours. Many types of new or reconstructed facilities are subject to NSPS that are intended to limit discharges from significant categories of water pollutant sources. These are regulations issued by EPA which require sources to meet minimum levels of performance based upon current technologies.

2. Does the facility discharge wastewater to an underground well?

Safe Drinking Water Act. No person may inject wastewater or other wastes into an underground well without obtaining a permit issued by EPA or the local designated agency. Such an underground injection well is subject to locational, structural and other restrictions in order to protect the quality of drinking water supplies. In addition, each state was required to develop a wellhead protection program in order to regulate activities that may contaminate underground drinking water supplies.

3. Does the facility discharge wastewater to a treatment works?

Clean Water Act. An industrial discharge to a treatment works is subject to permit, pretreatment and other standards which are administered by EPA or the local designated agency. These requirements are intended to (i) protect the operation of the treatment works and (ii) prevent the discharge to surface waters of pollutants that would not be addressed adequately by the treatment works.

G. Solid and Hazardous Waste Disposal

1. Does the facility generate any waste that is or may be hazardous?

Resource Conservation and Recovery Act. A waste is considered hazardous if it either has been listed as such by EPA or has any of the following characteristics: toxicity, corrosivity, ignitability or reactivity. Any person who generates a solid or semi-solid waste is required to determine if it is classified as a hazardous waste. A generator of a hazardous waste usually must: (i) register with EPA or the local designated agency; (ii) handle such wastes in compliance with the DOT regulations described above; (iii) not store hazardous wastes on-site for more than 90, 180 or 270 days, depending upon the monthly quantities generated; (iv) ship hazardous wastes off-site using a uniform waste manifest document; (v) maintain waste testing and manifest documents; and (vi) file periodic reports with EPA or the local designated agency. Special requirements apply to the importation and exportation of hazardous waste.

2. Does your company conduct transportation, treatment, storage or disposal operations involving solid or hazardous waste?

Resource Conservation and Recovery Act. A hazardous waste transporter must: (i) register with EPA; (ii) handle wastes in compliance with the DOT regulations described above; (iii) transfer waste manifests to the persons who receive wastes; and (iv) clean up any spill or release which occurs during transit. A hazardous waste treatment, storage or disposal facility or a municipal solid waste landfill must: (i) have received a permit issued by EPA or the designated local agency; (ii) comply with design, management and

technical standards issued by EPA; (iii) not accept wastes which it is prohibited from handling; (iv) return completed waste manifests to the generators; and (v) clean up any spill or release which occurs at the facility.

H. Community Planning and Protection

1. Is your facility required to report the presence of any hazardous chemical to emergency response officials?

Emergency Planning & Community Right-to-Know Act. The owner or operator of a facility that is required to prepare or have available an MSDS (as explained above) also must file a copy of each MSDS or a list of hazardous chemicals with its State Emergency Response Commission (“SERC”), Local Emergency Planning Committee (“LERC”) and local fire department (“LFD”) for each hazardous chemical present in amounts of 10,000 pounds or greater and each “extremely hazardous substance” present in amounts of 500 pounds or other specified lower threshold. Such materials are classified as either acute health, chronic health, fire, sudden pressurized release or reactive hazards. In addition, the owner or operator must submit further information, including the locations of hazardous chemicals at the facility. Upon the request of the SERC, LERC or LFD, the owner or operator must submit more detailed information.

2. Is your facility required to take steps to prevent any harm to the neighborhood because of the risk of an accidental chemical release?

Clean Air Act. EPA has issued a list of many chemicals that are very toxic, reactive, flammable or explosive. If a certain amount of such a chemical is present at a facility, then the owner or operator must prepare and implement a Risk Management Plan (“RMP”) to address off-site and other harms from an accidental release of a regulated substance. The RMP must include: (i) a hazard assessment; (ii) a hazard prevention program; and (iii) an emergency response program. Even if an amount less than the threshold quantity is used at a facility, the owner or operator has a general duty to prevent and minimize any accidental release.

3. Has an accidental or unpermitted release of a hazardous substance occurred at your facility?

Emergency Planning & Community Right-to-Know Act. If an unpermitted release of a hazardous substance occurs at a facility that exceeds the applicable quantity threshold and results in exposures to persons off-site, then the owner or operator must immediately notify the SERC and LEPC of the release and any area which is likely to be affected.

4. Is your facility required to report the release, emission, discharge or disposal of any hazardous material?

Emergency Planning & Community Right-to-Know Act. Certain manufacturing Facilities are required to annually submit to EPA a “Form R” for purposes of the national Toxic Release Inventory. The information required includes the: (i) off-site locations to which wastes were transferred; (ii) estimated quantities of

certain chemicals entering the air, land or water annually whether routinely or accidentally; (iii) waste treatment and disposal methods; and (iv) pollution prevention, recycling and source reduction efforts. A facility must submit Form R if it: (i) falls within Standard Industrial Classification codes 20 through 39; (ii) employs 10 or more full-time employees; and (iii) manufactures or processes more than 25,000 pounds, or otherwise uses more than 10,000 pounds, of a toxic chemical during the calendar year.

CONCLUSION

The United States has an elaborate system of EHS Laws, aspects of which apply to any project, facility or site. The above questions and summaries provide assistance with the identification and management of the most common legal requirements.