

Talking Points

Business interests and regulatory agencies often talk past each other, failing to see their duty to address each other's concerns. Exchanging information about practical resolutions can produce better-reasoned remediation plans.

By Cameron Kirk Jr.

Too often business people and their counsel forget that practical, common sense approaches to environmental regulatory matters can lead to efficient and reasonable resolutions. When a business receives notice of action by a governmental agency and faces the expense of contamination remediation and/or insurance coverage litigation, the first response is often aggressively defensive. The better tactic may be to meet with agency personnel to reach realistic, sensible and practical resolutions to the environmental problem.

PRIVATE INTERESTS, PUBLIC PURPOSES

Business should recognize that environmental statutes and regulations are enacted to seek contaminant reduction and remediation for the overall benefit of the public. Statutes concerned with the state's environmental policies (Public Resources Code §§21001, 21002; Water Code §13000) specifically include economic and social considerations. Thus, the economic and

social realities of any business, concomitant with its value to the surrounding communities, cannot be ignored by regulatory agency personnel.

Although agency staff employees are charged with identifying contaminants and potentially responsible parties; or PRPs, agency directors and board members are compelled to recognize the larger social picture as well. Business people and their counsel must consider, therefore, the social, political and economic realities inherent in a particular remediation plan. Such considerations are explored most effectively by informative exchanges between business representatives and regulators and will support better reasoned solutions to environmental problems.

The active participation in regulatory decisions is in the best interests of both business and its insurers. Early in any environmental administrative action, it is important that counsel understand, if not adopt, the purposes and motivations of environmental

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statutes, regulations and agency personnel. Such understanding will provide a basis for successful communication/negotiation with regulatory agencies.

Too frequently business denies the existence of real environmental problems, while governmental agencies pursue actions that significantly impact, even jeopardize, business interests without regard for negative economic or social impacts. Regulatory agency personnel, working under the guidelines imposed by law, must be led to recognize the value of practical solutions that may vary from strict interpretations of statutes or regulations. Even if agency personnel seem disinterested, business interests must press these issues persistently.

EXPANDING THE SOLUTION

An example of this process can be seen in the effort to deal with dry cleaning pollution in California. In November 1991 the Central Valley Regional Water Quality Control Board held a hearing on a cease and abatement order issued to the City of Turlock and three of its dry cleaners. The board had determined that the city's groundwater had become contaminated by the dry cleaning solvent perchloroethylene, or PCE.

The board's staff had recommended a remediation plan that would have required the PRPs, including the city itself, to remediate the groundwater contamination at a cost that would have bankrupted both the city and the dry cleaners. Because PCE contamination related to dry cleaning is a problem statewide, the proposed remediation plan proposed would have inflicted great suffering on one community, without addressing the greater contamination throughout the state.

Although the local contamination could not be disputed, and the cause of contamination was established by the staff, the social and economic realities of the remediation plan were unreasonable. The board, then, was unable to approve the limited local remediation plan.

Instead, the board recommended that the state legislature commission a task force to study alternative remediation proposals that would address PCE contamination throughout the state. That study has resulted, at least in part, in proposed legislation, AB 495, which would prohibit disposal of PCE into sewer systems and establish a fund to remediate PCE contamination statewide. The fund would be underwritten through a surcharge on dry cleaners that would raise \$20 million a year for the remediation. AB 495 did not clear a vote on the floor of the Assembly, but it and related legislation continue to be examined by industry and environmental interests in the legislature.

The Turlock example shows how cooperative efforts between business and government promote practical and realistic handling of contamination problems. It further demonstrates how a remediation plan that does not serve the public's best interests may be successfully challenged.

If an agency's strict interpretations of regulations do not address practical resolutions to an environmental problem, regulators may be convinced that other options better serve society's interests. Practical and realistic solutions to environmental problems must be emphasized consistently.

EXPANDING THE ISSUES

An environmental matter expands as the list of PRPs grows, and the issues pertinent to the underlying contamination problem are enlarged. As in the Turlock example, if the problem had not been recognized as existing statewide, the regional board likely would have seen the problem only within an isolated setting involving a few sewer leaks and a few dry cleaning establishments.

In a larger context, however, greater possibilities are available for practical resolution, and options for effective contamination control and remediation become more recognizable. Realistic solutions may include opportunities for community, state or industry-wide economic support. Many of today's contaminants may be traced to products or activities upon which the public relies. If society benefits from the activities causing the contamination, society may, in one way or another,

eventually accept responsibility for cleansing the environment.

Industries that produce contaminants as a result of providing services or products to the public should be actively involved in eliminating potential threats to the environment and corresponding liability. Such industries may be considered a resource for funds necessary to control future contamination, as well as to remediate today's hazardous conditions. To this end, counsel should seek the involvement of industry boards and councils.

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Perhaps those forums most supportive of realistic and practical solutions to environmental problems are our local and state legislative bodies. Although elected representatives will rarely act to directly influence regulatory decision making, indirect support may be very valuable and used to great advantage.

At the Turlock hearings, for example, board members questioned what involvement the state and local governments had in the controversy. The fact that state

and local legislators were already informed of, and involved in, the PCE contamination problem lent support to the proposal for a broader examination of potential remedial solutions.

Regulators are concerned about how various levels of government seek to remedy contamination for the public's benefit. Consequently, a showing of political support for propositions submitted by PRPs is of much interest to agency personnel. Involvement by any political entity, whether the state legislature or small community groups, may be extremely useful in marshalling support for practical solutions to community-wide contamination problems.

The potential for community-wide political action in environmental matters is confirmed in the Mello-Roos Community Facility Act, codified at Government Code §§53311 *et seq.* This act provides that community facilities may be established for "removal or remedial action for the cleanup of any hazardous substance released or threatened to be released into the environment."

MINIMIZING INSURANCE ISSUES

In efforts to realize practical and efficient remedial solutions, insurance issues may best be set aside temporarily. As California courts impose upon insurers the broad duty of providing insureds a defense if coverage

is even *possible*, protracted litigation commonly follows an insurer's complete denial of coverage. To avoid litigation and promote cost-efficient resolutions to environmental regulatory matters, coverage issues may be reserved while undertaking the defense.

The advantage to accepting a defense under reservation of rights is that having done so, the insurer is better able to control the course of the matter and achieve cost-effective resolutions. Thus, in many instances reserving all insurance issues while working toward a resolution short of litigation best serves both insurer and insured.

A range of public motivations and interests, social, political and economic, must be considered to effectively handle today's environmental regulatory actions. Rather than relying exclusively on arguments pertaining to the legal issues of causation, liability, damage assessment and coverage, etc., environmental lawyers should seek practical resolutions to contamination problems.

Such resolutions are reached most effectively through an active participation in the regulatory process, with counsel involved in initial discussions with all PRPs, early mediation and settlement negotiations with regulatory agencies, along with a full understanding of legal, economic, social and political factors that may affect the remediation. ■