

Cleanup Commitments

Accepting Responsibility for Contaminated Property

By Diane R. Smith

The California Legislature has taken steps to encourage environmental cleanups, voluntary and expedited resolution of environmental issues and mediation of disputes between the owners of contaminated property and responsible parties. The Environmental Responsibility Acceptance Act was signed by Gov. Pete Wilson on Oct. 11.

The act requires owners of property to take all reasonable steps to identify parties responsible for releases of hazardous substances and to notify them of potential liability. Owners must then give the parties time in which to accept responsibility for the releases and to provide commitments to remedy them. In return, the owners must agree to limit liability for some measures of damages. Under certain circumstances, the act requires responsible parties to provide owners with notices of releases of hazardous substances, which begins a process that can expedite cleanups for owners and limit responsible parties' liability.

By using the act, property owners and responsible parties have new tools and incentives, to avoid lawsuits and limit damages. The act does not subject owners or responsible parties to fines or penalties if they fail to send notices of potential liability because it is much more of a "carrot" than a "stick" law — though it has characteristics of both. The statute's procedures are meant to do what the best laws do best: protect reasonable expectations and encourage rational action.

The act becomes effective on Jan. 1, 1998. Notification requirements go into effect on July 1, 1998. The act also applies to releases that have already occurred when the notification requirements become effective, if those releases occurred after Jan. 1, 1995. Owners and responsible parties are required to provide notices on or before Dec. 31, 1998.

The release notices start a process of dispute resolution by defining and framing the issue of responsibility between the parties. The carrot for owners is speed, low legal fees and incentives to encourage responsible parties to take action. The stick for owners is that, in

exchange for the responsible party's commitment and cleanup, some of the owners' potential financial recoveries from responsible parties are limited.

The act's procedures also act as a moratorium, since they protect owners' legal rights to sue by tolling specific statutes of limitation during the time that the procedures outlined in the act are being implemented and the cleanup performed.

The carrots for responsible parties are limitations on some particularly extreme levels of financial exposure — both for cleanup costs and damages — and assistance in expeditiously commencing mediation to resolve disputes. Responsible parties can also avoid the burden of lawsuits from owners' successors and are able to make proposals to resolve environmental issues without the implication of weakness in their case.

Another carrot for responsible parties is that the act will likely reduce cleanup costs by requiring only the level of cleanup set by regulatory agencies, as opposed to more stringent, and therefore more expensive, remediation, which owners might demand. The act's focus on basic regulatory standards is the crux, from a responsible party's standpoint.

As a result of recent regulatory changes, agency cleanup requirements are increasingly more likely to be set by environmental health and safety risk assessments than by the ability of testing labs to detect very low concentrations of contaminants, or by reference to possibly irrelevant and extremely conservative cleanup requirements.

A good example is the area of cleanup of contaminated water. The California regional water quality boards, which implement state and federal clean water regulations, often decide that some contaminants may remain at a certain property if health and safety will not be endangered. Owners, however, frequently disagree with allowing any contamination to remain, due to purchaser, tenant and lender attitudes, paranoia about residual contamination, uncertainty about future standards or new on-site discoveries.

The statute's incentives will help promote acceptance of meaningful, reasonable cleanup standards throughout the business, financial and real estate communities and the general public.

The stick, from the responsible party's standpoint, is exposure to much higher levels of damages and defense costs, in addition to unknown standards of cleanup responsibility, if some of the act's provi-

sions are not followed.

If the owner does not accept the responsible party's initial terms of commitment to perform a cleanup, the parties are to engage in mediation prior to commencing litigation. However, the act contains provisions under which owners can elect to remove their property from operation of the statute prior to acceptance of a commitment statement issued by a responsible party.

The extent to which the act requires mediation as a prerequisite to litigation is not entirely clear. However, voluntary settlements reached in mediation supersede the settlement terms specifically set out in the act, which some parties may find unacceptable as written.

Environmental reporting requirements and notifications are nothing new to Californians. Notices and reports are required under a variety of laws. What distinguishes the new legislation, however, is the definition of "thresholds" that make a release reportable. Most environmental laws set thresholds that trigger reports or notices. The thresholds are usually based on quantities of materials released; the location of the release; actual or potential exposures to persons; or potential damage to the environment or to a public utility, such as a water treatment plant.

This new statute, however, makes releases reportable if they meet either of two new types of thresholds. Under the act, a release must be reported if it is the subject of a response action that has been ordered by, or is being performed by, an oversight agency, or if the release is impeding the ability of the site owner to sell, lease or otherwise use the site.

The first threshold is easy to recognize, but the second is not. An owner's failure to give notice could be used to imply that the owner's sale, lease or use of the site is not impeded. Such an implication could result in the owner's loss of rights to otherwise recoverable damages. Although the statute states that an owner's failure to send a notice of potential liability for a release in a timely fashion shall not be deemed to create liability for the owner under a theory of negligence per se, no such exclusion exists for other legal theories that could affect owners' rights.

The act does, like most new legislation, contain internal ambiguities and uncertainties. It presents, however, a real

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opportunity to expand use of voluntary cleanups and mediation to resolve environmental disputes because it promotes voluntary mediation and settlements.

The state's provision of incentives to both owners and responsible parties to utilize nonbinding, voluntary mediation as the dispute-resolution procedure of choice is significant. Mediation can be an effective form of dispute resolution for environmental issues. Through mediation, parties have been able to reduce many otherwise expected expenditures, like legal and expert fees. The act will like-

ly increase the number of environmental disputes resolved through alternatives to the expensive and slow legal procedures that have characterized many environmental disputes for the last 15 years.

Parties who frequently engage in environmental disputes recognize and already take advantage of negotiation and mediation to avoid the disadvantages and frustrations of environmental litigation, such as high legal costs and expert fees due to "battles of the experts" over cleanup standards and methods; allocation of devastating levels of potential cleanup liability; frequent involvement of numerous parties; applicability of both statutory and com-

mon-law principles and theories; and uncertainty of results.

The act could go a long way toward improving the positions of both owners and responsible parties and reducing the overall expense of cleanups. It could also bring effective conflict management, rationality and business sense into what has been a wasteful, frustrating and highly criticized aspect of environmental issues: the cost, ineffectiveness and inefficiency of focusing on disputes and liability rather than on cleaning up property quickly and to reasonable standards.