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# ENVIRONMENTAL COMPLIANCE: NEGOTIATING THE REGULATORY MAZE

by Richard F. Chatfield-Taylor<sup>1</sup>

## INTRODUCTION

As the nation's attention focuses on environmental concerns, businesses must assess the impact environmental laws have on them. Yet simply identifying the applicable laws and understanding when they apply can be a significant hurdle. For the uninitiated, a virtual jungle of jargon awaits. For example, acronyms representing various environmental laws include: RCRA,<sup>2</sup> CERCLA,<sup>3</sup> TSCA,<sup>4</sup> CWA,<sup>5</sup> CAA,<sup>6</sup> EPCRTKA,<sup>7</sup> FIFRA,<sup>8</sup> OPA,<sup>9</sup> SDWA,<sup>10</sup> SMCRA,<sup>11</sup> NEPA,<sup>12</sup> ESA,<sup>13</sup> and USTA<sup>14</sup>. Regulatory agencies are also referred to by acronyms. Some of these include OSHA, EPA and DOT. Even the chemicals which

are the source of the problem carry acronyms, such as TCE (trichloroethene), ACM (Asbestos-containing material),<sup>15</sup> MEK (Methyl ethyl ketone) and PCB (polychlorinated biphenyls).

It cannot be emphasized enough that the major federal environmental laws are complex and overlapping. Only through a careful reading of these laws and their accompanying regulations will you be able to begin to understand the full extent of the obligations they impose upon you. Often, where one law appears to exempt a certain chemical or activity, another law brings that chemical or activity within its scope and brings the full weight of the statute to bear on the problem.

These laws also contain many provisions that bind both the regulated community and the agency implementing them. Further, there may be state environmental laws that take precedence over the federal laws or, in some cases, cover issues of environmental concern not addressed at the federal level.<sup>16</sup>

This article is designed to help you negotiate your way through the various environmental statutes and regulations. I will explore the relationship between federal and state environmental programs; what the statutes are and how they relate to their accompanying regulations; and how to decipher the intent behind the regulations. In addition, I will list various sources of information including agency guidance and information hotlines.

## I. THE RELATIONSHIP BETWEEN FEDERAL AND STATE ENVIRONMENTAL PROGRAMS

Regulation of the environment is clearly pervasive. Regulation of a particular substance or practice may find its birth at the state level. Proactive states such as New Jersey, Michigan and California are often the first to act on a particular problem. For

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<sup>2</sup> See *infra* note 23.

<sup>3</sup> See *infra* note 25.

<sup>4</sup> See *infra* note 21.

<sup>5</sup> See *infra* note 74.

<sup>6</sup> See *infra* note 28.

<sup>7</sup> See *infra* note 66.

<sup>8</sup> FIFRA, the Federal Insecticide, Fungicide and Rodenticide Act, is codified at 7 U.S.C. §§ 136-136y (1988).

<sup>9</sup> See *infra* note 74.

<sup>10</sup> SDWA, the Safe Drinking Water Act, was enacted as a health based product control statute, focusing on the affects of products on human and animal health rather than on environmental concerns. Codified at 42 U.S.C. §§ 300f to 300j-26 (1988), SDWA can be divided into two broad areas of coverage. One main area applies to public water systems, and as such, affects primarily the owners and operators of such systems.

The second major portion of the statute is entitled "Protection of Underground Sources of Drinking Water," and it authorizes EPA to publish regulations containing minimum requirements for effective programs to prevent underground injection which endangers drinking water sources. Any underground injection, except as authorized by permit or rule issued under the underground injection program, is prohibited. SDWA's regulations appear at 40 C.F.R. Part 141 (1994).

<sup>11</sup> SMCRA, the Surface Mining Control and Reclamation Act of 1977, is codified at 30 U.S.C. §§ 1201-1328 (1988).

<sup>12</sup> NEPA, the National Environmental Policy Act of 1969, is codified at 42 U.S.C. §§ 4321-4370d (1988).

<sup>13</sup> ESA, the Endangered Species Act of 1973, is codified at 16 U.S.C. §§ 1531-1544 (1988). ESA's regulations are found at 50 C.F.R. Parts 1-24 (1994).

<sup>14</sup> See *infra* note 47.

<sup>15</sup> Most environmental problems have been dealt with by the enactment of specific in-depth regulatory statutes. For instance, the control and remediation of abandoned hazardous waste sites is dealt with specifically through the provisions of CERCLA. One area where this approach has not been achieved is the area of asbestos regulation. Indeed, federal regulation of asbestos has been piecemeal.

Asbestos is a naturally occurring fibrous mineral which was commonly used as a component in building materials before it became known that asbestos fibers, when inhaled, cause a variety of respiratory diseases. Asbestos is listed as a hazardous substance under regulations promulgated by EPA pursuant to CERCLA. The Occupational Safety and Health Act is codified at 29 U.S.C. §§ 651-678 (1988). Regulations promulgated by OSHA, the Occupational Safety and Health Administration, appearing at 29 C.F.R. Part 1910 (1994)(Occupational Safety and Health Standards), set limits on airborne asbestos in the workplace. In addition, EPA has promulgated regulations as part of the National Emissions Standards for Hazardous Air Pollutants ("NESHAP"), which pertain to the removal of asbestos when a building is remodeled or demolished and to other aspects of asbestos abatement. Various other federal laws also regulate asbestos, including bans on the use of certain asbestos containing products such as spray-on ceiling materials.

<sup>16</sup> By contacting the environmental agencies within your state, you can obtain the statutes and regulations that relate to hazardous waste, air, water, etc. In Missouri, contact the Missouri Department of Natural Resources, Jefferson City, Missouri, Phone: 1-800-334-6946.

instance, New Jersey passed the first law in the country aimed at requiring the disclosure of environmental problems when a property transfer is to occur.<sup>17</sup> This law was deemed necessary when it became clear that parties were escaping responsibility for environmental problems by transferring contaminated property to unsuspecting purchasers.<sup>18</sup> When a problem is recognized to be of national concern, however, Congress is persuaded to pass a law that binds individuals and businesses in all states, not just a few.

As a rule, when Congress passes a law, conflicting state laws are rendered invalid.<sup>19</sup> This preemption of state law helps ensure that Congress' purpose in passing a particular law is not frustrated.<sup>20</sup> Under TSCA,<sup>21</sup> this preemption concept is built into the statute itself. In pertinent part, the statute reads that, absent specific narrow exceptions:

[I]f the administrator [of EPA] prescribes a rule or order under . . .

[specified sections of TSCA] which is applicable to a chemical substance or mixture, and which is designed to protect against a risk of injury to health or the environment associated with such substance or mixture, *no State or political subdivision of a State may . . . establish or continue in effect, any requirement which is applicable to such substance or mixture, or an article containing such substance or mixture.* . . . (emphasis added).<sup>22</sup>

Because there are so many federal environmental laws, one might expect that the preemption doctrine would severely limit a state's ability to legislate in this area. Many methods exist, however, to avoid this problem. One frequently used technique is a specific delegation of authority in the federal statute to EPA directing that states be allowed to run the federal program upon EPA's approval. For instance, RCRA<sup>23</sup> pro-

vides that:

Any State which seeks to administer and enforce a hazardous waste program may develop and . . . submit to the Administrator [of EPA] an application . . . for authorization of such [a] program . . . [A state with an approved plan] is authorized to carry out such [a] program in lieu of the Federal program . . . and issue and enforce permits for the storage, treatment, or disposal of hazardous waste.<sup>24</sup>

Another approach to the preemption problem has been for Congress to indicate in the law that it intends for the states to be able to regulate independently in the particular area, provided that the state regulation is at least as stringent as the federal regulation. For instance, in CERCLA,<sup>25</sup> Congress states:

Nothing in this . . . [law] shall be construed or interpreted as preempting any State from imposing

<sup>17</sup> See the New Jersey Environmental Cleanup Responsibility Act (ECRA), N.J. STAT. ANN. §§ 13:1D-101, :1K-1 to :1K-11.6 (West 1995).

<sup>18</sup> See *id.* at §§ 13:1K-1 to -5.

<sup>19</sup> See U.S. CONST. art. VI, cl. 2; *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Com'n*, 461 U.S. 190 (1983); *McDermott v. State of Wis.*, 228 U.S. 115 (1913); *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd. of Mississippi*, 474 U.S. 409 (1986); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973).

<sup>20</sup> *Id.*

<sup>21</sup> TSCA, or the Toxic Substance Control Act, regulates commercially produced chemical substances through the identification and control of the manufacture, processing, commercial distribution, use or disposal of chemicals that pose an unreasonable risk to health or the environment. Codified at 15 U.S.C. §§ 2601-2692 (1988), TSCA regulates some 60,000 chemical substances that have been inventoried by EPA since its enactment. However, TSCA originated primarily as a response to problems posed by polychlorinated biphenyls ("PCB's"). Other examples of chemicals regulated by TSCA include asbestos, dioxin, vinyl chloride, mercury, arsenic, lead, and fluorocarbons. TSCA's regulations appear at 40 C.F.R. Parts 700-799 (1994).

Administered by EPA, TSCA functions: a) to allow information to be gathered on a chemical's toxicity and exposure; b) to regulate existing chemical risks; and c) to identify and prevent future risks.

<sup>22</sup> 15 U.S.C. § 2617(a)(2)(B) (1988).

<sup>23</sup> RCRA, the Resource Conservation and Recovery Act of 1976, is part of the Solid Waste Disposal Act of 1970. Codified at 42 U.S.C. §§ 6901-6992 (1988), RCRA was significantly amended in 1980 and 1984. RCRA provides a comprehensive "cradle-to-grave" statutory scheme, requiring EPA to regulate the generation, transportation, storage, discharge and final disposal of "solid" and "hazardous" waste. It also includes regulatory requirements for post-disposal monitoring care, but does not focus on the clean-up of contaminated sites, which is addressed instead by CERCLA. (See *infra* note 10). RCRA does, however, authorize EPA to obtain injunctions for "action as may be necessary" to remediate past bad practices which "present an imminent and substantial endangerment to health or the environment." This provision of RCRA is an example of the overlapping affect some of the environmental statutes have, in that it allows RCRA to be used to clean up uncontrolled waste sites as well. RCRA's regulations appear at 40 C.F.R. Parts 260-280 (1994)(Generators Part 262, Transporters Part 263, Owners and Operators of TSD Facilities Part 264, Underground Storage Tanks Part 280).

<sup>24</sup> 42 U.S.C. § 6926(b) (1988). Although RCRA vests EPA with regulatory authority over the identification and management of hazardous wastes, it also authorizes states to take over the hazardous waste regulatory program upon meeting certain conditions. The state hazardous waste management programs which have received such authorization are set forth in the Code of Federal Regulations at 40 C.F.R. Part 272 (1994).

<sup>25</sup> One of the most widely recognized pieces of federal environmental legislation is CERCLA. This acronym stands for Comprehensive Environmental Response, Compensation and Liability Act. It was enacted by Congress in December of 1980, and was amended by the Superfund Amendments and Reauthorization Act ("SARA") on October 17, 1986. CERCLA, which is also often referred to as "Superfund," is codified at 42 U.S.C. §§ 9601-9675 (1988). CERCLA's statutory program was enacted to provide sufficient resources through the creation of a \$8.5 billion fund, to facilitate the cleanup of hazardous substances at uncontrolled or abandoned waste sites. Superfund also sets remedial standards affecting anyone who owns, has owned, operated, transported or deposited hazardous substances in or at uncontrolled or abandoned waste sites, termed "Superfund Sites". These various parties are often referred to as "Potentially Responsible Parties." Under CERCLA, the Environmental Protection Agency ("EPA") may take steps to clean up Superfund Sites using the Fund, direct or attempt to compel the owner, operator or specified parties to clean up the Superfund Site, or clean up the Site and attempt to compel the owner, operator or other responsible parties to reimburse the clean up costs. CERCLA also mandates the reporting of releases of certain hazardous substances. Pertinent regulations appear at 40 C.F.R. Part 302 (1994)(reportable quantities for covered hazardous substances).

any additional liability or requirements with respect to the release of hazardous substances within such State.<sup>26</sup>

Where Congress takes this latter approach, a business may find it is liable under both federal and state law for the same dereliction of duty.<sup>27</sup>

As can be seen above, when Congress passes an environmental statute, it may preclude states from regulating at all, or may grant states authority to implement the federal program, provided that a state's program is at least as stringent as the federal program,<sup>28</sup> which means that the state program can be more stringent if the state chooses, provided the additional provisions do not frustrate the intent of Congress as reflected in the federal statute.<sup>29</sup> For instance, the courts have held that states and localities cannot pass laws prohibiting the land disposal of PCB-contaminated soil.<sup>30</sup> This is because such a statute would frustrate the purpose of the federal TSCA statute which allows land disposal as a way to insure the proper disposal of PCBs.<sup>31</sup>

Where a state is implementing a federal program, the regulated community works with state regulatory officials and looks to state law and regulations to determine its compliance obligations. Some states decline to accept the delegation. In those states, the environmental program is implemented by EPA using the federal statute and regulations. In Iowa, for instance, the state has refused to assume responsibility for the RCRA program.<sup>32</sup> As a result, businesses in Iowa must deal with EPA on hazardous waste disposal issues.<sup>33</sup>

Even in those states that implement a federal environmental program, EPA generally *retains* some enforcement authority. As can be seen in the following example, this is a significant reservation on EPA's part. In Missouri, the Missouri Department of Natural Resources ("MDNR") implements the RCRA program.<sup>34</sup> In a recent case, MDNR took a RCRA enforcement action against a generator who had voluntarily reported the improper disposal of certain solvent wastes at its facility.<sup>35</sup> After protracted negotiations, the generator and MDNR agreed to a settle-

ment that included a remediation plan and further audit of the facility.<sup>36</sup> No monetary penalty was imposed.<sup>37</sup> After reaching the proposed settlement, MDNR transmitted the proposal to EPA for review.<sup>38</sup> EPA rejected it outright, undertook enforcement proceedings and subsequently fined the company \$2.3 million.<sup>39</sup> In this case, EPA used the enforcement authority it had reserved when it approved the state RCRA program.<sup>40</sup>

A recitation of EPA's reserved enforcement authority under RCRA, taken from the Code of Federal Regulations, states:

A civil penalty assessed, sought, or agreed upon by the state director . . . shall be appropriate to the violation.

NOTE: To the extent that state judgments or settlements provide penalties and amounts which EPA believes to be substantially inadequate in comparison to the amounts which EPA would require under similar facts, EPA, when authorized by the applicable stat-

<sup>26</sup> 42 U.S.C. § 9614(a) (1988).

<sup>27</sup> See *Manor Care, Inc. v. Yaskin*, 950 F.2d 122 (3rd Cir. 1991); *Lyncott Corp. v. Chemical Waste Management, Inc.*, 690 F.Supp. 1409 (E.D.Pa. 1988); *Allied Towing Corp. v. Great Eastern Petroleum Corp.*, 642 F.Supp. 1339 (E.D.Va. 1986); *Attorney General v. Thomas Solvent Co.*, 380 N.W.2d 53 (Mich. Ct. App. 1985).

<sup>28</sup> See, e.g., 42 U.S.C. § 7410 (1988 & Supp. II 1990) (the Clean Air Act). While EPA has ultimate authority regarding the promulgation and enforcement of air pollution standards, CAA encourages the Administrator of EPA to delegate the prevention and control of air pollution to the state and local governments. Thus, regulation of potential emission sources is governed by a vast, complex and cumbersome array of federal, state and local regulations. CAA's regulations appear at 40 C.F.R. Parts 50-82 (1994). State Clean Air programs which have received authorization from EPA are set forth in the Code of Federal Regulations at 40 C.F.R. Part 62 (1994).

The Clean Air Act (CAA), is designed to protect and enhance the quality of the nation's air resources by a joint federal and state partnership. Codified at 42 U.S.C. §§ 7401-7671 (1988 & Supp. II 1990), the CAA establishes four general air quality goals: attainment and maintenance of National Ambient Air Quality Standards ("NAAQS"); prevention of significant deterioration ("PSD") in clean air areas; preservation of natural visibility in major national parks and wilderness areas; and avoidance of significant risks from hazardous air pollutants.

The passage of the Clean Air Act Amendments of 1990, signed into law as Public Law 101-549 on November 15, 1990, represents the most significant development in environmental legislation in years. The amendments contain a seemingly unending list of features with seven separate titles covering different regulatory programs. These titles are: Air Pollution Prevention and Control; National Emissions Standards; Hazardous Air Pollutants; Acid Deposition Control; Permits; Stratospheric Ozone Protection; and Provisions Relating to Enforcement. Taken together, these titles create a new group of statutory requirements to install more advanced pollution control equipment and to make other changes in industrial operations and even community life styles that will lead to reductions in the emissions of air pollutants.

<sup>29</sup> See, e.g., *U.S. v. Akzo Coatings of America, Inc.*, 949 F.2d 1409 (6th Cir. 1991) (holding that CERCLA does not preempt more stringent state laws).

<sup>30</sup> See *Warren County v. State of N.C.*, 528 F.Supp. 276 (E.D.N.C. 1981).

<sup>31</sup> *Id.*

<sup>32</sup> See *New State May Opt Out of RCRA*, ENGINEERING NEWS-RECORD, Aug. 20, 1987. Iowa pulled out of the RCRA program in 1985 due to a lack of adequate staffing and funds. *Id.* See also 40 C.F.R. Part 272 (1994).

<sup>33</sup> See *New State May Opt Out of RCRA*, ENGINEERING NEWS-RECORD, Aug. 20, 1987.

<sup>34</sup> See MO. REV. STAT. § 260.432 (1994).

<sup>35</sup> *In the Matter of Harmon Electronics, Inc.*, 1994 WL 730509 (E.P.A. 1994).

<sup>36</sup> *Id.* at \*3-\*9.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at \*1-\*2.

<sup>40</sup> *Id.*

<sup>41</sup> 40 C.F.R. § 271.16(e) (1994).

ute, may commence separate actions for penalties.<sup>41</sup>

## II. UNDERSTANDING WHAT THE STATUTE MEANS

As you know, a statute, whether passed by Congress or a state legislature, is the law and can be enforced by the courts. At the federal level, when a law is passed, it is referred to as a "Public Law" and is published in the Statutes at Large. Eventually, these public laws are compiled into the United States Code. While it takes some time for new laws to appear in these official government publications, any of the federal environmental laws can be obtained from the Government Printing Office in Washington, D.C. within a few days of their being passed.

When a state law is passed, it usually appears in the form of a "slip law." These are then added to the official state law publication. As with the federal laws, it may be some time before a law makes it into the official publication. However, the laws can be obtained from the state legislative service branch usually found in the capital city of each state.

Simply put, a statute is a creation of a legislature that declares, commands or prohibits something. Unfortunately, environmental statutes do not typically contain enough detail to allow a business to determine the full extent of its obligations from the statute alone. For instance, paraphrasing language under the Oil Pollution Act of

1990:

An owner or operator of an on-shore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters, adjoining shorelines or the exclusive economic zone of the United States must prepare and submit to the President a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance.<sup>42</sup>

Further, the owner or operator of a facility which must prepare a plan may not operate that facility after January 18, 1993 unless the plan has been approved.<sup>43</sup> Clearly, the statute sets forth what is required and when it is required. What the statute fails to do, however, is define certain critical terms. As a result, a business cannot determine from the statute itself whether its facility is one which must comply with the law.

Another example of this lack of detail is found in TSCA. Under the Act:

[N]o person may manufacture, process, or distribute in commerce or use any polychlorinated biphenyl in any manner other than in a totally enclosed manner.<sup>44</sup>

Again, the statute does not define key phrases like "totally enclosed" and "distribute in commerce", thereby preventing a business

from relying solely upon the statute to ascertain its rights and obligations.<sup>45</sup>

Although few in number, there are statutes, typically at the state level, that are written in copious detail. These statutes are intended to be the sole source of information regarding a business's legal obligations under that particular law. For instance, the legislature of the State of Kansas passed a statute governing the underground storage tank trust fund program.<sup>46</sup> This statute contains all the details needed to determine who is eligible, under what condition, and the amount of recovery that is available.<sup>47</sup> Statutes drafted in this fashion are, however, the exception.

Faced with a statute that does not contain sufficient detail to fully understand its requirements, where does one turn? The answer is to look at the regulations issued in connection with that law. Although this is the solution to the problem, it is important to move beyond this superficial answer and to understand how the regulations relate to a statute, where they come from and what legal affect they have.

One way to conceptualize the relationship between a statute and its accompanying regulations is to view the statute as a tree and the regulations as leaves on that tree. The statute provides the legal framework that binds the regulated community, while the regulations provide the details and direction needed by the regulated community to comply with the statute. Like a new limb, new provisions can be added to a law and,

<sup>42</sup> See 33 U.S.C. § 1321(j)(5) (Supp. II 1990).

<sup>43</sup> *Id.*

<sup>44</sup> 15 U.S.C. § 2605(e)(2)(A) (1988).

<sup>45</sup> See 15 U.S.C. §§ 2603(a), 2605(a), 2605(e)(2)(C) (1988).

<sup>46</sup> See KAN. STAT. ANN. § 65-34,100 to 65-34,124 (1992). The Kansas storage tank act had a sunset clause abolishing the board, the underground fund, and the aboveground fund as of July 1, 1994. This was recently extended to July 1, 2004. See KAN. STAT. ANN. § 65-34,123 (Supp. 1994).

<sup>47</sup> See KAN. STAT. ANN. §§ 65-34,102; 65-34,114 (1993).

In broader terms, the federal statute, USTA, or the Underground Storage Tank Act, regulates underground storage tanks ("UST's"). The Act was added as an amendment to RCRA, by the Hazardous and Solid Waste Amendments of 1984, Public Law 98-616. The UST provisions, codified at 42 U.S.C. § 6991-6991i (1988), require EPA to promulgate regulations governing the prevention, detection and correction of releases from USTs containing petroleum or certain hazardous substances. The UST provisions regulate the detection, prevention and correction of releases from USTs containing regulated substances. Persons who are owners or operators of USTs must comply with the requirements of the USTA and its implementing regulations.

While EPA administers the UST provisions, if a state has a UST program that EPA has approved as meeting the standards of the federal UST provisions, the state will have primary enforcement responsibility for the state program. Current information on whether a state has received such an authorization can be found by contacting the EPA regional office for that state or EPA's RCRA/CERCLA information hotline.

eventually, regulations emerge to give meaning to the new provisions.

Unlike statutes, regulations do not come from Congress or state legislative bodies. Instead, they are issued by the regulatory agency that is charged with ensuring that environmental laws are complied with. At the federal level, this is EPA. Each state has its own regulatory agency or agencies.

At the federal level, all regulations are incorporated into the Code of Federal Regulations ("Code" or "CFR"). Each state also has a similar compilation of regulations. For instance, in Missouri, the environmental regulations are contained in a section of the "Code of State Regulations", and in Kansas, they are contained in the "Kansas Administrative Code". These compilations are generally updated only once a year. Yet, new regulations are being issued almost daily. Fortunately, at both the federal and state level, when a regulation is issued as a "final rule", it is first published in the Federal Register if it is a federal rule or in the State Register if it is a state rule.<sup>48</sup> Typically, these publications are issued once a week. Thus, they provide the regulated community with a way to track new regulations that may have been issued since the last publication of the Code or state administrative rule compilation.

As noted, regulations are issued by a regulatory agency and not a legislature.<sup>49</sup> It must be understood, however, that once a regulation has been issued as a "final rule" it has the same legal force and effect as a statute.<sup>50</sup> Therefore, a violation of a regulation can result

in the imposition of fines and other penalties. At the federal level, this legally binding effect comes from a delegation of rulemaking authority by Congress to the EPA. For instance, under TSCA, the following grant of authority appears:

Within six months after January 1, 1977, the Administrator [of EPA] shall promulgate rules to -

- (A) prescribe methods for the disposal of polychlorinated biphenyls, and
- (B) require polychlorinated biphenyls to be marked with clear and adequate warnings, and instructions with respect to their processing, distribution in commerce, use, or disposal or with respect to any combination of such activities.<sup>51</sup>

At the state level, environmental statutes contain similar delegations from the state legislatures.<sup>52</sup>

Federal and state administrative agencies do have limits on their rulemaking capacity. For instance, a rule issued by an agency can be challenged if the agency has not received a delegation of authority to issue a rule covering the subject matter.<sup>53</sup> Agency rules may also be a challenged if the rule exceeds the scope of the rulemaking authority granted to the agency.<sup>54</sup> An example of the latter can be seen in the challenges that have been made to EPA's lender liability rule. The agency recently defined, by rule, the conditions under which a lender will be liable under CERCLA.<sup>55</sup> This rule was invalidated on the grounds that the agency exceeded its rulemaking authority by issuing a rule that

limits the liability the statute indicates a lender would incur.<sup>56</sup>

State agencies implementing a federal program also have an additional limitation imposed on their rulemaking power. As noted in Section I, the state law must be at least as stringent as the federal law.<sup>57</sup> This includes the federal regulations. As a result, a state administrative agency must ensure that its regulations do not relax the federal requirements. This situation often results in a "hybrid" regulatory program at the state level. For instance, the RCRA regulations in the State of Kansas are composed of references to the federal regulations coupled with state regulations not found in the federal program.<sup>58</sup> By using this approach the state agency ensures it meets the minimum requirements of the federal program.

To fully understand one's legal obligations under the environmental laws, both the statute and the regulations must be available for reference. The following example from TSCA demonstrates this point. The statute states:

[N]o person may manufacture, process, distribute in commerce or use any polychlorinated biphenyl in any manner other than in a totally enclosed manner.<sup>59</sup>

The statute does not, however, define what "totally enclosed" or "distribute in commerce" means. Therefore, if you want to sell a item that contains PCBs, it is impossible to determine from the statute whether that activity is permissible. If we ignore the statute and rely on the TSCA regulations, we find a similar problem. For example, the regulations state:

<sup>48</sup> 49 App. U.S.C. § 1110.8 (1988); See, e.g., MO. REV. STAT. § 536.021 (1994).

<sup>49</sup> See, e.g., MO. REV. STAT. § 536.021 (1994).

<sup>50</sup> See, e.g., *American Fed'n of Labor and Congress of Indus. Org. v. Donovan*, 757 F.2d 330, 341 (D.C. Cir. 1985); *Consumer Energy Council of America v. Federal Energy Regulatory Commission*, 673 F.2d 425, 466 (D.C. Cir. 1981).

<sup>51</sup> 15 U.S.C. § 2605(e)(1)(1988).

<sup>52</sup> See, e.g., MO. REV. STAT. §§ 643.050, 644.041 (1994).

<sup>53</sup> *American Power & Light Co. v. Sec. & Exch. Comm'n*, 329 U.S. 90 (1946).

<sup>54</sup> *Id.*

<sup>55</sup> *Kelley v. Envtl. Protection Agency*, 15 F.3d 1100 (D.C. Cir. 1994), cert. denied by *American Bankers Ass'n v. Kelley*, 115 S.Ct. 900 (1995).

<sup>56</sup> *Id.* at 1104-05.

<sup>57</sup> See, e.g., *Union Electric Co. v. Envtl. Protection Agency*, 427 U.S. 246, 265-66 (1976); *Shell Oil Co. v. Train*, 415 F.Supp. 70, 72 (N.D. Cal. 1976); *Indiana Coal Council v. Lujan*, 724 F.Supp. 1385, 1397-98 (D.C. Cir. 1991).

<sup>58</sup> See, e.g., KAN. ADMIN. REGS. 28-29-1 to -83 (1993).

<sup>59</sup> 15 U.S.C. § 2605(e)(2)(A) (1988).

Except as authorized in § 761.30, the activities listed in paragraphs (a) and (d) of this section are prohibited pursuant to Section 6(e)(2) of [the TSCA statute]. The requirements set forth in paragraphs (b) and (c) of this section concerning export and import of PCBs for purposes of disposal and PCB items for purposes of disposal are established pursuant to Section 6(e)(1) of [the TSCA statute]. *Subject to any exemptions granted pursuant to Section 6(e)(3)(B) of [the TSCA statute], the activities listed in paragraphs (b) and (c) of this Section are prohibited pursuant to Section 6(e)(3)(A) of [the TSCA statute].*<sup>60</sup>

As you read through this provision, it is apparent that the regulation cannot be understood unless you have the ability to refer to the statute. Despite numerous examples such as this throughout the various environmental statutes, we frequently find that individuals charged with environmental compliance make decisions based on what they find in the regulations, not having read the statute. This type of approach is sure to result in eventual nonconformance with the statute.

### III. WHAT DO THESE REGULATIONS MEAN?

As we have seen above, a statute is given life through its regulations, and we use those regulations as our primary method to determine what the statute requires.<sup>61</sup> Often, the regulations themselves are vague and difficult to decode. When this occurs we then look for tools that we can use to better understand them.

#### A. Using the Federal Register to Interpret the Regulation.

As noted above, all regulations at the federal level are compiled in the Code of Federal Regulations (Code).<sup>62</sup> As a rule, however, the Code does not discuss how a regulation should be interpreted and it is updated only once a year.<sup>63</sup> Fortunately, we can use the Federal Register to help us decode the regulations. In fact, the Federal Register is arguably the most effective tool for ascertaining EPA's interpretation of what Congress wanted when it enacted an implementing statute and EPA's views on how a regulation is to be implemented. This "regulatory intent" can be derived through an inspection of the "preamble" that precedes a "final rule" when it is published in the Federal Register.<sup>64</sup> In addition to learning about the regulatory intent behind the rule, the preamble often contains examples of

how the rule is to be applied in a specific situation.<sup>65</sup> For example, in the preamble to the final rule under the Emergency Planning and Community Right-to-Know Act,<sup>66</sup> there is a detailed example of how to distinguish when a chemical is being manufactured, processed or otherwise used. This distinction is critical since different reporting thresholds exist for each category.<sup>67</sup>

In addition to using the Federal Register to obtain EPA's interpretation of a rule, the Federal Register can be used to monitor a regulation as it is being developed.<sup>68</sup> When a rule is being written, EPA takes it through various review stages.<sup>69</sup> Once these are completed, EPA must then publish the rule as a "proposed rule" for public comment.<sup>70</sup> By monitoring these proposed rules, the regulated community can determine how the agency intends for the final rule to work.<sup>71</sup> With this insight, businesses can try to impact the language of the final rule by submitting comments on the proposed rule to the agency.<sup>72</sup> Once those comments are submitted, the agency is required to review and consider them before issuing the final rule.<sup>73</sup> Typically, you will find EPA's analysis of the comments in the preamble to the final rule.

#### B. Agency Guidance

In addition to using the Federal Register to

<sup>60</sup> 40 C.F.R. § 761.20 (1994).

<sup>61</sup> The Federal Register and Code of Federal Regulations are enacted by 44 U.S.C. §§ 1501-1511 (1988). The contents of the Federal Register are required to be judicially noticed. 44 U.S.C. § 1507 (1988).

<sup>62</sup> The Code of Federal Regulations is enacted by 44 U.S.C. § 1510 (1988), and is prima facie evidence of the text of the original documents.

<sup>63</sup> The Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows: Title's 1 - 16 as of January 1; Title's 17 - 27 as of April 1; Title's 28 - 41 as of July 1; and Title's 42 - 50 - as of October 1. 1 C.F.R. Explanation. at v.

<sup>64</sup> See, e.g., *infra* note 66.

<sup>65</sup> *Id.*

<sup>66</sup> "EPCRTKA," or the Emergency Planning and Community Right-to-Know Act of 1986, was passed by Congress as Title III to the Superfund Amendments and Reauthorization Act of 1986. Codified at 42 U.S.C. §§ 11001-11050 (1988). EPCRTKA is not merely an amendment to CERCLA, but is an independent act. Distilled to its essence, the goal of EPCRTKA is to establish programs that: provide the public with important information on the hazardous chemicals in their communities; provide the public and government officials with information about routine releases of toxic chemicals into the environment; and establish emergency planning and notification requirements designed to protect the public in the event of a non-routine release of hazardous chemicals. 42 U.S.C. §§ 11002-11005 (1988). EPCRTKA regulations appear at 40 C.F.R. Parts 355-372 (1994).

<sup>67</sup> 40 C.F.R. § 372.25 (1994).

<sup>68</sup> See, e.g., Procedures for Rulemaking Under Section 6 Of The Toxic Substances Control Act. 40 C.F.R. §§ 750.1-.41 (1994).

<sup>69</sup> See, e.g., 40 C.F.R. § 750.2 (1994) (where the EPA must include, in a notice of the proposed rulemaking, support that an unreasonable risk of injury to health or the environment exists, reasons for the proposed rule, and all relevant aspects of the risk).

<sup>70</sup> See, e.g., 40 C.F.R. §§ 750.4, 750.15, 750.35 (1994).

<sup>71</sup> See, e.g., 40 C.F.R. §§ 750.1-.41 (1994) (where interested persons may respond to the proposed rule through public comments, subpoena documentary material and witness, participate in informal hearings, and cross-examine witnesses).

<sup>72</sup> *Id.*

<sup>73</sup> See, e.g., 40 C.F.R. §§ 750.9, 750.21, 750.41 (1994).

interpret a regulation, there is a wealth of interpretive information available from EPA in the form of agency guidance documents. These guidance documents include internal EPA policy statements, guidance manuals, technical documents and interpretive memoranda that explain EPA's official position with respect to a particular situation or how the agency is going to interpret a particular section of a statute or regulation.

As you might imagine, these guidance documents can be particularly useful as one tries to understand what the agency is likely to do in a particular situation. For instance, EPA's NPDES stormwater permit application regulations, promulgated under the authority of the Clean Water Act,<sup>74</sup> were recently challenged in court.<sup>75</sup> As a result of that challenge, the court decided that EPA's exemption of construction sites under five acres in size and its provisional exemption of certain "light industries" from the permit application requirements was improper.<sup>76</sup> After this decision, many businesses within the light industry exception were left at a loss as to how to proceed and they began contacting the EPA regional offices for guidance. In response, EPA's headquarters office in Washington, D.C. issued an internal guidance document that explained to the regional offices EPA's official position with respect to the court decision. By inspecting

this document, an affected business can gain insight into how EPA is going to proceed in the face of the court decision and react accordingly.

Another form of agency guidance is EPA's penalty policies. These policies exist for each of the major environmental laws and they explain how penalties are to be computed and what type of mitigating factors can be considered by the agency. The purpose of these penalty policies is to make EPA's approach to penalty assessment uniform across the country. For a business, they can be used to explore the risks to the business for any apparent violations at their facility. They can also be used by management to help educate employees as to the seriousness of a failure to comply with environmental laws.

Although these guidance documents can be extremely useful, they can be very difficult to identify and obtain. EPA has issued literally thousands of these documents, some of which are published and some of which go unpublished. Often the easiest approach to obtaining these guidance documents is to contact the regional EPA office with jurisdiction over your facility. For instance, the Water Pollution Control Division of EPA's Region VII Office was making copies of EPA's position relative to the court decision on EPA's NPDES stormwater permit regu-

lations available to anyone who wanted one.

Unfortunately, just as often, EPA officials refuse to release any guidance documents without a more formal written request. Typically, this written request must take the form of a Freedom of Information Act ("FOIA") request.<sup>77</sup> FOIA was passed to provide the public access to the vast amount of information that is generated by government agencies.<sup>78</sup> In part, FOIA requires that:

Each agency, in accordance with published rules, shall make available for public inspection and copying -

(A) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) Those statements of policy and interpretations which have been adapted by the agency and are not published in the Federal Register; and

(C) Administrative staff manuals and instructions to staff that affect a member of the public . . . .<sup>79</sup>

EPA has specific regulations on who to send a FOIA request to and how the agency is to respond once it receives the request.<sup>80</sup> A FOIA request need not be elaborate.<sup>81</sup> The requests should be directed to the Freedom of Information Act Officer at either EPA's Washington, D.C. headquarters or the EPA Regional Office from whom you wish to obtain information.<sup>82</sup> The body of

<sup>74</sup> The Clean Water Act (CWA), is the primary statutory scheme under which environmental issues relating to water are addressed. Codified at 33 U.S.C. §§ 1251-1376 (1988), the CWA was designed to regulate the discharge of pollutants into the navigable waters of the United States. Wetlands are regulated under the act, and these regulations appear at 40 C.F.R. Part 228 (1994). CWA also establishes effluent limitations on point sources with the objective of achieving acceptable water quality standards through a program administered by both state and federal agencies. *Id.* at §§ 1311-1330. As the primary mechanism for achieving and enforcing water quality standards, the Act establishes the National Pollutant Discharge Elimination System ("NPDES") permit, a complex permit system which specifies the amount of pollutants that may be discharged into navigable waters. *Id.* at § 1342. Regulations pertaining to NPDES permits appear at 40 C.F.R. Part 122 (1994).

The Act also prohibits the discharge of oil in quantities determined to be harmful. *Id.* at § 1321. Added to the Federal Water Pollution Control Act Amendments of 1972, § 1321 declares that there should be no discharge of oil or hazardous substances that may affect natural resources belonging to the United States. *Id.* Thus, the primary authority for dealing with environmental regulation of petroleum product spills is contained in the Clean Water Act. *Id.* For those areas where spills occur, response actions are dictated by compliance with the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"). 40 C.F.R. 300.1-300.1105 (1994). In addition, certain facilities must comply with the provisions of the Oil Pollution Act of 1990 (OPA). 33 U.S.C. § 2761 (Supp. II 1990).

<sup>75</sup> *Natural Resources Defense Council, Inc. v. U.S. E.P.A.*, 966 F.2d 1292 (9th Cir. 1992).

<sup>76</sup> *Id.* at 1304-06.

<sup>77</sup> See 5 U.S.C. § 552 (1988).

<sup>78</sup> *Id.*

<sup>79</sup> 5 U.S.C. § 552(a)(2) (1988).

<sup>80</sup> 40 C.F.R. §§ 2.100-406 (1994).

<sup>81</sup> *Id.* at § 2.108 ("request shall be made in writing, shall reasonably describe the records sought in a way that will permit their identification and location . . . , but otherwise need not be in any particular form").

<sup>82</sup> *Id.* at § 2.106 (which specifically provides regional addresses to send a request).



the letter should recite that you are making a request pursuant to the Freedom of Information Act, 5 U.S.C. § 552. Then, you should recite the title of the document you wish to obtain, or an explanation of the type of material you are seeking using as much detail as possible. This will assist the agency in narrowing their search and will increase the odds that you will receive documents responsive to your request. Finally, you should indicate in the letter a dollar figure for copying charges above which you want to be notified before the agency proceeds. Generally, there is no charge for copying costs incurred by the agency up to \$25.00.<sup>83</sup>

Once a request is submitted, the agency is required to determine whether it will reply within ten days of receipt of your request.<sup>84</sup> If the agency refuses to respond, appeal procedures are set forth in the regulations.<sup>85</sup> In practice, what generally happens is the agency will send you a postcard indicating it has received your request and is processing it. Depending upon the difficulty the agency has in locating responsive documents, you can expect a response anywhere from two weeks to two months after the agency has received your request.

At the state level, there are fewer agency guidance documents, and those are even more difficult to identify and obtain.<sup>86</sup> However, each state has an FOIA equivalent which can be used to try to locate helpful documents. Requests at the state level should be directed to the state environmental agency.

### C. Hotlines

One of the most useful sources of information regarding a regulation and/or a statute are the various information hotlines that EPA or its representatives maintain.<sup>87</sup> These hotlines are manned by "information specialists" generally under contract with EPA. These specialists have a wealth of information available to assist you in interpreting the statutes and regulations. In this regard, they can often send you the agency guidance they are using at no charge.

In addition to using the hotlines to obtain agency guidance, they are particularly useful when you are trying to determine whether there are any statutes or regulations that apply to your facility. For instance, if you want to know whether there are regulations under TSCA concerning the storage of transformers containing PCBs, you can contact the TSCA hotline and they can direct you to the applicable regulations. The hotlines are also very useful as a check against your own research. Using the same example, if you have determined that there are no storage regulations for transformers that have been taken out of service and are destined for resale to someone who would use them as transformers, you can contact the hotline for a verification of your research. Its extremely important to note, however, that while these hotline information specialists are a very good source of information, you need to satisfy yourself through your own research that the information they provide you is accurate.

### D. National Technical Information Services

The National Technical Information Service ("NTIS") is an information clearinghouse within the U.S. Department of Commerce.<sup>88</sup> This group has more than 2.5 million documents in its collection, including thousands of pages of agency guidance from EPA. These documents may be obtained, for a fee, by calling 1-800-553-6847. Unfortunately, NTIS is only capable of responding to a request in which the name of the document or the document number is known. Although this limits NTIS' usefulness in identifying applicable documents, NTIS has cataloged the documents in its holdings and these catalogs can be inspected at any government document depository. Further, these catalogs can be obtained from NTIS, although there is a substantial fee for them.

### E. EPA Offices

EPA operates 10 regional offices, each of which is responsible for environmental compliance in the states within their jurisdiction. These offices can be contacted for advice regarding the application of a law or regulation to a particular problem.<sup>89</sup>

### CONCLUSION

Environmental laws can impact the regulated community in myriad ways. Federal and state programs interact, regulations relate to their statutes, and regulations themselves must be interpreted. For businesses to understand which law applies to them and when, it is crucial that they understand these relationships.

<sup>83</sup> See *id.* at § 2.120, regarding fee regulations.

<sup>84</sup> 40 C.F.R. § 2.112 (1994).

<sup>85</sup> *Id.* at §§ 2.114-117.

<sup>86</sup> Note: Missouri currently has no state statute mandating disclosure of information.

<sup>87</sup> The following is a list of EPA's information hotlines:

RCRA/CERCLA/EPCRTKA - 1-800-424-9346 or 1-800-535-0202

TSCA - 1-800-835-6700

NPDES Stormwater - 703-821-4823

Radon - 1-800-767-7236

Pesticides and Biocides - 1-800-858-7378

Safe Drinking Water - 1-800-426-4791

EPA Small Business - 1-800-368-5888

The Department of Transportation also maintains a hotline that can be used to obtain information regarding the proper shipment of hazardous substances. This number is 202-366-4488.

<sup>88</sup> See 15 U.S.C. § 3704(b) (Supp. 1988).

<sup>89</sup> Following is a list of the 10 regional EPA offices: EPA Region I (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont), Phone: 617-573-5770; EPA Region II (New Jersey, New York, Puerto Rico, Virgin Islands), Phone: 212-264-3384; EPA Region III (Delaware, District of Columbia, Maryland, Pennsylvania, West Virginia), Phone: 215-597-0980; EPA Region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee), Phone: 404-347-3016; EPA Region V (Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin), Phone: 312-353-8510; EPA Region VI (Arkansas, Louisiana, New Mexico, Oklahoma, Texas), Phone: 214-655-6655; EPA Region VII (Iowa, Kansas, Missouri, Nebraska), Phone: 913-551-7050; EPA Region VIII (Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming), Phone: 303-293-1662; EPA Region IX (Arizona, California, Hawaii, Nevada, Guam, Marianas), Phone: 415-744-1468; EPA Region X (Alaska, Idaho, Oregon, Washington), Phone: 206-442-2782.