

Government needs to be consistent with the regulatory process

OPINION BY SCOTT KIRK

Much has been written and said in the last several years about the inefficiencies and wasted resources resulting from efforts to protect the environment. For example, private property owners and their attorneys have been criticized for wasting millions of dollars fighting over who is responsible for paying the costs of contamination cleanup and thus spending money that critics say should be spent on the cleanup itself.

Compounding the problem recently is the fact that the government's approach to environmental regulation appears to have grown less consistent, making cooperative negotiation a less efficient alternative to the costly process of litigation. This is occurring despite recent legislation passed to make government-mandated environmental processes more consistent with private property rights and concerns.

Inconsistent actions

Recent inconsistent actions by government agencies have included situations where:

- A county agency recommended closure after several meetings with the private property owners' counsel and consultant, only to be reversed with no further discussion by the Regional Water Quality Control Board staff.
- A property owner obtained approval of a remediation plan from the Regional Water Quality Control Board staff, only to be told by the Underground Storage Tank Fund that it would not pay for the approved work.
- The UST Fund's pre-approval procedures have forced property owners to incur sig-

nificant additional expenses while ignoring the rights of both property owners and environmental consultants.

If regulators are inconsistent and contradict decisions made by other agencies in similar matters, private property owners are unable to rely on negotiations. Moreover, counsel for property owners will have a more difficult time encouraging cooperation with governmental authorities if the regulators' position is perceived as unreliable or inefficient.

If cooperative negotiation is to remain the most efficient means of resolving environmental disputes, the government must establish a more consistent order to its environmental regulatory process. Inconsistency on the part of government agencies will leave lawsuits as property owners' most reliable alternative.

These inconsistencies arise despite the fact that governmental agencies are compelled by law to bring consistency to their programs. Statutes adopted in 1993 require governmental agencies to adopt programs that will encourage efficient and consistent handling of environmental regulation. Beginning next year, for example, California environmental agencies are required to report annually their progress in accomplishing effective and consistent environmental administration.

While governmental regulators continue to remain accessible and cooperative within their perceived guidelines, these environmental guidelines have evolved significantly over the years.

Two questions

These changing environmental guidelines are largely to blame for the inconsistent

positions taken by governmental agencies.

To clarify, two practical questions need more consideration by all parties:

- 1) How do we quantify environmental risk?
- 2) How can the government best deal with evolving environmental technology?

Risk analysis

Within the last two years, studies commissioned by the government have promoted the consideration of environmental issues in terms of what risks are posed to the environment and human health. Indeed, state and local agencies have specifically adopted such a policy.

Nonetheless, some regulators continue to view their roles as only the first hurdle in the property owners' long road to demonstrating the lack of risk to environment and human health. Circumstances that present no risk and - consistent with state policy - should mandate the closure of a site are ignored by some agency personnel.

For example, leaving slight contamination in place (for instance, small amounts of petroleum that naturally degrade) may present no risk. Acknowledging such contamination, however, without ordering a full and costly remediation plan is inconsistent with many regulators' perceptions of their role. Thus, sites that should be closed continue to waste resources, both private and public. This also implies a confrontational approach, discouraging practical and efficient problem resolution.

The concept of risk analysis is significantly different and far more difficult than the more basic concept that all contamination must be removed. While the govern-

ment remains responsible for ensuring that contamination shall not present a risk to human health or the environment, the extent of contamination in California today requires that our resources be used wisely and efficiently. Our society does not have the wealth or facilities to remediate every contaminated site to purity. Accordingly, governmental agencies must consider environmental issues more efficiently at the risk-analysis stage.

This will require continuing and detailed discussions between property owners and regulators on how to evaluate risk. Because risk assessment is a relatively new and complicated topic, this will require significant time and commitment by all parties.

Evolving industry

Another difficulty that acts to complicate and confuse many environmental disputes is the constantly evolving technology pertinent to this field. New and unproved methods of cleanup are being proposed continually to regulators, and it appears that the regulators' natural tendency is to retreat to established techniques. A significant effort must be made by government personnel and property owners alike to consider new techniques in light of environmental and business efficiency.

Too frequently options proposed for remediation are not considered by government personnel because they may be out of the ordinary, though they provide for continuing business efficiency. Regulators must continue to recognize that there is great value to society in keeping business operational, without threat of closure due to environmental problems.

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Government . . .

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Continuing cooperative efforts

Certainly, neither of these issues is new, and both have been discussed continually since the government began legislating environmental protections. Still, both issues remain essential to the exercise of proper governmental control over environmental disputes, and government must develop some consistency in how these issues are considered. The best way to develop such consistency is to ensure that all interested parties continue to openly discuss and consider the issues cooperatively, with federal and state policies acting to provide controlling guidelines to the various governmental agencies. Regulators at all levels must continue to recognize the competing interests that affect these difficult issues.