



Negotiating for Assistance and Cost Control: Effectively Interacting with Environmental Regulatory Agencies

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Regulatory agencies are involved in analysis of plans for, and results of, virtually every environmental site investigation and remediation project. Controlling the cost of such projects is largely dependent on arriving at a reasonable scope of work. Regulatory approval is heavily influenced by the approach, cooperation, level of expertise, communication skills, preparation, and diplomacy of those who interact directly with agency personnel. Agencies also can be sources of assistance in obtaining the cooperation of other responsible parties. This article discusses a practical approach to maximize assistance, cooperation, and collaboration from regulatory agencies.

As the regulated community faces increasingly complex and stringent levels of regulation and cleanup requirements, effective negotiation with regulatory authorities becomes even more important. In most cases, there is no doubt about whether a cleanup will be required, only how extensive—and expensive—the effort will be.

Almost every cleanup is subject to regulatory approval (achievement of “no further action” status) either due to voluntary submittal of pertinent reports to obtain certainty as to results and requirements, for other legal reasons such as transaction terms, or because an agency demands review and approval for health and safety concerns or other regulatory requirements. Actions for recovery of environmental response costs (in which private-party litigants are concerned) involve demonstrating that costs incurred were “consistent with the National Contingency Plan” if suit is brought under the federal Superfund law. The usual way of demonstrating “consistency” is to have agency oversight of cleanup activity. Agency involvement is generally inevitable, especially if litigation is likely.

Securing agency approval of cost-effective, efficient plans and negotiating acceptable result parameters are critical to a successful, cost-effective project and to the recovery of response costs, hopefully without litigation.

CONTROLLING COSTS

There are various ways to control the cost of cleaning up hazardous substances:

Never get involved with contaminated sites without a clear understanding of potential costs and other implications.

- Never get involved with contaminated sites without a clear understanding of potential costs and other implications. Don't buy, sell, operate, serve as trustee or property manager for, or lease property without knowing its condition and the ramifications of those conditions. How to accomplish this goal is beyond the scope of this article, but is generally referred to as "environmental due diligence."
- If you are unfortunate enough to get involved in a site where hazardous substances pose concerns, minimize your share of liability, if at all possible, by providing facts that demonstrate that you should be completely exonerated or at least should be responsible for substantially less than the liability allegedly attributable to you. Put forth evidence showing that the volume of material you sent to the site or that resulted from your use of the site was not toxic, or at least was less than alleged; that what you sent was less toxic or less mobile than substances attributable to others. Carefully review the length of site occupancy, use, or control that others argue was attributable to you. Evaluate the processes or activities that have caused or contributed to the problem and discount your involvement in those processes or activities. Demonstrate that your contribution to troublesome conditions is minor and also somehow "divisible"; show that others should be held responsible for specific conditions that are obviously solely attributable to them.
- Increase the allocated "shares" of other potentially responsible parties by finding more to blame them for (increase their volume) or by demonstrating that they are more culpable (e.g., establish that they sent far more toxic materials or that their conduct was more blameworthy). Find a way to get others to cooperate and pay part of the cost (more on this point below).
- Find more parties to share the experience and shoulder part of the cost.
- Control the cost of the work by controlling the scope of the work.

Regulatory agencies should be enlisted to help by providing assistance in bringing in others to share the experience and allowing you to control the cost of the required work by approving reasonable work plans. There are always equitable and persuasive arguments that can be made to induce regulatory agencies to name others on enforcement orders and, it is hoped, use their persuasive and coercive powers to force all appropriate parties to cooperate and contribute to any proposed resolution.

In many states, such as California, administrative agencies are required by recent administrative appeal board decisions to name as potentially responsible parties all those with respect to whom substantial evidence of

responsibility for site conditions exists, based on the agency administrative record. Inform agencies of the identity and involvement of others, provide substantiating information, and push for the agency to require actions by, or issue orders to, all of the potentially responsible parties, not just the present owner and operator. Object to erroneous information regarding your interests and provide documentation regarding the involvement of others such as previous owners.

Willingness of regulatory agencies to force the involvement of other allegedly potentially responsible parties is a double-edged sword (next week it may be you). However, it simply makes sense to insist that all potentially responsible parties are provided with the incentive to resolve issues regarding allocations of liability or at least proceed with necessary work on some temporary "rough justice" basis pending resolution of responsibility issues.

Agencies are best equipped to provide incentives to settlement without significant cost to the regulated community. The only other option to force allocation is litigation or dispute resolution, which may delay the work and divert funds that could be better spent on site mitigation or analysis. Worse, litigation may well lead to the same allocation as would have been arrived at through alternative dispute resolution or negotiations. Litigation is often a tremendous burden to those already strapped with the expense of a remediation project.

Once all appropriate parties are committed to good faith negotiations and fact-finding, they can proceed together to achieve necessary results in a cost-effective manner—which requires the cooperation of the regulators.

KNOW YOUR AUDIENCE; KNOW THEIR AGENDA; BE A PROACTIVE PART OF THE REGULATED COMMUNITY

There is no substitute for having a credible, trustworthy presence with local agency staff.

It is essential that the people who represent your company before the regulatory agencies be "known quantities." There is no substitute for having a credible, trustworthy presence with local agency staff.

Be an active member of the community and your industry. Raise the agency's perception of your company or firm as an active participant in environmental matters by participating in discussions and resolutions of issues important to the agency's missions and your company's goals and needs. Develop and use a network of business and professional contacts. Find out who has had a similar situation, what approaches have worked, and what concerns were central to the resolution. Collect and compare your facts and distinguish or analogize your case; if appropriate, suggest industry-wide approaches.

Be sufficiently involved in issues to anticipate what will be required in the future and possibly economize by designing or planning for future requirements now, while dealing with current activities.

When participating in standard-setting or rulemaking proceedings, consider building in some flexibility within an acceptable range of alternatives. Regulatory flexibility may be of great use in future projects. Try to build in requirements for cost-effectiveness, cost-benefit analysis, and de minimis (i.e., small cases, minor involvement, low levels of contaminants) exceptions. In

some instances, certainty may be more desirable than flexibility (which allows more discretion on the part of the agency).

Whenever possible and practical, try to arrange for "grandfathering" to allow, for instance, for capture of the useful life of equipment that is subject to change to meet new standards. Sometimes pushing back a requirement to allow for better budgeting, technological developments, industry revitalization, or control of other variables (such as future contaminant reductions in background levels in receiving waters, which may affect discharge permit limitations) can result in significant advantages and possible savings over time.

APPROACHING THE AGENCY

There are two separate aspects to consider when interacting with regulatory agencies: first, how well you deal with the agency and the staff on a day-to-day basis, and second, what you should expect or be prepared to discuss with the agency. It is folly to approach an agency about a specific problem without first thoroughly discussing all issues with your environmental consultant and attorney. Many projects have gone awry because of initial tactical errors or statements made without the benefit of sound professional advice. Develop your strategy before you publicize the issues. Be aware of your attorney-client privilege and protect your confidential information.

Start at the Bottom and Work Your Way Up

Always start at the lowest staff level possible. You will get more time with lower-level staff than with those at higher levels, and additional time and attention will give you a better chance to adequately present your arguments and your plan in its best light. Goodwill of lower-level staff can go a long way toward resolving issues, avoiding penalties, and fostering communication and informal advice without "going up the chain." Further, starting at the bottom provides the maximum number of opportunities to talk to various persons at different levels within the agency who may have different perspectives or authority to act.

If it becomes necessary to move to a higher level of decision making, never jump to the top, skipping layers of review. Such an action costs opportunities to resolve the issue at those lower levels, and may be insulting to those over whom you attempt to skip, making them harder to deal with in the future. Besides, it rarely works.

Work your way up the chain of command one step at a time until you either get an acceptable resolution or exhaust your administrative remedies, at which time you may have to further assess your situation and the relative cost-effectiveness of further action. You may be forced to continue the argument in litigation, or you may decide to push for a change in standards or legislation.

Document the Administrative Record

As the matter proceeds, be sure to "paper the agency's files" in support of your position. Be particularly careful to document all agreements reached with agency staff in confirming letters. Be sure to preserve your

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rights to object to agency decisions, actions, or allegations by documenting your disagreements. Be constantly aware that, unless you refute incorrect statements made by others in the file, they will be interpreted as correct. Realize that every document in the agency's files, and everything you say to the agency, will likely be discoverable in court or by others interested in the property and its condition in the future.

Propose and Be Prepared To Defend Solutions

Propose solutions designed with the goal of meeting the issues that the regulatory system is designed to address. You may be able to get a permit, variance, or approval for an approach that is somewhat unconventional or unusual if you can show that the results will be the same your way as the agency's. "Results" is the key. What is the agency seeking to achieve? Is there a mutually acceptable way to achieve the goals? Be sensitive to why an agency requests something. Is it just for "information gathering purposes"? Or is it a technically-based request? Information gathering may be accomplished in other ways, or may not be appropriate or within the agency's powers at all, whereas technically-based agency demands are usually considered to be entirely within agency discretion.

Avoid Adversarial Behavior

The vast majority of disputes with agencies are resolved informally. Adversarial behavior is tiresome and generally counterproductive when dealing informally with administrative agencies. Agencies have set missions and policies and it is highly unlikely that, at any one moment, you are speaking to the person who can change any procedure or requirement.

If it is necessary to go to a formal appeal process, you will be better off if you can show a well-reasoned and cooperative record.

Understand the Agency's Point of View

To be effective, you must first understand the agency's perspective: Evaluate the history of the regulatory provision(s) in question and have a thorough understanding of why the requirement exists and what it is meant to accomplish. Determine if the goal is relevant in your case. Have all technical details relating to your particular question "down cold," and have supporting documentation and data at your fingertips.

Hire Effective Help

Use persons with stature in the environmental community, a good reputation with the agency, and personal presence and confidence for your important presentations. Be sure your message has the best messenger. Communication skills and tact are essential.

Be Prepared

Evaluate all your options thoroughly, and list and consider all pros and cons. Reach an informed decision that you can support. Figure out what the agency's goals and strategies are and why, and evaluate the agency's position in the same way. Be prepared to discuss both your position and the agency's

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and the rationales for both. Keep an open mind; there may be a compromise that will achieve everyone's goals. Success has many fathers.

Be Flexible and Collaborate

Build some "give" into your proposals to accommodate agency concerns. Solicit the agency's opinion in advance in appropriate circumstances. Understand what the big issues are, and make sure that your client or company understands. Be prepared to compromise, but understand when the price of compromise becomes too high. Be compliance-minded and candid, but do not be afraid to develop your own approach or to advocate your views. Emphasize the cost of the agency's demands and relate the cost to the financial welfare of your company.

NEGOTIATING THE "BIG TICKET" ITEMS

At most sites, project-specific requirements that are frequently the subject of negotiations include the scope of the preliminary site investigation. It is important to adequately evaluate a site before designing the remediation program. This includes establishing the vertical and lateral extent of contamination, as well as the concentration gradients within the contaminant plume.

Site Characterization

At small sites, it may be possible to minimize initial investigations and do required analyses as the work proceeds. When dealing with a relatively small-scale problem, take a practical, economy-minded approach that responds to the agency's requirements cost-effectively. Site characterization, known at Superfund sites as the remedial investigation/feasibility study (RI/FS) phase, constitutes approximately 5 percent of total site expenditures at large sites. Unless you control the process well, site investigation at a small site can be as high as 50 percent of remediation costs.

At large or complex sites, as site characterization costs go up, remediation costs generally go down, assuming effective use of site characterization funds and qualified professional advice. Because actual remediation activities after the site characterization phase generally constitute 80 percent of total costs at a site, cutting remediation costs is much more effective as a cost-control mechanism than scrimping on site characterization. The more accurate the characterization, the more certainty will be possible in evaluating technical options and estimating costs for cleanup. If treatment technologies appear promising, site investigations can include the collection of analytical data and performance of bench-scale treatability and other tests to fully evaluate options.

Use history and a site inspection to set the scope of work. Process studies, chemical use, manufacturing and waste-treatment histories, and a thorough physical site inspection, coupled with adequate intrusive testing and analyses, help ensure an effective cleanup.

Sampling and Analysis

Carefully plan your analytical program. How many soil borings will be

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required? What is the required spacing? What are the optimum locations? Can some other technique be used to save money, such as soil vapor analysis?

Examine and maximize the utility of analytical results. Are the analytical requirements appropriate to evaluate actual site conditions? Do the methods used for analyses adequately simulate site conditions so as to provide valid information about the movement or migration of contaminants at the property? Are the required analyses appropriate and not excessive?

Focusing environmental sampling on the number of samples and the locations and substances that will produce the most useful information minimizes the collection of extraneous data and reduces investigation costs while ensuring that sufficient data are collected to characterize the problems at the site. Argue that off-site contributors should be forced to provide additional data. Why shouldn't upgradient contributors join in the effort?

Environmental projects involving affected groundwater invariably involve well installation, monitoring, and maintenance. Wells are expensive, eventually require closure, and function as conduits to groundwater. It is important to address several questions whenever wells are required.

How many wells are needed? Is there another less expensive technique for obtaining water samples? What is the purpose of installing groundwater wells? Can existing data from other nearby wells be utilized to control the cost of installing new monitoring wells? What analytical methods are required? Can a less expensive method be employed? How often must the wells be monitored? When will the agency allow the wells to be abandoned (closed)? Under what circumstances will the agency agree to impose the cost of continued monitoring and maintenance of wells on others? Will the agency agree to assume the cost of continued monitoring at some point, if results do not produce facts supporting your company's involvement in groundwater problems? Investigations of previously owned property raise a myriad of legal issues with respect to the current property owner, such as site access and indemnity.

Try to keep the scope of the site investigation to a minimum but recognize that site conditions must be fully characterized for remediation work to be effectively planned and estimated. The extent of site characterization necessary for any remediation project to proceed is dependent on the facts in each case. It is usually most cost-effective to "phase" site investigations to control costs.

All available technologies or combinations of technologies should be evaluated during the feasibility stage. Regulatory agencies often lack knowledge about site-specific wastes and treatment capabilities. Often an industry will have specialized knowledge gained from years of experience with on-site materials. Sometimes companies can creatively examine the areas and amounts of material to be treated or disposed of. Sometimes "source removal," meaning treatment or removal of a "hot spot," can eliminate more exposure risk than remediation of a large area that contains low levels of contaminants.

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Cleanup Standards

Cleanup standards set ground rules for achieving "closure" (no further action status). What cleanup standards are appropriate? What agency-applied action, cleanup levels, other requirements or guidelines exist? Is there a less stringent standard that should logically apply in your case? What assumptions are contemplated cleanup levels based on? (For example, if drinking water standards are proposed as cleanup standards for a particular aquifer, is the water from this aquifer used for drinking water? Should the usual assumptions regarding water quality apply in your case?)

Determine what has been done in similar circumstances. Agency staff members are often unfamiliar with precedents at other sites or with the latest toxicological information, which can dramatically influence opinions regarding risk of exposure. Even a small change in a target cleanup level can reduce the cost of remediation substantially. Be sure to analyze the following issues: What are background levels of the constituents in question in the area of the site? What are the potential routes of exposure to humans, animals, resources, and so on? What established standards exist for exposure? What are they based on? What are the potential exposures here? What risk is there in a "do nothing" alternative? Are established exposure limits appropriate here? Is a risk analysis appropriate? Risk assessment is an organized method for determining and establishing cleanup levels that protect human health and the environment.

Cleanup levels (and time constraints) usually directly affect the technology selected and determine the quantity of material that must be remediated. The quantity of material to be remediated and the unit price of the remediation process have the greatest impact on project cost.

The overall goal of remediation is achievement of a target cleanup level for contaminants at a site, using a combination of regulatory requirements and risk assessment models. Risk assessment models incorporate many site-specific assumptions about property use and the potential for exposure to hazardous substances. Regulatory agencies tend to make conservative assumptions about current and future property use and, as a result, propose stringent cleanup levels. However, they are often willing to negotiate cleanup levels if a good case can be made about exposures at a site. A recent trend, however, is to require deed restrictions or notices in exchange for closure at levels other than those usually required by an agency. Be aware of the future ramifications of such requirements, such as reduced value and marketability.

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UNDERSTAND THE BASICS OF ADMINISTRATIVE LAW

Most environmental disputes with agencies are resolved informally. In dealing with agencies on environmental issues, it is often useful to know some basic principles of administrative law. As you will see, the difficulty of successfully challenging agency actions and the cost of such challenges is a definite impetus to informal settlements.

Administrative agencies have no power of their own, but act only pursuant to authority "delegated" to them in laws. If an agency acts beyond its powers, its actions are of no legal effect. Determine whether the agency

has authority to require what it has asked for. If not, challenge the requirement. Enlist the aid of your "network," if an industry issue is involved.

Agencies' interpretations of their own regulations and statutes will be granted deference by the courts, especially if they have been consistently maintained over a period of time. Recognize an uphill battle, and its price, in your strategy.

Agencies must act in accordance with their established procedures, which normally involve publication and periods for public comment. Finding a procedural "glitch" can bring things to a halt. If you argue that a procedure has been violated, however, you may get only temporary respite from a requirement while the agency goes back and follows correct procedures.

Agencies must maintain a record in support of their actions and that record must contain evidence to support the action. The record must, subject to some limitations, be made available for public inspection. Aggrieved parties may challenge an agency's requirements that have no foundation in the agency's files.

Agency actions cannot be arbitrary and capricious. This means that there must be at least some evidence in the record to support the agency's actions. The burden of proof is on the party challenging the administrative agency's decision to show that the decision was arbitrary and capricious. Courts generally will not overturn an agency's decision unless it is not supported by substantial evidence. Again, recognize an uphill battle, and its costs.

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Agency decisions may be appealed to the courts, either under specific judicial review provisions in enabling legislation, or under the general authority of applicable administrative procedures statutes. To get into court, however, one must exhaust administrative remedies (such as any available administrative appeals) and a final agency decision must be rendered before an action may be appealed.

More often than not, those who use agency appeal procedures lose, as administrative appeal boards uphold agency decisions much more frequently than not.

Administrative agency actions are usually upheld by the courts in the absence of a procedural defect or a clearly inadequate record. However, successful appeals to courts, though not the rule, are far from rare.

CONCLUSIONS

Although there are numerous opportunities to control the costs of site remediation, the most effective way is to treat the entire project, beginning with the initial agency contact and continuing through site characterization and remediation, as a process. By focusing on the immediate goal and on future requirements throughout the process, and by taking a proactive approach together with an informed and supportable proposal on how to proceed, companies unfortunate enough to get involved with a site cleanup can minimize the financial pain and maximize the effectiveness of money spent from health, safety, and regulatory compliance standpoints.

Negotiations with environmental regulatory agencies are an inevitable part of the process when environmental remediation is concerned. Informal resolution is almost always the best approach, due to the uphill battle of overthrowing agency decisions. To protect rights to appeal specific matters, agencies should be contacted, and agency records documented in such a manner as to ensure that the administrative file will be adequate to support, on appeal or in court, whatever position is advocated. ☒

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