

STRATEGIC ALTERNATIVES FOR DEALING WITH THE REGULATORY MAZE GOVERNING ENVIRONMENTAL CLEANUP*

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Summary

The ultimate goal of a cleanup of industrial-site contamination is not simply to eliminate unreasonable risks to public health or the environment, but to accumulate objective evidence that such a cleanup has been completed and protect the responsible party from being required to repeat some or all of the cleanup effort. Careful development of a legal and administrative strategy can reduce time, costs, and risks. Questions to be considered to achieve the goal include: 1. Who needs to know about the condition? 2. What happens if we do nothing? 3. What agency should I deal with? 4. Should I get my cleanup plan governmentally approved before I begin? 5. Is RCRA a better framework than CERCLA? 6. What guidance applies? 7. What is the standard for soil contamination? 8. Do I need permits for the cleanup itself? 9. How can I get the cleanup approved after completion? 10. How can I keep the government from making me do the cleanup a second time?

Introduction

As an attorney representing clients regulated under the Comprehensive Environmental Response, Compensation and Liability Act ("Superfund")¹ and Resource Conservation and Recovery Act ("RCRA")², this author is often asked to advise on questions of regulatory strategy in addition to providing legal advice. Over the years, this author has found that certain questions routinely arise and that certain assumptions are made about how to deal with the regulatory agencies. Depending on the client's experience with regulatory matters, those assumptions may be insightful and correct, or they may be dangerously wide of the mark. The following material seeks to distill some of the common elements of strategy that arise in dealing with environmental cleanup. These materials do not address legal issues; instead they provide the framework in which the laws and regulations can serve as tools or obstacles.

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¹42 U.S.C. § 9601 *et seq.*

²42 U.S.C. § 6901 *et seq.*

1. Questions clients commonly ask

Certain questions seem to come up almost every time the prospect of environmental cleanup appears:

1. Who needs to know about the contamination?
2. What happens if we do nothing?
3. What agency should I deal with?
4. Should I get my cleanup study plan governmentally approved before I begin?
5. What are the applicable cleanup standards?
6. Can I get the cleanup approved after it is finished?
7. How can I keep the government from making me do the cleanup a second time?

Answering these questions requires knowledge of both the objectives of the regulatory officials and the objectives of the owner and operator of the regulated facility. In addition, it requires a recognition that, as with any strategic decision, certain trade-offs must be made.

The first step in the process is to recognize the factors that motivate the regulators. Their primary objectives as public officials and bureaucrats are (a) achievement of a "clean environment," (b) minimization of institutional risks (that is, the risks of criticism of their personal performance or the agency's performance), and (c) verifiability (that is, objective measures of cleanup with automatic triggers for contingencies).

The objectives of the owner or operator of the facility are dramatically different. First, the operator obviously wants to minimize its costs for the cleanup. Costs include the number of factors, however; in addition to direct, in-house costs, there are the costs of legal and technical advice, costs associated with the impairment of the use of the facility, and the time value of money (that is, a dollar spent in five years is less costly than a dollar spent today). Second, as with any business decision, the operator will want to balance the costs of additional cleanup against the risks being avoided, so if the risk appears small and the costs high, it will be reluctant to spend additional funds. Finally, the operator will typically want to reach a point of finality, where obligations can be quantified, legal and financial uncertainties reduced, and management talent and energy redirected to other matters.

The differences in outlook between the regulators and the operators often generate enormous misunderstandings about intentions and ability. For example, operators tend to assume that prompt action is a priority for regulators where the environmental conditions pose a threat to human health or the environment. Regulators, on the other hand, may be more interested in identifying the right solution for the centuries to come than with immediate amelioration of existing conditions. Thus, when the regulators ask for another set of studies, the operators often consider the task a waste of time and money, and when the operators press for prompt decisions, the regulators often suspect

their motives. At the same time, the differences in perspectives between regulators and operators provide fertile ground for the development and implementation of strategies to accomplish the desired end.

2. The underlying considerations

The development of a coherent strategy for the operator must begin with a careful evaluation of a number of factors. For ease of analysis, I have broken them down into three groups: time objectives, verification objectives, and finality objectives.

2.1. Time objectives

In some cases, the operator will want to implement a remediation program immediately. The environmental condition may be an immediate threat to the health of workers, visitors, or the public at large; complete remediation may be a prerequisite to sale or refinancing of the facility; the condition may get worse (and therefore be more costly to remedy) as time passes; or a realistic estimate of cleanup costs may indicate that cleaning up the condition in five years will be far more expensive than cleaning it up today. This last circumstance is particularly likely because of the generally more rapid inflation of construction costs, and because tightening regulations, such as the ban on land disposal of hazardous waste, may make cleanup more difficult in the future.

On the other hand, the operator may be in no hurry at all to address the environmental condition. The problem may be of no practical significance, even though it does not satisfy the extremely stringent environmental standards imposed by Superfund and RCRA, or the acceptable alternatives may all be so expensive that the operator simply wishes to postpone as long as possible taking any action; finally, the operator may hope or have practical reasons to believe that new technologies will be developed or demonstrated that will reduce the costs of cleanup dramatically.

Note that the operator may be interested in reaching certain points promptly, but no others. For example, it may be eager to enter into some kind of an agreement with regulatory authorities to avoid the costs and adverse publicity associated with litigation, but be quite content to conduct extensive studies that will take years to complete before the heavy costs of remediation begin.

Identifying the operator's time objectives is one of the most critical factors in determining what approach should be taken toward the regulatory agencies, so careful consideration of this factor is particularly important.

2.2 Verification objectives

Objectives with respect to verification may also vary widely, depending on the circumstances the operator finds itself in. For example, the operator will want objectively verifiable results if it is seeking financial assistance from lend-

ers or is planning to sell the facility; or it may want objectively verifiable results to satisfy neighbors, workers, or the public; or, it may need objectively verifiable results to keep regulatory agencies from taking enforcement action or to satisfy the requirements of the Securities and Exchange Commission.

On the other hand, objective verification may not be important if the only one who really needs to be satisfied is the operator itself. That circumstance may exist where neither the problem nor the remedy are visible to the public or the regulators, where the business and financial consequences are relatively insignificant and will not affect lenders or trigger materiality disclosure requirements. In some circumstances, even the regulatory agencies may be satisfied with a straightforward information report of conditions discovered and actions taken, without imposing any formal regulatory action. Ultimately, the question that must be answered is, "Whom do we have to convince that the job is done?"

2.3 Finality objectives

Of course everyone wants to do remediation once and be done with it forever. But such finality has a price, and in some circumstances, the price may be too high. Finality is particularly valuable where inconsistent remedial alternatives are being considered. For example, where the choice is between capping or exhuming wastes and incinerating them, the operator would not want to follow one strategy only to be told later that he had chosen incorrectly and now had to follow the other. Different strategies may also be financially as well as technically "lumpy", and the operator may not be willing to proceed with a particular remedy unless it is confident that nothing more will ever be required. Finality may also be necessary because a buyer or banker insists on a "clean bill of health" before proceeding with a planned transaction, or because the operator's plans for a future use of the site are impeded by uncertainty about the finality of the environmental remedy.

On the other hand, the threat of further remedial action at some point in the future is not always a serious problem. If the remedial program is an incremental one, the operator may feel there is no harm in doing as little as possible now even if that involves a greater risk that it will have to do something more later. If the operator is assured of future access to the site and has no plans for the facility that will impede future remediation efforts, it may conclude that the choice is between spending some money now with the risk of spending some money later, or spending more money now, in which case the answer may be easy. The problem of finality is complicated by the regulatory agencies' insistence on "reopener" provisions that allow them to come back for more whenever they think the circumstances call for it. Once the operator recognizes that complete finality can never be assured (in part because public health risks can never be ignored, regardless of prior agreements), the importance of achieving formal finality may be downgraded.

3. Answers to some typical questions

Once the importance of timing, verifiability, and finality have been determined, the operator can begin to address more specific questions that arise in many environmental cleanup situations:

3.1. Should I work with the State or EPA, or both?

In many circumstances, the operator will have little or no choice on this matter, because the environmental conditions will be sufficiently serious that both the State and Federal agencies will be deeply involved. In some cases, the operator may be able to deal only with the State Government because the problem is too small to merit EPA attention; and in other cases, if a strong working relationship is developed with EPA, the State may simply bow out of the practical process of negotiation and oversight. The operator can often bend matters in one direction or the other if it has a definite preference. Working with both State and Federal agencies raises the possibility of stalemate if they disagree. Worse yet, each agency may try to “one-up” the other by demanding more extensive remedial action. Because State governments are smaller and more integrated, the State agencies tend to have a more practical approach and a greater interest in the viability of local business concerns. Accordingly, State agencies can sometimes be helpful in goading EPA into making decisions. On the other hand, if EPA is deeply involved, it may be easier to work with one agency than two, simply because the involvement of additional bureaucracies can complicate any decision-making process.

3.2. Should I get advance governmental approval of my study plan?

Initiating studies of environmental conditions or remedial alternatives without governmental approval of the study plan is always a gamble. Whatever results the operator finds are subject to multiple challenges: the wrong wastes were studied; the wrong tests were used; the laboratory methodology was insufficiently rigorous; the results were not reported in accordance with the accepted guidance. Recognizing the risks, it may nevertheless be worthwhile to study first and ask questions later. If the study is reasonably competent and professional, and if the results seem relatively definitive, the agencies may not feel the need to require new studies just to satisfy formalistic guidance requirements. At an industrial site, designing the study methodology so that the analysis of a known problem does not carry with it a high potential for finding unknown problems may be a quite important consideration.

Going forward without governmental approval can be a two-edged sword from the point of view of public relations. On the one hand, the sooner studies are initiated and the sooner the problem is defined, the more easily public fears can be allayed and the problem placed in the proper perspective. On the other hand, if the operator’s announcement of test results is accompanied by regu-

latory agency statements that the studies are inconclusive or worthless, the public relations effect may be negative.

Finally, of course, the initiation of studies without government approval can save months or years (if speed is one of the operator's objectives), because negotiations with EPA over study methodology can go on indefinitely.

3.3. Should I obtain advance governmental approval of my remedy?

Although many of the issues involved in proceeding with the remedy are similar to those involved in proceeding with studies prior to government approval, there are important differences. First, the amount of money involved may be significantly greater, and the gamble is greater. Once a remedial action is completed, the operator loses any leverage it may have had to obtain agency approval. Before remediation, the agency is under some pressure to deal with the public health problem; to the extent that the operator's remediation alleviates some of the immediate or long-term risks, the agency can afford to take a tougher line with a longer time frame.

On the other hand, insisting on agency approval before any remedial action is initiated can create a significant public relations problem for the operator, which will be perceived as stalling while the public health and environment are at risk. This problem is particularly serious if the first stages of remediation are non-controversial or are particularly important to risk reduction, such as removal of chemicals in drums at the site. And there is always the risk that the regulators will order an immediate partial cleanup while discussions and negotiations about the remainder of the cleanup program are underway.

3.4. Should I anticipate forthcoming guidance or rely on approved existing guidance?

The world of environmental regulators is driven by Guidance documents. Whenever an operator asks the agencies to approve a study program, a sampling protocol, or a remedial program, the agency personnel will turn to some kind of Guidance to find out what the agency will accept. In theory, this fact should make life easier for everyone – all the operator (or its consultants) needs to do is find the right Guidance document and follow it. In real life, however, that strategy is rarely satisfactory. First, of course, the Guidance may require things that the operator does not want to do, either because of cost or because the operator does not think the required approach will achieve the desired result. Second, because the Superfund and RCRA programs in particular are still being “invented,” much of the Guidance is still in draft form and under review; or it may be explicitly labeled “Interim,” which means that a “Final” Guidance will be coming out later; or it may be labeled “Final,” but a draft of a new Guidance document may already be circulating in the agency.

Thus, the operator faces the constant dilemma of which Guidance to follow. The temptation is to follow the “official,” approved Guidance, both because it

has already received the agency's stamp of approval and because older Guidance is almost always more palatable than newer Guidance. The iron law of environmental regulation seems to be that "Guidance gets worse." (This reality reflects the fact that writing and revising Guidance is a group effort by regulators – each reviewer tries to make certain that the new Guidance will explicitly prevent any abuses he or she has suffered or witnessed under the old Guidance.) Following the approved Guidance also avoids the frustration that arises when you follow the latest draft Guidance only to find that it has gotten rejected or radically revised by senior agency or Executive officials. Finally, the operator and its consultants may not even know that newer draft Guidance exists or be able to obtain a copy, either officially or unofficially.

The difficulty inherent in sticking with the existing Guidance until it is officially replaced is twofold: first, agency personnel tend to regulate on the basis of the most recent draft Guidance they have seen because they believe it represents the most current agency thinking; and second, agency personnel have no qualms about applying Guidance retroactively. So any work performed before the Guidance was issued or made final may be rejected on the ground that it is inadequate by the most current standards. While the operator may feel that applying standards that were not in existence when the work was done is unfair, the exercise of judgment about when to fight and when to conform to new or draft Guidance is a critical strategic choice.

3.5. Should I deal with the agencies through consultants, lawyers, or in-house technical or legal personnel?

A multitude of considerations go into deciding who should deal with the regulatory agencies. Agency personnel may react better to a technical, rather than a legal, approach, which they may equate with a more adversarial relationship. But if the agency is demanding things the operator is unwilling to give, using a lawyer from the beginning may avoid actions that undermine the operator's ability to exercise its legal rights. Outside legal or technical consultants usually bring a broader knowledge of agency policies, procedures, and personnel; but they usually have less understanding of the operator's internal structure and chain of command, which can sometimes be equally important. Some operators are so large that their in-house experience with the regulatory agencies is actually broader than that of the local consultants they use. On the other hand, in-house personnel can rarely focus their attention on a single problem, no matter how major, and give it the undivided attention it may need.

Where a major matter is involved, the ideal approach is to assemble a team that includes a variety of talent – legal, technical, and public relations – using both in-house and outside personnel. Once a good team is in place, it can explore a variety of approaches and switch from one to another as the circumstances demand. The more tools in the kit, the better the chance of being able to fix the problem with a minimum of effort.

Conclusion

In summary, a successful cleanup effort requires the operator to assemble a team of in-house and outside experts, carefully evaluate the operator's time, verification, and finality objectives, and develop appropriate strategies for dealing with the regulatory agencies. Attention to these concerns at the outset will maximize the probability that the effort will truly accomplish the operator's objectives.