

BE AWARE OF OVERLAPPING OVERSIGHT OF ENVIRONMENTAL LAWS IN THE UNITED STATES

Smarter Way to Cross Blog Archives
May 7, 2013

Canadian companies doing business in the United States need to be aware of the basic structure of environmental regulatory oversight and enforcement in the applicable jurisdiction. Environmental regulation and enforcement in the United States is handled at the federal, state, and local levels.

On the federal level, the U.S. Congress has enacted various statutes to regulate major environmental areas (e.g., Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [CERCLA]; Clean Water Act [CWA]; Clean Air Act [CAA]; Resource Conservation and Recovery Act [RCRA]; etc.). These federal statutes provide the federal government—usually through the U.S. Environmental Protection Agency (USEPA)—with primary day-to-day enforcement, permitting, and oversight responsibilities. However, many of the statutes have provisions that allow the USEPA to delegate its oversight and enforcement responsibilities to the states, such as through the adoption of a State Implementation Plan (SIP) by a state and USEPA for the CAA.

As part of this delegation, states are required to enact legislation at least as stringent as the federal requirements, but *may* enact more stringent requirements if they choose through their own state analog legislation. This has generally allowed USEPA to avoid the need to micromanage state-level issues, such as permitting and auditing compliance, while maintaining the ability to intercede in more serious enforcement and policy matters. However, it is important to always be cognizant of the fact that even in circumstances where USEPA has delegated authority, it still has the ability to take action. This means that simply relying on state-level approval does not guarantee avoiding USEPA scrutiny.

Each state has its own department that oversees general environmental concerns such as the New York State Department of Environmental Conservation (NYSDEC). These departments handle a range of matters, which generally include basic environmental enforcement, permitting, scheduled site inspections and audits, community dialogue, cleanup oversight, and enforcement proceedings. All states have implemented corresponding laws and regulations to assist the overseeing department with fulfilling its duties. In most states, these departments have regional offices, which allow businesses to deal with people based in their region, as opposed to addressing issues through central offices. In many jurisdictions this is a benefit, as

Attorneys

Michael Hecker

Jeffrey Stravino

BE AWARE OF OVERLAPPING OVERSIGHT OF ENVIRONMENTAL LAWS IN THE UNITED STATES

over time you can develop strong working relationships with the regional office. There are circumstances where states have entered into agreements to work together with regard to the oversight of certain natural resources, such as with regard to the Delaware River basin watershed, whereby Delaware, New Jersey, Pennsylvania, and New York have all ceded some state control to the Delaware River Basin Commission.

Of note, not all federal and state oversight deals with regulatory compliance or enforcement issues. For example, it is important to note that many states, such as New York, have instituted programs to spur development of abandoned or underutilized former commercial or industrial sites (brownfields), which quite often have on-site contamination concerns. For example, NYSDEC oversees the Brownfield Cleanup Program in New York. This program allows for innocent parties to purchase contaminated property, enter it into the program with the department's permission, and receive a pro-rata share of tax credits for the site's redevelopment. These tax credits can apply beyond an entity's taxable basis, thereby resulting in a refund check. State programs such as this can provide profitable business opportunities and should be explored prior to setting up or developing a business in any state, as programs—including New York's—may have sunset provisions built into them.

Finally, local oversight of environmental laws can vary from state to state. Most localities, such as towns and cities, may require certain basic permitting (e.g., permit for the storage of flammable materials with the local fire department, permit for discharge of effluent to a town sewer, etc.), emergency planning notifications should an issue arise at the business or facility, or environmental reviews prior to the acquisition or development of property. In some states, there are regional entities that maintain oversight of various natural resources such as air and water.

No matter where you may be doing business, it is important to engage counsel familiar with the various applicable laws, rules, and regulations, as they will dictate how and with whom environmental issues are addressed.