

Legislation on Environmental Liability in the United States of America(I)

- With focus on doing business in U.S. -

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Environmental Liability in the U.S.(Ⅱ)

- with focus on the case study of the acquisition of
a facility for the treatment of hazardous waste -

KiHan Lee

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I . Introduction

The 1980s were challenging for companies doing business in the United States. Bankers, investors, facility owners and operators, real estate developers and others were equally as challenged during the 80s. The challenge common to all these disciplines related to environmental law. The 1990s promise to keep even busier staying ahead of this ever-changing and highly complex area.

The regulated community has increasingly become compliance-oriented, if not philosophically, then at least strategically. Although the basis for evaluation of environmental liability is more complicated now than ever before, the gradual recognition during the 1980s by the regulated community and other companies doing business in the United States that compliance with environmental laws as a matter of policy is more cost-effective than not, has made transactional work marginally easier than before.

The initial orientation of most U.S. environmental legislation was command and control, that is to say, to set specific requirements and direct their implementation. These laws properly may be considered political weapons. Over time, however, more and more impetus for compliance is coming not from these statutes, but from the need to comply with procedural requirements of environmental (e.g. the National Environmental Policy Act, see below) and non-environmental laws (e.g. securities disclosure). These effects may be deemed a combination of political and economic weapons.

Finally, a knowledgeable group of commentators continues to call for greater reliance on market forces to achieve environmental compliance, as, for example, in the proposal to create transferable credits for pollution reduction, in effect imposing a pricing mechanism on excess pollution.

I will briefly review the American legal framework before illustrating and addressing marketplace compliance influences.

II. The General Legal Framework

1. Structure of Government in the United States

Government operates at both federal and state levels in the United States. Each of the 50 states composing the federal union theoretically retains its sovereignty while the national government enjoys only those powers specifically granted it by the United States Constitution. In practice, however, the national government has extremely broad powers in areas affecting the environment. Actions by the federal government within its sphere of competence are supreme over state law¹⁾

The national government established under the U.S. Constitution has three branches: the legislative, composed of the Senate and the House of Representatives of the U.S. Congress; the judiciary; and the executive. The federal executive branch includes the Cabinet departments, such as the Department of Justice ("DOJ"), as well as agencies like the Environmental Protection Agency ("EPA").

Most states' governments, created by individual state constitutions or charters, are similarly organized, with three branches of government. Their executive branch agencies also have power to promulgate regulations of general applicability pursuant to a statutory framework. A third, local level of government operates in most states, typically enjoying only the powers delegated to it under state law.²⁾

The principal Constitutional grant of power under which the federal government acts in the environmental arena is the power vested in

1) U.S. Const., Art 6, cl. 2 (superemacy clause).

2) For example, in New York there is a state statute governing assessment of environmental esvital consequences of a significant environmental action including new construction, the State Environmental Quality Review Act (SEQRA). N.Y. Env'tl. Conserv. Law 8-0101-0117 et seq. (McKinney 1984). Additionally, within the City of New York, another set of standards, the Uniform Land Use Review Procedures, 1 N.Y. City Charter 197-C et seq. (1976), must be satisfied.

Congress to regulate interstate and foreign commerce.³⁾ This power extends not only to regulating pollutants which themselves move between or among the states, and in all navigable waterways, but also to conduct with only local impacts which, when coupled with "like conduct by others similarly situated," affects foreign or interstate commerce.⁴⁾ The commerce clause is unique in that the Constitution vests Congress with virtually unrestricted authority to determine the extent to which interstate commerce is impacted.

In essence, Congress has the power to define the scope of the power delegated to it. Congress can use its commerce clause power to legislate directly in a given area; it also can decline to legislate but nevertheless bar states from some or all legislation in the area under a corollary doctrine of the supremacy of federal law known as pre-emption.

Other grants of power to Congress which are noteworthy from an environmental perspective are the power to make treaties with foreign states, which treaties also became the supreme law of the land,⁵⁾ and the power to make expenditures to further the public welfare.⁶⁾

The commerce clause is the basis for most of the federal environmental statutes discussed below. Some research programs under the statutes and the some federal capital aid programs (for example, to improve municipal waste treatment facilities) also draw on the spending power.

The Tenth Amendment to the Constitution reserves to the states or the people all powers not specifically granted to the federal government and not prohibited to the states. In the environmental context these would

3) U.S. Const., Art. I, Sec. 8, cl. 3.

4) *Fry v United States*, 421 U.S. 542,547(1975).

5) U.S. Const., Art. 4, cl. 2 ("...all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land...").

6) U.S. Const., Art. 1, Sec. 8, cl.1 (Congressional power to tax to "provide for the common defense and general welfare of the United States"); see also, Art. 1 Sec.8, cl. 18 (power to make "all laws which shall be necessary and proper" to carry out Congressional powers or other powers vested in the federal government).

include the police power and powers over land use and zoning, among others.⁷

2. The Role of Administrative Agencies

Although the commerce clause makes its grant of power to Congress, Congress by legislation can empower federal administrative agencies to act for the government. The agencies, in turn, can promulgate regulation of general applicability.⁸ The agencies' senior personnel are appointed by the President, in some instances with the advice and consent of the Senate.

For most of the United States' history, the federal government was relatively small, with its largest functions being the military and the post office. Railroads aside, federal agencies only became major players in regulation during this century, mostly commencing with programs initiated by President Franklin D. Roosevelt during the Depression. After initial resistance from the Supreme Court, increasing delegation of authority to administrative agencies was sustained. The number of programmatic agencies has increased markedly since, as has total spending.

EPA was assembled from components of various federal agencies, including the Federal Water Quality Administration from the Interior Department, the Pesticides Regulation Division from the Agriculture Department and the Office of Pesticides Research from the Department of

7) For example, federal EPA Administrator William K. Reilly recently decided that a scientific study conducted in connection with the resettlement of parts of the neighbourhood adjoining the Love Canal in Niagara Falls, New York satisfied the requirements of the Superfund statute. As to whether resettlement should proceed, however, Administrator Reilly declared that "[w]e are not called on to make decisions about future land uses of the area...[Those decisions] are being made by state and local authorities." *The Buffalo News*, May 15, 1990, at A2.

8) The Administrative Procedure Act, 5 U.S.C. 500 seq., sets out the rules for such rule-making

Health Education and Welfare, pursuant to an Executive Order signed by President Nixon in 1970.⁹⁾ EPA is organized into 10 geographic Regions, which report to EPA Headquarters in Washington, D.C. A Region may have concurrent jurisdiction with a state regulatory agency in accordance with a delegated program (see below) and may "cooperate" with the state in accordance with the terms of a memorandum of agreement between EPA and the state. Legislation is now pending to make EPA a Cabinet-level agency.

Federal administrative regulations of general applicability are published in the Code of Federal Regulations ("CFR"), which numbered 175 volumes in 1989, 14 of which are dedicated to environmental regulations (112,807 pages and 9,065 pages, respectively). For example, EPA's National Priority List under the Superfund statute (see *infra*) is published in CFR.¹⁰⁾

Additionally, Congress can delegate functions to the states. In the environmental area, for example, the power to administer the federal Resource Conservation and Recovery Act ("RCRA"), discussed below, can be delegated to the states in the EPA Administrator's discretion. Likewise, the Administrator can withdraw a state's authority to administer a delegated program. This happened in the State of Connecticut in 1986, when EPA Withdrew Connecticut's authority to administer the federal RCRA program.

III. Principal Federal Environmental Statutes

- with focus on affecting doing business in U.S.

Although federal legislation affecting the environment can be traced

9) Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (1970). See also Guruswamy, "Integrating Thoughtways: Re-Opening of the Environmental Mind", 1989 Wis. L. Rev. 463 (1989).

10) 40 CFR Part 300.

back as far as 1899 with the federal Rivers and Harbors Act (also known as the refuse Act),¹¹⁾ most of the now significant U.S. legislation was enacted during the 1970s, in large part in response to the rise of a national environmental movement. The majority of this legislation focused principally on command and control measures, setting fairly short-term goals and deadlines for pollution control, although typically leaving specific technical standards to be set by EPA. The legislation gave extremely broad powers to the federal government on the premise that the environmental problems being addressed were singularly urgent.

Although progress was made in a variety of fields, most of the statutory goals were not met and were relaxed or postponed in subsequent amendments. Statutory amendments, often referred to as "mid-course correction", codified EPA's experience in administering the various programs and adjusted programmatic errors arising out of judicial interpretation of the statutes.

I will provide a brief overview of some of the major statutes as an illustration of their influence on a broad range of marketplace activities. Most of the statutes discussed below will be the subject of new legislation over the next two years.

1. The National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. 4321 et seq.)

The first major piece of legislation resulting from the environmental movement was the National Environmental Policy Act of 1969 ("NEPA"). The primary focus of NEPA is activity by the federal government, but, particularly in determining the scope of judicial review and the standing of parties to intervene in litigation, it sets important standards which

11) 33 U.S.C. 407 et seq.

affect other areas.

NEPA 101 declares the national policy of the United States to be that all practicable means should be employed so that federal programs are administered in the most environmentally sound fashion possible. This effects not only federal government construction, but also construction supported in part by federal grant funds, and, of course, federal agency policy-making. The range of projects covered by NEPA is extremely broad. For example, it includes such diverse items as interstate highway construction, urban mass transportation construction, airport construction, federally subsidized housing construction and leases for development of natural resources on the vast areas of U.S. land or water under the control of the federal government.¹²⁾

Without such a statement of policy, agencies might (and did) argue that they lacked Congressional authority to expend funds or take actions premised on environmental considerations.¹³⁾ To accomplish the policy of making federal action as environmentally sound as possible, NEPA requires the revision of agency rules to provide for consideration of environmental impacts relating to the proposed action.

Moreover, agencies must consider long-term and extranational environmental consequences of their actions and develop alternatives. Most importantly, however, NEPA requires any federal agency making a proposal for federal legislation or "other major Federal actions significantly affecting the quality of the human environment" to prepare an environmental impact statement ("EIS").

Among other things, the EIS must detail the environmental impact of the proposed action; any unavoidable adverse environmental impacts it would create; any permanent commitments of resources the project would

12) In 1970, just the land area controlled by the federal government equalled roughly the area of India.

13) See, e.g. the former Atomic Energy Commission's position that it had no authority to address thermal water pollution from unclear reactors.

entail; and alternatives to the proposed action. The EIS procedure requires consultation with other federal agencies with affected jurisdictions or special knowledge, and also require publication of the EIS in draft form and the solicitation of public input on the EIS.¹⁴⁾

Although not outlined in the statute itself, NEPA has become an important predecate for involvement of the judecial branch. Citizen group suits and other suits challenging the adequacy of the EIS process for particular projects have developed a body of law construing the statute. Most states have adopted laws with EIS requirements paralleling NEPA, and also have developed a body of interpretive case law (see e.g., New York's SEQRA, discussed in note 2). Generally speaking, the combination of EIS requirement and the risk (or certainty) of litigation has introduced an element of delay into most government-sponsored capital projects.

In many respects, NEPA is the foremost example of a political weapon to achieve environmental goals in the U.S. system. By insisting on the airing of environmental consequences, the statute has increased greatly the leverage which interest or citizen groups can bring to bear on agency action. Because NEPA creates a process rather than mandating a result, however, most of the litigation over NEPA compliance is procedural in nature.

2. The Clean Air Act (("CAA "), 42 U.S.C. 7401 et seq.)

There has been some federal involvement in attempting to control air pollution since 1955. The initial role consisted of affording grants in aid and technical assistance to the states. Extensive amendments to the statute in 1963 created the first direct federal involvement with regulation, but only in limited areas (notably interstate pollution and

14) NEPA 102(c).

motor vehicle emission standards for new vehicle).

What is commonly thought of as the Clean Air Act is the result of the Clean Air Amendments of 1970,¹⁵⁾ as further significantly amended in 1977¹⁶⁾ and 1981.¹⁷⁾ Extensive revisions to the Clean Air Act are the subject of pending legislation.

Although the 1970 amendments state that “...the prevention and control of air pollution at its sources is the primary responsibility of States...”¹⁸⁾ in fact it profoundly reshaped the relative roles of the federal and state governments in air pollution control, using a command and control model aimed at achieving generally uniform national standards.

CAA Chapter 111 established uniform nationwide standards for air pollution emitted by new sources of pollution as well as for existing sources which underwent physical modification or change in operations. CAA 112 provided the authority for the establishment by EPA of standards for particularly hazardous pollutants (defined as any air pollutant which the EPA Administrator determined to cause or to contribute to air pollution which reasonably may be anticipated to result in an increase in human mortality or in either serious irreversible or incapacitating irreversible illness.). The law vested in EPA the authority not only to designate which pollutants were subject to its provisions, but also the authority to promulgate emission standards for such pollutants after public hearing.

CAA 109 vests EPA with the authority to establish national ambient air quality standards (“NAAQS”). Two standards are contemplated: the primary standard, which is designed to protect public health and allow an adequate margin of safety for that purpose; and a secondary standard, designed to protect the public welfare in such items as crops, livestock,

15) Pub. Law No. 91-604, 84 Stat. 1676.

16) Pub. Law No. 95-95, 91 Stat. 685.

17) Pub. Law No. 97-23, 95 Stat. 139.

18) CAA 101.

and other property.

Within 270 days of the promulgation of NAAQS for a pollutant, each state was to submit a state implementation plan to accomplish the NAAQS as expeditiously as practicable, but in any event within three years for the primary standard and within a reasonable time for the secondary standard. EPA was to review and adopt state implementation plans ("SIP") and adopt those it found to be adequate, thereby giving them the force of federal as well as state law. If any state failed to develop an adequate SIP, EPA, had the power to issue a plan with binding force. EPA initially issued NAAQS for seven pollutants: particulate matter ; carbon monoxide; sulphur dioxide; nitrogen dioxide; ozone; lead and hydrocarbons.¹⁹⁾

The very strict deadlines contemplated by the 1970 Amendments were not met, and much of the subsequent legislative history of the Clean Air Act has concerned extending deadlines for compliance. Because the Clean Air Act imposed extremely onerous penalties for non-compliance — for example, loss of federal grants-in-aid related to pollution control (such as grants for construction of drinking water treatment or sewage treatment facilities) and prohibitions on further or denser land development — the debate over compliance has been highly political. Until this year, the primary consequence has been stopgap measures designed to prevent the implementation of the statutorily mandated penalties for non-compliance.

The Clean Air Amendments also imposed emission level of reduction standards for new motor vehicles; like the NAAQS deadlines, these, too, were later extended. The 1970 legislation also delegated to EPA the authority to establish and revise periodically performance standards for new stationary air pollutant sources.

Finally, the 1970 legislation establishes the principle of prevention of

19) EPA rescinded the hydrocarbon NAAQS in 1982.

substantial deterioration of air quality in areas not complying with NAAQS limits. In complying areas, major new pollutant sources must receive a permit, which is issued only after a finding that the standards for allowable emission increases will not be exceeded and that the source will employ the best available control technology for all air pollutants, without regard to the source's emissions' relation to allowable increase limits.

Congress has been unable to adopt major new Clean Air legislation for 13 years. There has been great difficulty in reaching consensus approaches to problems which cut dramatically across political and geographical interests and different environmental media. For example, one of the pollutants with respect to which NAAQS have not been met is sulphur dioxide. There is substantial evidence to link sulphur dioxide emissions to acid precipitation, which in turn can cause serious damage to vegetation and lakes.

Much sulphur dioxide in the United States is emitted by electric power plants burning high-sulphur content coal, mined primarily in the eastern part of the country. Many of these utilities are located in the Midwest; Most of the damaged forests and lakes are in the Northeast and Canada. A proposal to reduce sulphur dioxide levels which limits use of high sulphur coal will damage coal-mining communities in states like West Virginia and Kentucky. A proposal which requires expensive scrapping equipment for utility stacks will adversely impact power consumers in the Midwest. Either approach would benefit residents of the Northeast, but these residents would pay nothing for the benefit.

The Bush Administration legislative proposal (and, with variations, both the House and Senate versions of the bill) deal with this problem in an interesting fashion. Sulphur dioxide emission level reductions are mandated in a command and control fashion. Utilities which exceed those reductions, however, will be granted transferable credits which they can

sell. Utilities whose costs in meeting the standards are greater can choose to buy permits instead.²⁰⁾

Other principal provisions of the White House proposal and those proposed by the two houses of Congress include: further extensions of the deadlines for meeting NAAQS, with still further extensions for the most-polluted urban areas; and requirements of further tail-pipe emission reductions on new motor vehicles. In addition, one or more versions of the legislation calls for a mandated program of manufacture of alternative fuel motor vehicles and a mandated program of sales of reformulated gasolines in the most polluted urban areas.

Apart from the sulphur dioxide instance, which introduces some market factors, the overwhelming orientation of the legislation remains command and control.

3. The Clean Water Act ((“CWA”), 33 U.S.C. 1251 et seq.)

Federal legislation regulating the discharge of refuse into navigable waterways dates back to the 19th Century.²¹⁾ Although a Federal Water Pollution Control Act was adopted in 1948, the 1972 Clean Water Act (“CWA”) marked a complete departure from the earlier enactments, which had looked to the states to develop water quality standards keyed to the contemplated uses of particular waterways.

The 1972 Act, like the Clean Air Act, took a command and control approach, and also set, ambitious tasks for accomplishment in relatively short time periods. For example, the statute set as a national goal “that the discharge of pollutants into the navigable waters be eliminated by 1985.”²²⁾ That goal was not achieved.

20) See generally Morgenson and Eisenstodt, “Market Driven Environmentalism : Can We Have A Cleaner Environment and Pampers Too”, *Forbes*, March 5, 1990, at 94.

21) *Id.* at n.11.

22) CWA 101 (a)(1).

In addition to the statutory standards for water quality, the 1972 CWA also established a system of effluent limitations for point sources of water pollution. These limitations required all sources other than public treatment works to implement "best practicable control technology currently available" by 1977 and "best available technology economically achievable" by 1983.²³⁾ Public treatment works were required to implement secondary treatment by 1977 and "best practicable control technology currently available" by 1983.

Additional limitations can be imposed on a point source or group of sources when EPA determines such limitations are necessary to attain water quality standards. The statute creates a system of permits granted by EPA (or by states whose programs have EPA approval) for point source emissions, the National Pollutant Discharge Elimination System (NPDES);²⁴⁾ states which have authority to administer the federal CWA refer to their parallel permitting systems as state pollutant discharge elimination systems (SPDES).

New emission sources in certain categories were required to meet performance standards to be issued by EPA.²⁵⁾ EPA has promulgated standards for 51 categories of discharges under the NPDES program since 1974. In January, it proposed its first biannual plan under CWA 304 (m) for issuing new standards and announced that it intends promulgating new discharge limits for certain industrial categories, including adequate hazardous waste and municipal leachate.²⁶⁾ Finally, the CWA authorized EPA to create a list of toxic substances and pollutants and to develop categorical effluent limitations for them.²⁷⁾

CWA made provision for enforcement by the states, but also vested in

23) CWA 301(b).

24) CWA 402.

25) CWA 306.

26) 55 Fed. Reg. 80 (January 2, 1990). See Eremich, "HWT Categories: The Time to Plan Is Now", *Hazardous Waste and Toxic Torts: Law and Strategy* (March, 1990 at 1).

27) CWA 307.

the federal government the power to enforce the CWA. Moreover, the Act permitted citizen suits to effluent limitations set by permits.

As with its air counterpart, subsequent amendments to the CWA changed and postponed various of its deadlines. For private industry, the EPA was given authority to extend the time for compliance with the "best practicable technology" deadline to 1979. The best available technology standard was redefined to vary by type of pollutant. For toxic and nonconventional pollutants, deadline became 1984 (or, for pollutants not initially classed as toxic, three years after adoption of effluent limitations.²⁸⁾

For "conventional" pollutants, the deadline remained 1984, but the standard to be met was "best conventional pollutant control technology", a standard permitting EPA to weigh costs and benefits. EPA extended the deadline in the 1987 amendments to 1989.

The 1987 amendments to the law also attempted to address water pollution from non-point sources, such as run-off from farming operations. A new provision, 319, required the states to identify waterways where water quality standards cannot be met without controlling non-point source emissions. It required them to develop state management plans for non-point source emissions into those bodies of water.

The CWA 307(b) (1)removal credits program for intake waters recognizes innovation in EPA's approach to identifying total existing and permissible additional pollutant loading on the nation's waters. Essentially, the point sources is allowed to reduce the per cent of removal of pollutants in its effluent discharge by a factor relating to the per cent of pollutants in its intake waters. In such a way, the point source may not cause further degradation of the receiving waters but is credited in terms of total discharge with a factor relating to existing water quality.

28) See NRDC v Train, 6 Env'tl. L. Rep. 20588 (D.D.C. 1976))

4. The Resource Conservation and Recovery Act ((“RCRA”), 42 U.S.C. 6901 et seq.)

This statute, enacted in 1976, is addressed to the problems posed by solid and hazardous waste. It recognizes specifically that the solid and hazardous waste problem has been aggravated by efforts to control and manage media under the CAA, CWA and other statutes.²⁹⁾ The portion of the Act dealing with hazardous wastes confers on EPA the power to issue regulations governing hazardous wastes either defined as such under the statute (and implementing regulations) or identified as having the characteristics of hazardous waste which therefore would be treated as “hazardous” for statutory and regulatory purposes.

The Act provides an 18 month period within which the Agency is to promulgate three standards, “as may be required to protect human health and and the environment”, for generators, transporters and those who treat, store or dispose of hazardous materials.³⁰⁾ At the same time, a permitting system for the operation of treatment, disposal and storage facilities is to take effort. The statute also created an elaborate record-keeping system to track hazardous waste from generation to disposal. EPA is given enforcement powers with respect to disposal sites, including powers to inspect (RCRA 3007), and to order compliance and to commence civil proceedings (RCRA 3008). Criminal penalties also are imposed for permit violations or document falsification.³¹⁾

Finally, RCRA gave EPA a broad mandate to seek injunctive relief where past or present handling, storage, disposal or treatment of solid or hazardous waste “may present an imminent and substantial endangerment to health or the environment” (RCRA 7003). In addition, the section confers on EPA the power to issue orders, violation of which subjects the violator to civil

29) RCRA 1002(b)(3).

30) RCRA 3002 ~3004.

31) RCRA 3008.

penalties of up to \$5,000 a day (RCRA 7003(b)).

A similar “imminent hazard” provision governs the citizen suit provision of RCRA(7002). A would-be citizen suitor must give 60 days' notice of the contemplated suit to the asserted violator, to EPA and to the state where the violation assertedly is occurring. The citizen suit may not proceed if during the 60 day period either EPA or the state commences an action to compel compliance.

The Hazardous and Solid Waste Act Amendments of 1984 (HSWA) amended RCRA. HSWA imposed various technical requirements on new or expanded landfills or surface impoundment facilities (e.g., double liners). HSWA also imposed a new requirement that owners or operators of disposal sites undertake corrective action to clean up certain waste (e.g., solid waste management units, “SWMUs”) and provide assurances of their financial responsibility to comply with this regulatory requirement. Assurances can take the form of insurance, a surety bond, a letter of credit, or other devices.

Finally, HSWA gave EPA the power to issue regulations governing underground storage tanks.³²⁾ EPA's regulations are to deal with leaks in existing tanks and standards for new tanks. States were required to undertake a survey of underground storage tanks containing regulated substances. EPA proposed regulations in 1987 requiring testing of tanks for leaks. Title V of SARA (see below) established a \$ 500 million Leaking Underground Storage Tank Trust Fund to pay for remediation where solvent owners or operators of leaking tanks cannot be found to undertake the cleanup.

32) RCRA 9002 et seq.

5. The Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA” or “Superfund”) and the Superfund Amendments and Reauthorization Act of 1986 (“SARA”), 42 U.S.C. 9601 et seq.)

CERCLA arguably is one of the most radical pieces of legislation ever adopted by the United States Congress. The statute was enacted in 1980 to address actual or threatened releases from sites containing hazardous substances. CERCLA, a liability statute, broadens the RCRA definition of hazardous waste (CERCLA 101(14) and (33)) and defines who is responsible for the cleanup of sites containing hazardous substances.

The parties are referred to as potentially responsible parties or “PRPs” (CERCLA 107). Owners and operators of facilities where hazardous substances and wastes are stored, treated or disposed of were required to notify EPA by June 9, 1981 of the quantities and types of hazardous substances and wastes, and any known, suspected or likely releases of them to the environment. (See section 4.(2) below.)

EPA used this information to formulate the original National Priority List (“NPL”), a ranking of contaminated containing sites requiring cleanup, which EPA revises periodically. Currently, the NPL has more than 1,000 sites requiring immediate remedial attention.

CERCLA gives the federal government the power to deal with hazardous substances either by removal (short-term) or remedial (long-term cleanup) actions. CERCLA established a \$ 1.6 billion trust fund to pay for such removal and remedial actions, which SARA increased to \$ 8.5 billion. The trust fund, however, is intended to pay only on an interim basis or in instances where no party can be held responsible. The primary focus of CERCLA is to require parties connected with the contaminated site or the hazardous substances it contains to pay for the cleanup.

CERCLA imposes strict liability³³⁾ upon any party which owned the site from which the actual or threatened release is taking place; which generated, transported or disposed of the substances at the site; or which operated the site. The liability is joint and several among all such parties.³⁴⁾ It is no defence that the party's actions may have been lawful-indeed, allowed by permits-at the time taken. Any responsible party may be obliged to pay not only for the remedial and removal costs incurred by federal or states governments and for other "necessary" response costs incurred by any other party, but also for damage to natural resources resulting from a release of hazardous substances. Moreover the President may issue administrative orders to responsible parties obliging them to take protective measures. CERCLA also provides that the Attorney General may seek injunctive relief where there is "imminent and substantial endangerment" to public health, public welfare or the environment from an actual or threatened release of hazardous substances.

SARA added an "innocent landowner" defence to CERCLA to deal with problems faced by lending institutions and others. (See discussion at section 4.(g)(1) *infra*.)

33) Although CERCLA is silent on the issue of strict liability courts have interpreted CERCLA liability as "strict" based solely on status as a 107 PRP, even if the defendant neither caused nor contributed to the release or threatened release of hazardous substances at the site. *New York v Shore Realty Corp.*, 759 F. 2d 1032 (2d Cir. 1985).

34) Although 101(32) defines the standard of liability under CERCLA to be the same as under CWA 311, i.e. strict liability, the statute is silent as to whether liability also is joint and several. EPA's policy has been that if the harm is indivisible, then liability is joint and several. However, if the harm is divisible and if PRPs can establish a basis for apportionment, then some courts will impose liability on each PRP only for its portion of the total harm. See e.g. *United States v Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983).

IV. Conclusion

There was an enormous upsurge in legislation aimed at protecting the environment in the United States. In the first instance, these laws employed primarily political weapons. At both federal and local levels, "command and control" type were adopted, often mandating strict goals and deadlines and imposing draconian liability.

Such statutes enormously complicated the competition and structure of transactions like the one described both directly and indirectly. At the same time, legislative and administrative initiatives required governments and private actors to consider the environment in ways which they had not in the past. The combination of impacts on third parties and process requirements in areas such as securities law disclosure had introduced market forces as a significant factor for compliance.

The combined effect of these political and economic weapons has been to produce an increasingly compliance-oriented business community. As familiarity with the statutory requirements has grown, and case law has developed, counsel's ability to define and minimize risk has grown. Whether the present mix of political and economic tools will continue is an open question. A variety of factors, including limitation on enforcement resources and economic efficiency, can be cited to support a move toward greater reliance on market forces. The continuing political pressure to preserve the environment, however, makes it unlikely that political arrows will be entirely removed from the U.S. environmental quiver.

미국에 있어서의 기업활동의
환경책임에 관한 입법연구(I)
-미국의 환경법규와 실제 사례를 중심으로-

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5. 주 부동산 양도 법령
6. 환경지역평가
7. 환경지역평가의 장점
8. 기업체의 배상책임
9. 보험
10. 기업공개

Ⅵ. 최종결론

【국문 요약】

1990년 이전까지 약 20년 동안 미국에서는 환경을 보호할 목적으로 수많은 환경입법을 제정하였는데, 초기에는 이러한 환경법규들은 주로 정치적무기로서 채택된 결과였다. 연방정부나 주정부차원에서 명령, 지시규제(Command-Control) 형식의 법규들이 채택되었었고, 이 법규들은 환경규제의 목적, 마감시한, 그리고 책임에 있어서 엄격하게 집행되어졌다. 이러한 환경법규들은 직접적으로는 부동산거래에 있어서 양도요건(transfer requiremints)과 간접적으로는 제3자에의 효과 같은 상거래의 경쟁방식과 구조에 커다란 복잡성을 야기시켜 왔다. 동시에 입법부와 행정부의 환경규제에 대한 최우선정책은 정부와 산업체로 하여금 과거와는 다른 방식으로 환경문제에 따른 그들의 규제활동과 산업활동을 고려하게끔 하였다. 연방증권법(securities law)의 disclosure 조항과 같은 영역에서의 제3자와 절차요건에 비친 이러한 영향은 규제준수를 위한 중요한 요소로서 시장경제의 역할(market force)을 인정하고 있다.

이러한 미국의 환경규제에 있어서 정치적이고 경제적인 정책수단의 복합적 효과는 점차적으로 규준순응적인 산업체의 확장을 가져왔으며, 환경법규의 준수요건에 익숙할수록 법원의 환경판결이 발달할 수 있었고 변호사의 이러한 기업의 위협을 규정하고 최소화하는 능력 역시 증

대되어 왔다. 미국 환경규제체계에 있어서 이러한 정치적이고 경제적 수단을 병행해서 활용하는 현재와 같은 상황이 계속되어질지는 아직까지 단정지을 수 없다. 예컨대 규제집행의 諸자원들과 경제적 효율성에 제한을 끼치는 것을 포함하여 다양한 요소들이 시장경제의 힘에 더욱 더 의존하는 방향으로 진행되도록 유도되어질 수 있는 점을 강조할 수 있다.

이 논문에서는 미국내의 환경규제법하의 배상책임에 대해 기업의 활동과 관련지어서 고찰해 보고자 한다. 먼저 논문의 전반부에서는 법체계에 대한 개괄적 서술로서, 첫째 미국 규제행정기관의 역할과 정부의 기능을 삼권분립의 메카니즘, 환경보호처(EPA)의 기능 등을 중심으로 살펴보고, 둘째로 연방환경규제법의 기업활동과 관련된 주요 내용을 서술하였다.

주요한 환경규제법으로서 환경정책기본법(NEPA), 대기정화법(CAA), 수질규제법(CWA), 자원보존과 회복에 관한 법(RCRA), 환경보상과 책임에 관한 법(CERCLA), 그리고 superfund 개정법인 SARA에 대해 기업활동에 있어서의 배상책임을 중심으로 각각의 liability 내용들을 고찰하였다.

이 논문의 후반부(다음호에서 게재 예정)에서는 Case Study로서 유해쓰레기처리와 관련된 시설물의 매입에 따른 미국의 환경규제법의 준수에 영향을 끼치는 시장경제적 요인(market forces)들을 살펴보고자 한다. 즉, 기업의 시설물매매에 있어서 미국의 환경법의 변화가 20년 전의 기업환경에 비해 어떠한 큰 차이가 있는지를 다음의 문제의식을 가지고 고찰하였다.

- (i) 기업체의 부동산·시설물 매매에 있어서 각각의 계약당사자들의 환경규제에서의 Liability문제
- (ii) 주차원의 부동산양도 법령의 영향
- (iii) 환경지역에 따른 시설물 거래의 범위 및 평가의 장점
- (iv) 기업체의 구조와 경영철학과 관련된 의사결정에 끼친 CERCLA상

의 책임조항의 영향

- (v) 회계원칙과 보고요건이 환경준수에 긍정적 경영철학을 갖도록 유인했는지의 효과분석
- (vi) 보험과 관련된 이슈들
- (vii) 환경법규에서의 시민소송조항의 영향

전술한 법적인 쟁점들은 미국 내에서 외국기업체들이 부동산매매나 기타 기업활동과 관련되어서 미국 환경규제법의 배상 책임에 대한 높은 주의와 관심을 필요로 한다는 현실적 요구를 그 바탕으로 하고 있으며, 이는 미국에 진출해 있는 한국기업들도 예외가 될 수 없다는 점이다. 특히 미국 환경법규에서의 liability문제는 환경규제법규의 빈번한 개정과 엄격한 시행들로 인해 법적인 대응책을 상시 점검해야 하며 법률전문가의 조언을 필요로 한다는 점에서 이 논문은 전반적인 미국 환경법에서 기업체의 환경책임을 중심으로 서술하였으며 후반의 Case Study는 주된 쟁점만을 골라 고찰하였다. 특히 영국기업인 Crown Castle, Ltd 사례에서도 살펴볼 수 있듯이 기업을 인수하거나 합병하는 경우 다음의 법적인 문제들이 사례연구에서 얻을 수 있는 쟁점들이다.

첫째 과거사용에 따른 환경상 위험의 존재 여부

둘째 인수기업이 피인수시설체를 인수하는 데 따른 소유권과 사용권의 환경상 위험과 법률적 책임문제 여부

셋째 거래은행에서 환경상 위험에 따른 금융계약이 있는지 여부

넷째 보험, 재정사의 책임요건 등, 인수되는 기업의 운영에 필요한 규제요건 여부

다섯째 인수되는 기업의 주식이 공개 매매되는지 여부 등 환경규제 대상인 기업체와 관련된 재정상 공개나 보고요건 여부 등이다.