

# Environmental Health & Safety Considerations for Business Operations

Extensive responsibilities and potential liabilities

by Todd W. Rallison

► Comprehensive U.S. laws to protect the environment and worker health and safety (collectively EHS laws) date from the 1970s and 1980s, with numerous state or industry-specific antecedents. Most of those original laws have since been amended or expanded in the 1990s and beyond, the most recent being the 2016 revision to the Toxic Substances Control Act (TSCA, which, despite its name, regulates almost all chemicals in use in the U.S.). Most of these environmental laws, such as the Clean Air Act, Clean Water Act, and the Resource Conservation and Recovery Act (RCRA, which regulates hazardous and solid wastes), were initially designed to regulate large industries that posed a particular threat to the environment. Similarly, the Occupational Safety and Health Act (OSHA) was designed primarily to protect workers in certain hazardous industries or carrying out hazardous activities, such as energized electrical work or working in confined spaces. The majority of these laws are implemented at the state level in conjunction with minimum standards set by the Environmental Protection Agency (EPA) for environmental laws and the Occupational Safety & Health Administration for health and safety laws.

Most environmental laws are implemented through permits, which specify maximum discharge limits and require regular monitoring and reporting. However, some laws — like RCRA and OSHA — are implemented through regulations that apply regardless of whether the business requires an environmental permit. These regulations focus on the activities engaged in by the business or industry. Moreover, OSHA includes a “general duty” on businesses to ensure worker and workplace safety. Essentially, OSHA focuses on the environment within the business perimeter; environmental laws focus on the environment outside of the business perimeter, which may be adversely affected by the business activity.

While EHS laws generally apply to large industries, over time the types of businesses potentially impacted by EHS laws have expanded, and that expansion continues today. For example, in the 1980s Congress enacted and amended the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) to cleanup inactive hazardous waste sites. CERCLA retroactively created liability for past and current owners of facilities where hazardous substances were disposed and anyone who arranged for and transported hazardous substances. Moreover, CERCLA requires reporting of hazardous substance releases. As a result, many small businesses that managed hazardous substances in accordance with the standards of the day became liable for their past activities.

Ongoing businesses must also understand and comply with the reporting requirements, which continue to expand. On August 25, 2022, EPA proposed designating perfluorooctanoic



acid (PFOA) and perfluorooctanesulfonic acid (PFOS) as CERCLA hazardous substances. PFOA and PFOS repel water and oil and have been used in a wide variety of products, including non-stick cookware, food wraps, stain repellents and fire-repellent foams. Importantly, the reporting requirements apply to whomever “releases” the chemical into the environment, which means both manufacturers and users of the chemical can be subject to these reporting requirements.

Beyond these “standard” EHS considerations, there are new and evolving requirements or expectations that can impact a business or its products. In 2002, the European Union began regulating hazardous substances in electronic products, then followed up with a take-back scheme for waste electronic products, including batteries and other similar products. These EU directives set minimum standards for marketing products, which have driven — and continue to drive — product manufacturing decisions in the U.S. and elsewhere, since no business wants to limit where its product can be sold. The EU then took aim at the energy efficiency of electronic products and is now focused on the “material” efficiency of products (e.g., minimizing raw material inputs and other harmful impacts during the product life cycle).

Moreover, climate change and responses to the COVID pandemic continue to increase the EHS challenges for businesses. Businesses now must be aware of their manufacturing and product carbon footprints, as well as that of their suppliers. Similarly, businesses must be better prepared for the next pandemic to protect worker health and ensure business continuity. Environmental, social and governance (ESG) considerations also must be contemplated as investors and governments increasingly focus on whether the business exercised adequate “due diligence” or oversight on its supply chain, workplace practices and environmental footprint.

EHS considerations are more important today than ever before, whether buying real estate, constructing a building, merging/acquiring a business or just trying to operate and manufacture a product. EHS issues must be considered to both comply with laws and meet customer expectations. ■



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