

A Comparative Study of U.S. and Chinese Environmental Law with a Focus on the Real Estate Industry

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In our cross-border practice, clients often encounter legal issues stemming from differences between their jurisdictions and target countries.

Experience has shown that clients operating in multiple countries should know the legal atmosphere of target countries at least as well as their own, regardless of whether they are foreign companies in the PRC or Chinese entities going abroad. This article stresses the importance of understanding local law and practice by analyzing the implications of U.S. and PRC environmental laws on their respective real estate industries.

Part I reviews the environmental administrative laws of the United States and China; Part II focuses on related civil liabilities; Part III describes corresponding criminal repercussions; and Part IV briefly discusses environmental due diligence.

I. Environmental Administrative Law

Environmental, administrative, civil, and criminal implications are intertwined by the legislative and regulatory documents that create them as well as alleged actions or omissions that lead to their respective liabilities. This article begins with administrative law as it is often the first area of law encountered during a real estate project or transaction such as through environmental impact assessments or related licenses and permits.¹

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1. *Environmental Law Alliance Worldwide, Guidebook for Evaluating Mining Project ELAs* 19 (1st ed. July 2010) (emphasizing the importance of EIAs and their early performance).

A. UNITED STATES

In the United States, environmental administrative laws can be found at the federal and state levels.² As detailed below, states typically implement federal law through local procedural rules, with some states also imposing additional administrative penalties.³

1. Federal Statutes

The federal environmental protection regime may be categorized by two prominent acts and the laws that amend them.⁴ The first act is the Resource Conservation and Recovery Act of 1976 (RCRA).⁵ The second is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), commonly referred to as the “Superfund” (referring to the federal trust fund created by CERCLA for hazardous substance release prevention and cleanup).⁶ Both of these acts have been amended by separate legislation.

RCRA was amended by the Hazardous and Solid Waste Amendments of 1984.⁷ Since its enactment in 1980, CERCLA has been amended by three subsequent laws: (1) the Superfund Amendments and Reauthorization Act of 1986, (2) the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, and (3) the Small Business Liability Relief and Brownfields Revitalization Act of 2002.⁸

2. Erin Ryan, *Federalism, Regulatory Architecture, and the Clean Water Rule: Seeking Consensus on the Waters of the United States*, 46 LEWIS & CLARK ENVTL. L. REV. 101, 110 (2016) (discussing how the Clean Water Act (federal legislation) “stepped into a field formerly regulated by the states”).

3. See, e.g., *New York v. United States*, 505 U.S. 144, 167 (1992) (stating “where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress’ power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.”).

4. Memorandum from Thomas P. Dunne, Acting Assistant Admin’r, U.S. Env’tl. Prot. Agency, to Regional Administrators, Regions I-X (Dec. 21, 2005) (on file with author).

5. *Resource Conservation and Recovery Act (RCRA) Overview*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/rcra/resource-conservation-and-recovery-act-rcra-overview> (last visited Sept. 18, 2016).

6. *Comprehensive Environmental Response, Compensation, and Liability Act*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act> (last visited Sept. 18, 2016).

7. See *Summary of the Resource Conservation and Recovery Act*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-resource-conservation-and-recovery-act> (last visited Sept. 18, 2016) (explaining that “HSWA - the Federal Hazardous and Solid Waste Amendments - are the 1984 amendments to RCRA that focused on waste minimization and phasing out land disposal of hazardous waste as well as corrective action for releases.”).

8. See *The Superfund Amendments and Reauthorization Act (SARA)*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/superfund/superfund-amendments-and-reauthorization-act-sara> (last visited Sept. 18, 2016); see also *CERCLA Lender Liability Exemption: Updated Questions and Answers*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/sites/production/files/documents/lender-liab-07-fs.pdf> (last visited Sept. 18, 2016); see also *Summary of the Small Business Liability Relief and Brownfields Revitalization Act*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/>

In addition to setting the basis for administrative actions, these environmental laws contain causes of action for lawsuits brought by the Environmental Protection Agency (EPA), state agencies, and private parties.⁹ As such, the burdens of proof, defenses, and arguments discussed below are relevant to both administrative actions and lawsuits.

a. CERCLA

The underlying policy behind CERCLA is to shift the financial burden of preventing and cleaning up hazardous substance release from the government to private parties.¹⁰ To achieve this goal, CERCLA gives the EPA a wide berth to either order private parties to clean up hazardous waste spills or to recover costs from them.¹¹

i. *Potentially Responsible Parties*

The private parties that the EPA may order cleanups or recover costs from are referred to as Potentially Responsible Parties (PRPs), and consist of four categories:

1. Current owners and/or operators of the facility where a hazardous substance is illegally disposed;
2. Legal persons that arrange for illegal disposal in the facility;
3. Legal persons that transport a hazardous substance to the facility for illegal disposal; and
4. Current owners and/or operators of the facility where a hazardous substance may be released or has been released.¹²

ii. *Joint and Several Liability*

To allow a prompt response to dangers associated with hazardous waste, CERCLA establishes joint and several liability on PRPs for financial liabilities related to Superfund sites (unless the harm is divisible).¹³ This signifies that a single PRP may be compelled to pay for the entire cost of preventing or cleaning up a spill.¹⁴ Of course, the PRP may then seek contribution from other parties. Federal courts have applied joint and several liability to many environmental administrative cases involving real

brownfields/summary-small-business-liability-relief-and-brownfields-revitalization-act (last visited Sept. 18, 2016).

9. See *Civil Cases and Settlements by Statute*, U.S. ENVTL. PROT. AGENCY, <https://cfpub.epa.gov/enforcement/cases/index.cfm?templatePage=12&ID=4> (last visited Sept. 18, 2016) (providing a database of EPA enforcement cases and settlements by federal statute).

10. See *This is Superfund: A Community Guide to EPA's Superfund Program*, U.S. ENVTL. PROT. AGENCY (2011), available at <https://semsub.epa.gov/work/11/175197.pdf> (stating that “[t]he Superfund program is administered by the EPA in cooperation with state and tribal governments. It allows EPA to clean up hazardous waste sites and to force responsible parties to perform cleanups or reimburse the government for cleanups led by EPA.”).

11. *Id.* at 4 (describing EPA removal and remedial actions).

12. 42 U.S.C. § 9607 (2002).

13. See, e.g., *United States v. Mottolo*, 695 F. Supp. 615, 629 (D.N.H. 1988).

14. See, e.g., *id.*

estate, establishing common law factors for determining the amount of cleanup costs and fines to impose on a joint tortfeasor.¹⁵

iii. *Burden of Proof*

CERCLA sets a low burden of proof.¹⁶ Essentially, a plaintiff need only show that the defendant released hazardous waste at the Superfund site.¹⁷ Courts have found that plaintiffs do not need to demonstrate that the hazardous waste addressed by the cleanup is the same type as the defendant's waste, the defendant's waste caused the response, or whether the defendant's waste was cleaned up during the response.¹⁸

iv. *Defenses*

Given that most cases meet the burden of proof, defendants in CERCLA claims tend to focus on statutory and common law defenses.¹⁹

CERCLA only provides three statutory defenses: act of war, act of God, and an act or omission of a third party.²⁰ As would be expected, most cases involve the third-party defense, which requires a defendant to adequately demonstrate that:

1. There is no relationship, direct or indirect, contractual or otherwise, between the defendant and third party;
2. Upon discovery of the hazardous substances by the defendant and third party, the defendant exercised due care; and
3. The defendant took precautions against the acts or omissions of the third party.²¹

If the defendant purchased land that was allegedly previously contaminated, then it could assert the common law innocent landowner

15. See, e.g., *S. Florida Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402, 407 (11th Cir. 1996) (where a tenant contaminated land with toxic pesticides and, although the landowner did not cause the contamination, the court assessed 25 percent of cleanup costs to the landowner, stating that the landowner was aware of the tenant's operations and associated environmental risks.).

16. See Laurence S. Kirsch & Geraldine E. Edens, *Federal Environmental Liability*, in *ENVIRONMENTAL ASPECTS OF REAL ESTATE AND COMMERCIAL TRANSACTIONS: FROM BROWNFIELDS TO GREEN BUILDINGS* 3, 7 (James B. Witkin, ed., 2004) (stating "courts have tended to impose liability on CERCLA defendants who fit into one of the PRP classes and who cannot raise one of the limited defenses set forth in CERCLA.").

17. *Id.* (providing "plaintiffs [. . .] only [need to prove] that the defendant disposed of the same type of hazardous substances as those found on the site.").

18. *Id.*

19. See generally *Civil Cases and Settlements by Statute*, U.S. ENVTL. PROT. AGENCY (2016), <https://cfpub.epa.gov/enforcement/cases/index.cfm?templatePage=12&ID=4> (last updated Nov. 3, 2016). The summaries and mentioned court cases demonstrate the prevalent defenses in current EPA enforcement cases.

20. 42 U.S.C. §§ 9607(b)(3).

21. *Id.*

defense.²² The defendant landowner would contend that the previous owner (third-party whom sold the land to the defendant) is responsible, and that the defendant was not aware of the illegal activity.²³

In the past, some courts ruled that the CERCLA third-party defense requirement barred the innocent landowner defense.²⁴ According to these courts, there was a contractual relationship through the sale of the property.²⁵ In response, the Superfund Amendments and Reauthorization Act of 1986 created an exception that “contractual relationship” does not include the sale of land if it is acquired after the disposal of hazardous substances.²⁶

v. *Parent Liability*

A client that owns a PRP may also face financial obligations under CERCLA.²⁷ In *United States v. Bestfoods*, the Supreme Court clarified that there are two theories the government may argue to impose liability on a parent for the actions of a subsidiary PRP.²⁸

First, the government could allege that the parent company managed, directed, or conducted (1) operations specifically related to the pollution or (2) decisions on compliance with environmental regulations.²⁹ Second, a court may find a parent liable under the common law principle of “piercing

22. See, e.g., Sidhir Lay Burgaard, *Landowner Defenses to CERCLA Liability*, A.B.A. Y.L.D. PUB. 101 PRACT. SERIES, http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/landowner_defenses_to_cercla_liability.html (last visited Sept. 23, 2016) (listing the criteria for the innocent landowner defense).

23. *Id.*

24. Laurence S. Kirsch & Geraldine E. Edens, *Federal Environmental Liability*, in ENVIRONMENTAL ASPECTS OF REAL ESTATE AND COMMERCIAL TRANSACTIONS: FROM BROWNFIELDS TO GREEN BUILDINGS 19 (James B. Witkin ed., 3d ed. 2004) (stating that “[a]lthough the third-party defense was contained in the original CERCLA, controversy arose in the early 1980s about whether the statute precluded use of the defense by innocent buyers of the previously contaminated land.”).

25. See *id.* (further stating that “[s]uch a buyer [innocent buyer of previously contaminated land] might hope to be protected against CERCLA liability by claiming that the presence of a hazardous substance on the property was caused solely by a third party [. . .] But a buyer could not rely on the defense because it had a “contractual relationship” with the seller[.]”).

26. 42 U.S.C. §§ 9601(35)(A).

27. See, e.g., *Structuring Ownership and Control of Real Estate Holdings*, TITUS BRUECKNER & LEVINE PLC (Sept. 30, 2010), <http://www.tbl-law.com/structuring-ownership-and-control-of-real-estate-holdings/> (last visited Sept. 16, 2016) (providing that “liability under CERCLA can [. . .] arise “indirectly” by virtue of a person’s status as a parent company of the “person” which acquires, owns and/or operates the facility.”).

28. See *United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998) (providing that “[t]o sharpen the definition for purposes of CERCLA’s concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.”).

29. *Id.*

the corporate veil” by applying the traditional factors such as inadequate capitalization, pervasive control, and intermingling of assets.³⁰

b. RCRA

Compared to CERCLA, which addresses hazardous waste spills, RCRA sets the federal policies on treatment, storage and disposal of hazardous waste.³¹ These policies are the foundation of the related federal laws and regulations enforced by the EPA.³²

RCRA affects the real estate industry much less than CERCLA.³³ However, there are two important aspects to consider.

First, RCRA creates what are referred to as “Cradle to Grave” requirements.³⁴ Essentially, the EPA must regulate hazardous waste from generation (cradle) to storage or disposal (grave).³⁵ As these requirements are relatively strict, the EPA in turn implements stringent regulations on generators, transporters, and operators.³⁶ The most notable example is that owners and operators of underground storage tanks have several obligations including notifying the EPA of tanks, detecting leaks, making corrective actions, and ensuring proper tank performance.³⁷

30. *See id.* at 55 (writing that “[t]he United States brought this action for the costs of cleaning up industrial waste generated by a chemical plant. The issue before us, under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 94 Stat. 2767, as amended, 42 U. S. C. § 9601 *et seq.*, is whether a parent corporation that actively participated in, and exercised control over, the operations of a subsidiary may, without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary. We answer no, unless the corporate veil may be pierced.”).

31. *See Resource Conservation and Recovery Act (RCRA) Laws and Regulations*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/rcra> (last visited Sept. 19, 2016) (providing an overview of RCRA).

32. *See id.*

33. *See* Rose-Marie T. Carlisle & Laura C. Johnson, *The Impact of CERCLA on Real Estate Transactions*, 4 S.C ENVTL. L.J. 129, 129 (1995) (asserting that “[a]lthough RCRA sets standards for the generation, transportation, storage, and disposal of hazardous wastes, it was widely perceived as inadequate for cleaning up abandoned or inactive hazardous waste sites. CERCLA was enacted to impose liability for the cleanup of hazardous waste sites on companies and individuals perceived as having profited from the use or disposal of hazardous substances on those sites.”).

34. *Learn the Basics of Hazardous Waste*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/hw/learn-basics-hazardous-waste> (last visited Sept. 19, 2016) (outlining RCRA Cradle to Grave requirements).

35. *See id.*

36. *See, e.g., id.* (describing in the “Hazardous Waste Transportation” section that “[a]fter generators produce a hazardous waste, transporters may move the waste to a facility that can recycle, treat, store or dispose of the waste. Since such transporters are moving regulated wastes on public roads, highways, rails and waterways, United States Department of Transportation hazardous materials regulations, as well as EPA’s hazardous waste regulations, apply.”).

37. *See Resources for UST Owners and Operators*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/ust/resources-ust-owners-and-operators> (last visited Sept. 19, 2016) (providing a guideline for RCRA-imposed obligations on underground storage tank operation and maintenance, reporting and recordkeeping, etc.).

Second, owners and operators of hazardous waste facilities that violate RCRA and corresponding regulations may be subject to a daily civil fine of up to USD 25,000, criminal fines, imprisonment (see III.1.b below), and corrective action obligations.³⁸

2. *State Statutes*

State environmental statutes often mirror federal law.³⁹ However, states may also legislate beyond the scope of the federal laws discussed above.

Since the 1980s, some U.S. states have instituted “transaction-triggered” statutes that pose additional potential liabilities within the real estate industry.⁴⁰ Although the content of these statutes varies,⁴¹ their general goal is to promote compliance with federal and state environmental standards by imposing requirements on (1) real estate owners before property is transferred to another party and (2) operators before their related operations terminate.⁴²

States may also have other environmental laws which affect the real estate industry. For example, a seller in New Jersey must test its potable water wells,⁴³ and a seller of waterfront property in New Hampshire is required to perform a site assessment of its septic disposal system.⁴⁴

B. CHINA

Akin to the United States, China’s environmental laws and regulations are found on both national and local levels.

First, the National People’s Congress and Standing Committee formulate laws that lay the foundation for environmental protection; legislation includes general laws (*i.e.*, the Environmental Protection Law) and subject-

38. Doris K. Nagel, *RCRA Enforcement and the Statute of Limitations*, 18 ENVTL. L. REP. 10431, 10431-32 (1988) (stating that “[f]or violations occurring in states without authorized RCRA programs, the Administrator may immediately commence a civil action in federal district court, or may issue an order assessing a civil penalty or suspending or revoking any permits issued under RCRA. Civil penalties are assessable up to \$ 25,000 per day of non-compliance for each violation, and if a violator fails to comply with the order, the Administrator may assess an additional civil penalty of up to \$ 25,000 per day.”); *id.* at 10432 (further stating that “[t]he U.S. Department of Justice may seek criminal indictments of RCRA violators who “knowingly” violate any of several specified requirements.”).

39. See, e.g., *Environmental Law*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/environmental_law (last visited Sept. 20, 2016).

40. See David B. Farer, *Transaction-Triggered Environmental Laws and Transfer Notice Laws*, www.greenbaumlaw.com/media/publication/26_Transaction_Triggered_2013.pdf (last updated Mar. 2013) (listing state transaction-triggered laws).

41. See generally *id.*

42. See generally *id.*

43. See *id.* at 19.

44. See *id.* at 49.

specific laws such as for land, water, air, etc.⁴⁵ Second, the State Council also creates environmental regulations (*e.g.*, the Environmental Impact Assessment Planning Regulations.⁴⁶ Third, related ministries (primarily the Ministry of Environmental Protection) promulgate environmental protection rules such as the Measures for the Reporting of Information on Environmental Emergencies.⁴⁷ Fourth, local governments may also implement regional environmental laws and regulations.⁴⁸

1. *Environmental Administrative Liability*

Environmental administrative liabilities can be found in most environmental laws, administrative regulations, local laws, ministry-level regulations, and local government regulations, while procedures are detailed in the Administrative Penalty Law and Environmental Administrative Penalty Measures.⁴⁹

An entity or individual may be subject to an administrative penalty if an intentional or negligent act violates an environmental law or regulation.⁵⁰ There may also be a damages requirement, depending on the violation at hand.⁵¹

Similar to the United States, administrative penalties range from fines, confiscation of illegal proceeds, orders to cease and desist, permit revocation, etc.⁵²

There is a general two-year statute of limitations for administrative penalties.⁵³ However, this period may be extended by law or regulation for specific acts, and the time for a continuous act begins to toll when the act ceases.⁵⁴

45. See *Environment*, CHINA.ORG.CN, <http://www.china.org.cn/english/environment/34152.htm> (last visited Sept. 20, 2016) (providing a list of official English translations of China's environmental national legislation).

46. See, *e.g.*, Environmental Impact Assessment Planning Regulations (promulgated by the St. Council, Aug. 17, 2009, effective Sept. 1, 2009) (China).

47. See, *e.g.*, Measures for the Reporting of Information on Environmental Emergencies (promulgated by the Ministry of Environmental Protection Apr. 18, 2011, effective May 1, 2011) (China).

48. See, *e.g.*, Beijingshi Jianshe Xitong Kongqi Zhongwuran Yingji Yuan (北京市建设系统空气重污染应急预案) [Beijing Municipality Building Heavy Air Pollution Contingency Plan] (promulgated by the Beijing Municipal Commission of Housing and Urban-Rural Development, Mar. 30, 2015, effective Mar. 30, 2015) (China).

49. See Administrative Penalty Law (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 17, 1996, effective Oct. 1, 1996) (China); see also Environmental Administrative Penalty Measures (promulgated by the Ministry of Environmental Protection., Jan. 19, 2010, effective Mar. 1, 2010) (China).

50. See Administrative Penalty Law, *supra* note 49.

51. See *id.* art. 8 (providing the types of administrative penalties, including fines).

52. *Id.*

53. *Id.* art. 29.

54. *Id.*

2. *Select Laws*

The applicable laws and regulations vary by situation (*i.e.*, type of pollution and resulting damages). As such, this section briefly introduces the two laws that may have the most impact on environmental administrative actions.

a. Environmental Protection Law

Enacted in 1989, the Environmental Protection Law lays the foundation for Chinese environmental law.⁵⁵ It establishes several important environmental protection systems such as the environmental impact assessment system, pollution rectification time limitation system, pollution discharge fees system, pollutant overall control system, daily fine accumulation system, and public participation environmental system.⁵⁶

The law provides a specific chapter on legal liabilities, most of which address administrative liability.⁵⁷

b. Environmental Impact Assessment Law

Depending on the impact that a real estate project may have on the environment, an environmental impact assessment report, summary, or registration must be submitted to the related environmental authority.⁵⁸

Failure to receive the proper approvals may result in administrative liability. For example, the Environmental Impact Assessment Law provides that:

[W]here any construction entity fails to submit its environmental impact appraisal document of the construction project concerned or fails to submit environmental impact document for examination and approval anew or for inspection anew according to the provisions of Article 24 of this Law and unlawfully starts the construction, it shall be ordered by the administrative department of environmental protection that is entitled to examine and approve the environmental impact appraisal documents to stop the construction and go through the relevant procedures within a prescribed time period. If it fails to go through the relevant procedures within the time period, it may be fined not less than CNY50,000 but not more than CNY200,000, and the person in-charge and other personnel of the construction entity who are held to be directly responsible shall be given an administrative punishment.⁵⁹

55. Environmental Protection Law (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 24, 2014, effective Jan. 1, 2015) (China).

56. *See id.* at Chapter VI.

57. *See id.*

58. *See* Environmental Impact Assessment Law (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2002, effective Sept. 1, 2003) (China), art. 8.

59. *Id.* art. 31.

c. Administrative Cases

Although China's environmental laws are not as strict or severe as in the United States, there have been several instances where substantial administrative liability has been imposed on large-scale environmental contamination.⁶⁰ For example, in the wake of widespread pollution of the Ting River by Zijin Mining Group in July 2010, an administrative fine was levied against the Chinese company for approximately USD 4.6 million, along with other civil and criminal repercussions.⁶¹

There are also several environmental administrative cases involving U.S. companies. Perhaps the most well-known is the 2011 Bohai Bay Oil Spill Incident, where ConocoPhillips and China National Offshore Oil Corp. (CNOOC) reportedly entered into an administrative settlement with the Ministry of Agriculture.⁶² In this settlement:

1. ConocoPhillips would provide approximately USD 154 million in compensation for damage to aquatic organisms and fisheries; and
2. ConocoPhillips and CNOOC would allocate USD 15.4 million and USD 38.5 million, respectively, for the establishment of oceanic environmental and ecological protection funds to be used related to protecting fisheries.⁶³

II. Civil Liability

Companies acting in both China and the United States should be aware that environmental law extends beyond administrative actions to the court system. Under civil law, environmental polluters may be subject to damages as well as court-ordered injunctions or remedial actions.

A. UNITED STATES - COMMON LAW CAUSES OF ACTION

Lawsuits may also be brought independent of or in conjunction with federal and state environmental law.

Following the English law tradition, the United States allows common law causes of action. This section discusses these concepts in relative depth as Chinese companies are often unfamiliar with them. We recommend that any state-specific research also include precedent and corresponding local law (if any).

60. JIAHUA PAN, CHINA'S ENVIRONMENTAL GOVERNING AND ECOLOGICAL CIVILIZATION, 203 (Springer eds.; 1st ed. 2016 edition).

61. See, e.g., Elaine Kurtenbach, *US\$4.6 million fine upheld against Zijin over poisoning*, MINES AND COMMUNITIES (May 17, 2011), <http://www.minesandcommunities.org/article.php?a=10900>.

62. See, e.g., Greg Botelho, *ConocoPhillips to pay \$191 million more to China over oil spill*, CNN (Apr. 27, 2012), <http://www.cnn.com/2012/04/27/world/asia/china-oil-spill/>.

63. See *id.*

The most typical common law claims and theories in the real estate industry are negligence, strict liability, trespass, and nuisance.⁶⁴

1. *Negligence*

Regardless of the circumstances, a plaintiff must always prove the four elements of a negligence claim: duty, breach, causation, and damages:⁶⁵

1. **Duty:** Typically, the applicable duty in a negligence claim is determined by the “reasonable care” standard.⁶⁶ A court will decide what a reasonable person would have done in the situation at hand by applying factors that differ by state precedent and/or law. For example, the District of Columbia federal district court held that expert testimony is a prerequisite for a claim alleging negligent storage and operation of underground storage tanks.⁶⁷ A plaintiff may be able to avoid this standard by arguing that the defendant violated a sufficiently related statute (this is called negligence *per se*).⁶⁸ If successful, the court will presume duty and breach.⁶⁹
2. **Breach:** Breach is almost always the easiest element to meet—a plaintiff must simply provide enough evidence to demonstrate a divergence with duty.⁷⁰
3. **Causation:** There are two forms of causation in United States negligence theory—actual and proximate—and the plaintiff must prove both.⁷¹ Actual causation requires that a breach of the duty by the defendant results in injury to the plaintiff.⁷² Proximate causation has several tests and many nuances. In a broad sense, proximate causation generally focuses on whether the event was the cause-in-fact (the damage could not have happened “but for” the event) or whether it was foreseeable that the event would cause the damage.⁷³
4. **Damages:** Finally, a plaintiff must show damages.⁷⁴ Courts normally do not award punitive damages unless there are personal damages (for

64. SUSAN M. COOKE, *THE LAW OF HAZARDOUS WASTE* §17.01 (Matthew Bender) (2016).

65. See *RESTATEMENT (SECOND) OF TORTS* § 328A (1965).

66. *Id.* § 293.

67. See *National Tel. Coop. Ass’n v. Exxon Corp.*, 38 F. Supp. 2d 1, 10 (D.D.C. 1998).

68. See, e.g., *Negligence Per Se Law & Legal Definition*, USLEGAL, <http://definitions.uslegal.com/n/negligence-per-se/> (last visited Sept. 23, 2016).

69. See, e.g., *What is “breach of duty”?*, ROTTENSTEIN LAW GROUP LLP, <http://www.rotlaw.com/legal-library/what-is-breach-of-duty/> (last visited Sept. 23, 2016).

70. *Id.*

71. See, e.g., *Elements of a Negligence Case*, FINDLAW, <http://injury.findlaw.com/accident-injury-law/elements-of-a-negligence-case.html> (last visited Sept. 23, 2016).

72. *Id.*

73. See *id.*

74. *Id.*

environmental cases, damage to property may suffice) and the defendant exhibits a higher *mens rea* (e.g., willful or wanton conduct).⁷⁵

2. *Strict Liability*

There are many situations in the real estate industry (such as those related to safety) that may lead to strict liability. The risk is only compounded by actions with potential environmental law implications.

Strict liability is reserved for activities that are so dangerous or unusual that there is no mental state requirement (e.g., intent, willful misconduct).⁷⁶

Under strict liability, a plaintiff must show that its injury was caused by an “abnormally dangerous” or “ultrahazardous” activity attributed to the defendant.⁷⁷ Courts apply six factors to determine whether an activity is appropriate for this standard, including likelihood of harm, inappropriateness of where the activity took place, and whether its risks could have been eliminated through reasonable care.⁷⁸

Strict liability is often applied relating to the transportation, storage, and disposal of hazardous materials.⁷⁹ For example, the court in *City of Northglenn v. Chevron U.S.A., Inc.* applied strict liability to storing over 16,000 gallons of gasoline in a residential area.⁸⁰ Plaintiffs have also won strict liability cases related to gasoline tank storage, air conditioning unit disposal, and nuclear radiation contamination.⁸¹

3. *Trespass*

In the United States, trespass theory historically only required a plaintiff to show intentional entry onto land possessed by the plaintiff.⁸² “Entry” was also confined to people and objects.⁸³ Under modern trespass theory, all states have added an actual damages requirement through precedent and/or

75. See, e.g., *Punitive Damages*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/PunitiveDamages> (last visited Sept. 23, 2016) (providing that “[p]unitive damages will not be awarded in tort actions based on the defendant’s Negligence alone. The conduct must have been willful, wanton, or reckless to constitute an intentional offense. Willfulness implies a plan, purpose, or intent to commit a wrongdoing and cause an injury.”).

76. See, e.g., *Strict Liability*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/lii/about/about_lii (last visited Sept. 21, 2016).

77. See, e.g., *Abnormally Dangerous Activity*, FINDLAW LEGAL DICTIONARY, <http://dictionary.findlaw.com/definition/abnormally-dangerous-activity.html> (last visited Sept. 22, 2016).

78. RESTATEMENT (SECOND) OF TORTS § 293.

79. See Christopher J. Grant, *Sale or Disposal: The Extension of CERCLA Liability to Vendors of Hazardous Materials*, 23 LOY. U. CHI. L. J. 355, 355 (1992).

80. *City of Northglenn, Colo. v. Chevron USA Inc.*, 519 F. Supp. 515, 516 (1981).

81. See, e.g., *id.*

82. See, e.g., *Trespass*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Trespass> (last visited Sept. 22, 2016) (providing a historical account of trespass theory followed by a detailed definition).

83. See *id.*

statutes, and judicial practice now expands entry to any observable object, including chemicals and particles that cannot be seen by the human eye.⁸⁴

It is important to note that a possessor is not always an owner. Under U.S. law, possession is generally established by:

1. Occupancy of land with intent to control;
2. If no party currently occupies with intent to control, previous occupancy of the land without abandoning it; and
3. If there is no current or previous occupant with intent to control, the party with the right against all other persons to occupy the land (*i.e.*, the owner) shall have possession.⁸⁵

Courts have found for defendants after determining that another party was the possessor.⁸⁶ Previous U.S. cases include determinations that tenants are possessors as well as that a previous possessor is not liable if a later occupant possessed the land at time of entry.⁸⁷ In *Busch Oil Co., Inc. v. Amoco Oil Co.*, there was a spill when the land was owned and possessed by Amoco, and Amoco then sold the land to Busch.⁸⁸ The court determined that Amoco did not trespass on the land because Amoco, not Busch, was in possession at the time of entry.⁸⁹

4. Nuisance

The most obvious distinction between trespass and nuisance is that the latter cause of action does not require actual entry onto the plaintiff's property.⁹⁰ Another important difference is that nuisance is actually composed of two independent theories—private and public.⁹¹

a. Private Nuisance

To succeed under private nuisance, a plaintiff must demonstrate that a non-trespassory invasion by the defendant caused unreasonable and substantial interference with the plaintiff's enjoyment of its land.⁹²

When determining whether the interference is unreasonable, U.S. courts apply a balancing test for whether the defendant's right to enjoy its own land outweighs the plaintiff's right to be free of interference (with the right to

84. *Bradley v. Am. Smelting & Ref. Co.*, 104 Wash. 2d 677, 691 (1985); *Stevenson v. E.I. DuPont De Nemours & Co.*, 327 F.3d 400, 406 (5th Cir. 2003); *but see Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215, 216 (Mich. Ct. App. 1999).

85. RESTATEMENT (SECOND) OF TORTS § 157.

86. *See, e.g., Busch Oil Co., Inc. v. Amoco Oil Co.*, No. 5:94-CV-175, 1996 U.S. Dist. LEXIS 4705 at *30 (W.D. Mich. Feb. 20, 1996).

87. *See, e.g., id.* at *24.

88. *See id.* at *3-5.

89. *See id.* at *28.

90. *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 821.

91. *See, e.g., Nuisance*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/private-uisance> (last visited Sept. 22, 2016).

92. RESTATEMENT (SECOND) OF TORTS § 821D.

enjoy its land).⁹³ Factors include the social value of the enjoyment, extent of the harm, difficulty in avoiding the harm, and the character of the surrounding community.⁹⁴

Due to the wide applicability of private nuisance theory, courts have demonstrated a preference for this non-exhaustive and broad test. Likewise, judges often narrowly interpret the breadth of private nuisance.⁹⁵ For example, it is likely not interference for non-trespassory invasion to reduce property marketability or value.⁹⁶

b. Public Nuisance

Instead of alleging interference with a private right to enjoy land, a plaintiff bringing a public nuisance claim must demonstrate that the defendant obstructed rights common to the public.⁹⁷ This cause of action was intended for the government to represent public interests.⁹⁸ However, U.S. legal practice also allows private parties to sue under public nuisance by demonstrating a peculiar interest (that their interest is sufficiently different than that of the general public).⁹⁹

Courts tend to reject private party claims due to the peculiar interest requirement.¹⁰⁰ For example, it is generally accepted that degree of harm is not a factor, no matter how egregiously a private plaintiff may be affected.¹⁰¹

Blair v. Anderson is a good example of what judges look for when determining whether a private party has a peculiar interest.¹⁰² In *Blair*, the plaintiff was located near a landfill.¹⁰³ The court found that an obstruction of the plaintiff's creek was sufficient to meet the pecuniary interest requirement because the public did not share an interest in the creek.¹⁰⁴

B. CHINESE TORT LAW

As discussed above, United States civil environmental liability involves both civil statutes and common law theories. In comparison, national-level Chinese civil environmental liability is founded in and interpreted by a handful of legal documents, namely the:

93. See *Frank v. Envtl. Sanitation Mgmt.*, 687 S.W. 2d 876, 880 (Mo. 1985).

94. RESTATEMENT (SECOND) OF TORTS § 827.

95. See, e.g., *Nat'l Tel. Coop. Ass'n*, 38 F. Supp. at 14.

96. See *id.*

97. See, e.g., *Nuisance*, *supra* note 91.

98. *Id.*

99. See, e.g., F. William Brownell, *State Common Law of Public Nuisance in the Modern Administrative State*, 24 ABA NAT. RESOURCES AND ENV'T 34, 34 (2010) (discussing the history of public nuisance theory and its contemporary application).

100. See, e.g., *Adams v. Ohio Falls Car Co.*, 131 N.E. 57, 58 (Ind. 1892).

101. See *id.*

102. *Blair v. Anderson*, 570 N.E.2d 1337 (Ind. Ct. App. 1991).

103. *Id.* at 1338.

104. *Id.* at 1340.

1. Environmental Protection Law;¹⁰⁵
2. Tort Law;¹⁰⁶
3. Civil Procedure Law;¹⁰⁷
4. Interpretations of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the Application of Law in the Handling of Criminal Cases of Environmental Pollution;¹⁰⁸ and
5. Interpretations of the Supreme People's Court on Issues concerning the Application of Law in the Trial of Environment-related Civil Public Interest Lawsuits.¹⁰⁹

Of these five documents, the Tort Law and Environmental Protection Law provide the framework for environmental civil liability.

According to the Environmental Protection Law, those who cause damage related to "environmental pollution or ecological damage . . . shall bear tortious liability in accordance with the relevant provisions of the Tort Law."¹¹⁰ Chapter eight of the Tort Law is dedicated to addressing liability for environmental pollution.¹¹¹ As such, this section discusses the ramifications of these two laws.

1. *Burden of Proof*

Chinese courts require a plaintiff in environmental cases to prove that the defendant discharged pollutants, the plaintiff suffered damages, and there was a causal relationship between the discharge and damage suffered.¹¹²

A people's court shall ascertain the absence of a causal relationship between the discharge and damage if a polluter provides evidence that: (1) it is impossible for the discharged pollutants to cause the damage in question, (2) the discharged pollutants that may cause the damage in question never arrived at the site of damage, (3) the damage in question occurred before the discharge of pollutants, or (4) other scenarios where the court can ascertain the absence of a causal relationship between the discharge and damage.¹¹³

105. Environmental Protection Law, *supra* note 55.

106. Tort Law (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010) (China).

107. Civil Procedure Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Jan. 1, 2013) (China).

108. Interpretations of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the Application of Law in the Handling of Criminal Cases of Environmental Pollution (promulgated by the Sup. People's Ct., June 17, 2013, effective June 19, 2013) (China).

109. Interpretations of the Supreme People's Court on Issues concerning the Application of Law in the Trial of Environment-related Civil Public Interest Lawsuits (promulgated by the Sup. People's Ct., Dec. 8, 2014, effective Jan. 7, 2015) (China).

110. Environmental Protection Law, *supra* note 55, art. 64.

111. *See* Tort Law, *supra* note 106, arts. 65-68.

112. Interpretations of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the Application of Law in the Handling of Criminal Cases of Environmental Pollution, *supra* note 108, art. 6.

113. *Id.* art. 7

Parties considering litigation should note that the statute of limitations for civil environmental liability is three years, calculated from the time when the relevant party first became or should have become aware of the relevant damage.¹¹⁴

2. *Strict Liability*

Chinese courts impose a strict liability standard for environmental pollution.¹¹⁵ Because defendants cannot use lack of mental state as a defense, they often argue that pollution discharge has met standards or corresponding pollutant discharge fees have already been paid.¹¹⁶

There is a typical misunderstanding here. Even if a company does not violate environmental laws *per se*, it may still be liable if it discharges pollutants, such discharge is accompanied by a rise in environmental pollution, and the company cannot disprove causation (between the discharge and damage caused by the pollution).¹¹⁷

However, there may be extenuating circumstances that lead a court to exempt a defendant from liability. Specific environmental protection laws provide exemptions such as the Marine Environmental Protection Law,¹¹⁸ Water Pollution Prevention Law,¹¹⁹ and the Air Pollution Prevention Law.¹²⁰ For example, the Marine Environmental Protection Law allows a defendant to overcome strict liability if there was a force majeure event or the relevant authorities did not fulfill their responsibilities.¹²¹

Finally, co-defendants may be subject to joint and several liability.¹²² As such, a plaintiff may seek the whole amount of damages from one defendant (which may sue the other defendants for contribution).

3. *Public Interest Lawsuits*

Individual civil lawsuits only result in compensation for personal injuries and property losses of an individual or company.¹²³ The amount of such

114. Environmental Protection Law, *supra* note 55, art. 66.

115. See Interpretations of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the Application of Law in the Handling of Criminal Cases of Environmental Pollution, *supra* note 108, art. 1.

116. See *id.*

117. See *id.* art. 7 (note that Chinese court opinions are almost always much shorter than common law opinions; researchers may rely on Supreme People's Court interpretations).

118. Marine Environmental Protection Law (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 25, 1999, effective Apr. 1, 2000) (China).

119. Water Pollution Prevention Law (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 2008, effective June 1, 2008) (China).

120. Air Pollution Protection Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 29, 2015, effective Jan. 1, 2016) (China).

121. Marine Environmental Protection Law, *supra* note 118, art. 92.

122. See Tort Law, *supra* note 106, art. 67.

123. See Yuhong Zhao, *Environmental Dispute Resolution in China*, 16 ENV. LAW 1, 4.5.1 (2004) (discussing compensation damages).

compensation is quite small and does not include compensation for damages done to the environment.¹²⁴

To further deter environmental pollution, the latest revision of the Environmental Protection Law allows designated private organizations to file public interest lawsuits.¹²⁵ These organizations may receive assistance from government entities such as supervisory agencies and prosecutorial offices including legal advice, investigations, and assisting with evidence collection.¹²⁶

Pursuant to the Supreme People's Court interpretations on several issues regarding the Application of Law in Public Interest Environmental Civil Litigation, a defendant may be subject to injunctions, remedial action orders, and civil liability.¹²⁷ For ecological cases, a defendant may also be required to restore the environment to its original state and function.¹²⁸

After the most recent revision of the Environmental Protection Law, the first environmental case was filed on January 1, 2015.¹²⁹ This public interest lawsuit was filed by two private environmental protection organizations, Friends of Nature and Fujian Green Homes Environmental Friendly Center, against four defendants to restore twenty-eight acres of destroyed forest.¹³⁰

The defendants were found jointly liable and were ordered to restore the damaged forest, plant trees, and maintain them for three years.¹³¹ The court order also stated that they would have to pay Ren Min Bi (RMB) 1.1 million (app. USD 172,000) in damages if the vegetation was not restored in three years.¹³² Additionally, the court ordered the defendants to pay RMB 1.27 million (app. USD 200,000) to compensate for damages to the environment during the restoration period.¹³³

III. Criminal Implications

Corporate clients and their attorneys often focus on potential civil liabilities. However, not only could an individual defendant be imprisoned under the laws in Part I, but her organization may also be subject to

124. *See id.*

125. Environmental Protection Law, *supra* note 55, art. 58.

126. *See id.* art. 57.

127. Interpretations of the Supreme People's Court on Issues concerning the Application of Law in the Trial of Environment-related Civil Public Interest Lawsuits, *supra* note 109, art. 18.

128. *Id.*

129. *See, e.g.,* Xinhua, *China NGOs win landmark environmental lawsuit*, CHINADAILY (Oct. 29, 2015), http://www.chinadaily.com.cn/china/2015-10/29/content_22312656.htm; *see also* Chun ZHANG, *NGOs Win China's First Public Interest Environmental Lawsuit*, THE DIPLOMAT (Nov. 14, 2015), <http://thediplomat.com/2015/11/ngos-win-chinas-first-public-interest-environmental-lawsuit/>.

130. *See, e.g.,* *NGOs Win China's First Public Interest Environmental Lawsuit*, *supra* note 129.

131. *See, e.g., id.*

132. *See, e.g., id.*

133. *See, e.g., id.*

substantial fines.¹³⁴ As discussed in this section, criminal laws in both the United States and the People's Republic of China provide imprisonment for serious environmental infractions.¹³⁵

A. UNITED STATES

All of the direct federal criminal implications are created by the laws discussed in Part I.¹³⁶ In practice, federal prosecutors typically base allegations on these few laws. However, prosecutions may also incorporate related federal law.¹³⁷ For example, Title 18 has various fraud-related provisions that may be tacked on.¹³⁸ As alluded to above, states may also prosecute under their own environmental statutes and related laws.¹³⁹

As state laws generally reflect their federal counterparts, this section provides a condensed overview of the criminal implications in federal environmental laws. Most statutes provide for both fines and imprisonment.¹⁴⁰

1. CERCLA

If a hazardous substance is released above the respective quantity threshold, then the person in charge of the facility may be fined and/or imprisoned if (1) she fails to notify the government, (2) knowingly reports false or misleading information or (3) knowingly destroys or falsifies specified reports.¹⁴¹

The maximum statutory fine is USD 25,000 for an individual and USD 500,000 for an organization.¹⁴² If the statutory maximum is exceeded by an amount that is twice the pecuniary gain or loss, the fine could be increased

134. Resource Conservation and Recovery Act, 42 U.S.C. § 6928(e); Nagel, *supra* note 38, at 10431-32 (stating “[f]or violations occurring in states without authorized RCRA programs, the Administrator may immediately commence a civil action in federal district court, or may issue an order assessing a civil penalty or suspending or revoking any permits issued under RCRA. Civil penalties are assessable up to \$25,000 per day of non-compliance for each violation, and if a violator fails to comply with the order, the Administrator may assess an additional civil penalty of up to \$ 25,000 per day.”).

135. Nagel, *supra* note 38, at 10432 (stating “Maximum criminal penalties are \$ 50,000 per each day of violation and/or up to two years in prison for knowing violations, or up to \$ 250,000 and/ or 15 years of imprisonment for knowing endangerment.”).

136. *Id.*

137. *See, e.g.*, 18 U.S.C. § 47 (2016).

138. *See id.*

139. Captain James P. Calve, *Environmental Crimes: Upping the Ante for Noncompliance with Environmental Laws*, 133 *MIL. L. REV.* 279, 322 (1991) (stating “[t]his federal-state partnership relieves EPA of the impossible task of regulating pollution nationwide and allows states to protect their environments. Federal supremacy and sovereign immunity limit the ability of states to regulate pollution from federal facilities. These limitations should protect federal employees from criminal liability under state environmental laws.”).

140. *See, e.g.*, 42 U.S.C. § 9603(b), (d)(2); *see also, e.g.*, 42 U.S.C. § 6928(d)-(e).

141. 42 U.S.C. § 9603(d)(2).

142. *Id.* §§ 9609, 9607(c)(1).

up to that amount.¹⁴³ Imprisonment could be up to three years for a first offense and up to five years for subsequent offenses.¹⁴⁴

2. RCRA

The Resource Conservation and Recovery Act (RCRA) imposes fines and imprisonment for the knowing and illegal storage, transportation, or disposal of hazardous waste.¹⁴⁵

Fines for each count are the same as CERCLA, but RCRA also creates a daily fine capped at USD 50,000.¹⁴⁶ This means that prosecutors may circumvent the statutory maximum by demonstrating five days of non-compliance for individuals and ten days for organizations.¹⁴⁷ A felony conviction brings up to five years of imprisonment.¹⁴⁸

3. Clean Water Act

Similar to RCRA, the Clean Water Act could impose fines by count or daily non-compliance.¹⁴⁹ The amounts are the same as RCRA, other than a USD 5,000 minimum for daily non-compliance.¹⁵⁰ A defendant could be imprisoned for up to three years.¹⁵¹

The Clean Water Act also includes negligence violations.¹⁵² Defendants may be fined by count (maximum of USD 100,000), fined by daily non-compliance (USD 2,500 to USD 25,000), or imprisoned for up to one year.¹⁵³

4. Clean Air Act

The violations and fines in the Clean Air Act are similar to those in the Clean Water Act other than (1) imprisonment for felony conviction brings up to five years, (2) imprisonment for knowingly failing to report, submitting false reports, or tampering with monitoring equipment is limited to two years, and (3) for a negligence violation, the maximum fine for organizations is USD 200,000.¹⁵⁴

The Clean Air Act also includes knowing endangerment, which requires that the defendant both knew of the release of a hazardous pollutant and that

143. Alternative Fines Act, 18 U.S.C. § 3571(d) (2012).

144. 42 U.S.C. § 9603(b)(3), (d)(2).

145. *Id.* § 6928 (d)-(e).

146. *Compare* 42 U.S.C. § 9609, *with* 42 U.S.C. § 6928(d)(7)(B).

147. *See* 42 U.S.C. § 6928(d)-(e).

148. *See id.* § 6828(d)(7)(B).

149. 33 U.S.C. § 1319(c) (2012).

150. *Id.* § 1319(c)(2)(B).

151. *Id.*

152. *See id.* § 1319(c)(1).

153. *Id.* § 1319(c)(1)(B), (c)(2)(B).

154. *Compare* Clean Air Act, 42 U.S.C. § 7413(c), (d)(1)(C), *with* Clean Air Act, 33 U.S.C. § 1319(c).

such release would put another person in immediate danger.¹⁵⁵ Knowing endangerment carries some of the highest repercussions in U.S. environmental law.¹⁵⁶ Organizations could be fined up to one million dollars.¹⁵⁷ The fine for individuals is capped at USD 25,000, but maximum imprisonment is 15 years.¹⁵⁸

B. CHINA

In China, all environmental criminal liabilities are provided under the Criminal Law (articles 338 and 339 specifically pertain to environmental crimes) and the liabilities are further explained in the Supreme People's Court interpretations.¹⁵⁹

1. *Environmental Pollution*

A criminal defendant may be fined and/or imprisoned up to three years for severely polluting the environment by discharging, dumping, or illegally treating radioactive waste or waste containing infectious diseases, toxic substances, or other hazardous substances.¹⁶⁰ A court may also impose an extended imprisonment term of up to seven years if there are "especially serious consequences" to the environment.¹⁶¹

Pursuant to the Interpretations of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the Application of Law in the Handling of Criminal Cases of Environmental Pollution, there are thirteen specific consequences that qualify as "especially serious" (although courts may determine whether other circumstances also lead to serious environmental pollution):

1. Discharging, dumping or disposing of wastes containing radioactive substances or infectious disease pathogens, or toxic substances in the Grade I reserves of drinking water source and the core areas of nature reserves;
2. Illegally discharge, dumping or disposing of three tons or more of hazardous wastes;
3. Illegally discharging pollutants containing heavy metals, persistent organic pollutants and other pollutants that seriously harm the environment and damage human health, which exceed the national standards for the discharge of pollutants or exceed three

155. 42 U.S.C. § 7413(c)(5)(A).

156. *See id.*

157. *Id.* § 7413(c)(5)(A).

158. *Id.*

159. *See* Criminal Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 29, 2015, effective Aug. 29, 2015) (China); *see also, e.g.*, Interpretations of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the Application of Law in the Handling of Criminal Cases of Environmental Pollution, *supra* note 108.

160. Criminal Law, *supra* note 159, art. 338.

161. *Id.*

- times of the standards for the discharge of pollutants formulated by provinces, autonomous regions and municipalities directly under the Central Government according legal authorization;
4. Discharging, dumping, or disposing of radioactive wastes, wastes containing infectious disease pathogens, or toxic substances by privately setting up pipelines or making use of seepage wells, seepage pits, crevices, or karst caves;
 5. Receiving two or more administrative punishments due to discharging, dumping, or disposing of radioactive wastes, wastes containing infectious disease pathogens or toxic substances within two years in violation of the state provisions, but recommitting the aforesaid conduct;
 6. Resulting in more than 12 hours of interruption of centralized water drawing from the drinking water source at or above the township level;
 7. Resulting in the loss of fundamental functions of or permanent destructions to five mu or more of basic farmland, protection forestland or special-purpose forestland, or ten mu or more of other farmlands, or 20 mu or more of other lands;
 8. Resulting in the death of 50 cubic meters or more of forests and other woods, or 2500 saplings or more;
 9. Resulting in the loss of public or private property of more than 300,00 yuan;
 10. Resulting in the evacuation or transfer of 5,000 people or more;
 11. Resulting in thirty persons or more being poisoned;
 12. Causing any serious injury, moderate disability or serious dysfunction due to the damage of organ or tissue to one person or more; [and]
 13. Causing any serious injuries, moderate disability, or serious dysfunction due to the damage of organ or tissue to one person or more[.]¹⁶²

2. *Solid Waste*

Per the Criminal Law, a criminal defendant may be imprisoned up to five years and/or fined for illegally importing, dumping, piling, or treating solid waste.¹⁶³

Imprisonment may be extended up to ten years if the defendant causes a major environmental pollution incident leading to heavy losses of public or private property or serious harm to human health.¹⁶⁴ Imprisonment may be extended beyond ten years if the consequences are extremely severe.¹⁶⁵

162. Interpretations of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the Application of Law in the Handling of Criminal Cases of Environmental Pollution, *supra* note 108, art. 1.

163. Criminal Law, *supra* note 159, art. 339.

164. *Id.*

165. *Id.*

IV. Due Diligence

The previous sections discuss the possible environmental liabilities in the real estate markets of the United States and the People's Republic of China. With this in mind, a party contemplating a real estate transaction with environmental implications should make due diligence a top priority.¹⁶⁶

It is often necessary to perform an environmental assessment.¹⁶⁷ Not only may an assessment allow a party to rectify potential problems (thus avoiding liability), but it can also be used in a dispute to demonstrate steps taken to comply with environmental law.¹⁶⁸

In the U.S., CERCLA plays an important role in judicial and administrative determinations on the adequacy of an environmental assessment.¹⁶⁹ China has a national law governing environmental assessments—the Environmental Impact Assessment Law¹⁷⁰—which is further clarified by its Environmental Impact Assessment Planning Regulations.¹⁷¹

The extent of the due diligence on any given transaction depends on jurisdictional requirements, anticipated amount of participation in the transaction, and foreseen risks. We generally recommend that clients collaborate with involved parties (such as an owner working with lenders) and, of course, legal counsel. For the United States, we might also suggest engaging a consultant that exclusively performs environmental due diligence.

V. Think Globally, Work Locally

This article only scratches the surface of environmental law in the United States and China. These laws vary not only between countries but also within their borders. Thus, their practice is often nuanced and specialized.

Foreign companies in China should be aware of its comprehensive legal reforms along with heightened enforcement of environmental laws, while

166. See SMALL BUS. ENVTL. ASSISTANCE PROGRAM, BASIC ELEMENTS OF PHASE I AND II ENVIRONMENTAL SITE ASSESSMENTS (2014), <http://dnr.wi.gov/files/PDF/pubs/am/AM465.pdf> (providing “There are numerous risks involved with starting your own business. One that can be costly is dealing with hazardous waste contamination discovered on property you have recently acquired. Performing an environmental site assessment prior to acquiring a property can minimize that risk.”).

167. See *id.*

168. *Id.* (providing “Be aware of state, local, or federal regulations outside of CERCLA that have other site assessment requirements and liability protections.”).

169. *Id.* (providing “Standards for the Phase I and Phase II ESAs have been established by the American Society for Testing and Materials (ASTM) to address the “All-Appropriate-Inquiry” (AAI) aspect to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). CERCLA contains national policy and procedures for containing or removing hazardous substances that have been released, and also provides funding and guidance for cleaning up some abandoned and contaminated hazardous waste sites.”).

170. See Environmental Impact Assessment Law, *supra* note 58.

171. See Environmental Impact Assessment Planning Regulations, *supra* note 46.

Chinese businesses in the U.S. would benefit from recognizing its strict prosecution regime and the implications of common law.

As the world's two largest economic powers become increasingly interconnected, it is more important than ever for companies to protect themselves by engaging qualified legal counsel that appreciates their goals and requirements.

