

What to remember when approaching an environmental agency

by Diane R. Smith

The regulated community faces increasingly complex and stringent requirements, and effective interaction with regulatory authorities is essential to compliance, liability and cost control, project success and schedule requirements.

Agency approval of cost-effective, efficient work plans and negotiating acceptable result parameters are critical to all of those goals. Further, effective interaction with agencies can avoid penalties and litigation and enhance your ability to avoid or recover the costs of cleanups from others.

▼ **Cost control.** Other than avoidance of the problem or compliance at the outset, one very effective means of controlling the cost of a project is to effectively influence the scope of the work by effective collaboration with the agencies involved in oversight or compliance.

Regulatory agencies can provide assistance in bringing in others to share the experience and can help control costs by approving reasonable work plans. There are persuasive, equitable and legal arguments that can be made to induce regulatory agencies to name others on enforcement orders and, hopefully, use their persuasive and coercive powers to force all appropriate parties to cooperate and contribute to any proposed resolution.

In California, administrative authority exists indicating that agencies are

required 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. It is critical that agencies be informed of the identity and specific factual information relating to the involvement of others, and that the agency require actions by, or issue orders to, all of the potentially responsible parties, not just, for instance, the present owner and operator. It is also essential to document the administrative record by correcting erroneous information which, if left unchallenged, will be considered correct. Agencies cannot operate effectively in a vacuum, and are too understaffed to carry out exhaustive fact finding.

Agencies can provide incentives to settlement without significant cost to the regulated community. Litigation delays work and diverts funds which could be better spent on site mitigation or analysis, and usually results in the same allocation (with respect to cleanup costs, as opposed to other damages) as would have been arrived at through agency actions. Litigation is a tremendous burden to those already strapped with the expense of a remediation project.

▼ **Be a known quantity.** There is no substitute for having a credible, trustworthy presence with local agency staff. Participate in agency rulemaking and resolution of issues important to

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 the agency's missions and your company's goals and needs. Be sufficiently involved to anticipate what will be required in the future and economize by planning for future requirements now, while dealing with current activities.

Regulatory flexibility may be of great use in future projects. Try to build in requirements for cost effectiveness, grandfathering of existing equipment and projects, cost benefit analysis, and seek *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).

Sometimes pushing back a requirement to allow for better budgeting, technological developments or industry revitalization can result in significant advantages and possibly savings over time.

▼ **Be prepared and evaluate the issue**

if necessary. It is folly to approach an agency without thorough preparation. Many projects go awry because of initial tactical errors or statements made without the benefit of sound professional advice. Analyze the issues. Utilize the attorney-client privilege to protect confidential information. Go in completely prepared and well-represented.

Always start at the lowest agency staff level possible. You will get more time with lower level staff than with those at higher levels, and time and attention give you a chance to adequately present your arguments and plan. Goodwill and a compliance-minded approach goes a long way toward resolving issues, avoiding penalties and fostering communication and informal advice. Further, starting at the bottom provides the maximum number of opportunities to talk to various persons at other levels within the agency who may have different perspectives or authority to act. If it be-

comes necessary to move to a higher level of decision making, never skip layers of review, as you lose opportunities to resolve issue at lower levels, and may insult those you attempt to skip. Besides, it rarely works.

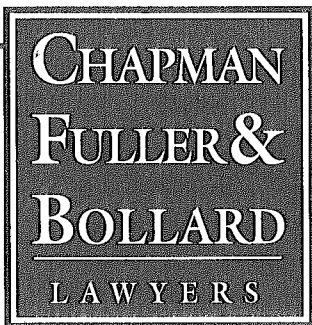
If necessary, work your way up the chain of command one step at a time until you get either an acceptable resolution or exhaust your administrative remedies, at which time you may have to further assess your situation and the relative cost effectiveness of further action. You may be forced to continue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

Document the administrative record in support of your position as the matter proceeds. Be particularly careful to document all agreements reached with agency staff. Be 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 solutions with the goal of meeting the issues which the regulatory system is designed to address. "Results" is the key. What is the agency seeking to achieve? Is there a mutually acceptable way to achieve their goals?

▼ **Avoid adversarial behavior.** The vast majority of disputes with agencies are resolved informally. Adversarial behavior is tiresome and counter-productive 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.

To be effective you must first understand the agency's perspective. Evaluate the history of the regulatory provi-



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sions 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.

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.

Evaluate all of your options thoroughly, and consider all pros and cons. 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, and the rationales for both. Keep an open mind; maybe there is a compromise that will achieve everyone's goals. Success has many fathers.

Solicit the agency's opinion in advance in appropriate circumstances. Understand what the big issues are. Be prepared to compromise, but understand when the price of compromise becomes too high. Be compliance-minded and candid, but not be afraid to develop your own approach or to advocate your views.

▼ **Negotiate a work plan.** Adequately evaluate a site before designing the remediation program. At small sites, it may be possible to minimize initial investigations and do required analyses as the work proceeds. Take a practical, economy-minded approach that responds to the agency's requirements cost effectively. Site characterization constitutes approximately 5% of total site expenditures at substantial sites. Unless you control the process well, site investigation at a small site can be as high as 50% of remediation costs. At large or complex sites, remediation costs generally go down, as site characterization costs go up, assuming qualified professional advice. Since actual remediation activities after the site charac-

terization phase generally constitute the lion's share of total costs at a site, cutting remediation costs is much more effective, as a cost control mechanism, than scrimping on site characterization.

Carefully plan your analytical program. Focusing environmental sampling on the type, location and numbers of samples and the specific analytical results needed will produce the most useful information and minimize the collection of extraneous data and investigation costs, while ensuring that sufficient data are collected to characterize the site. Argue that off-site contributors should be forced to provide additional data. Why shouldn't upgradient pollutants contribute to the effort?

Environmental projects involving impacted groundwater invariably involve well installation, monitoring and maintenance. Wells are expensive, eventually require closure, and function as conduits to groundwater. It is impor-

tant 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 result in facts supporting your company's involvement in groundwater problems?

Cleanup standards set ground rules

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for achieving "closure" (no-further-action status). What cleanup standards are appropriate? What agency-applied action or cleanup levels or other requirements or guidelines exist? Is there a less stringent standard which should logically apply in your case? What assumptions are contemplated cleanup levels based on?

Even a small change in a target cleanup level can reduce the cost of remediation substantially. The quantity of material which must be remediated and the unit price of the remediation process has the greatest impact on project cost. 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, etc.? What established standards are there 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? Is a risk analysis worthwhile?

A recent trend 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, and tailor your response and level of interaction regarding such requirements accordingly.

▼ **Recognize an uphill battle and be practical.** The difficulty of successfully challenging agency actions and the cost of such challenges is a definite impetus to informal settlements.

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.

Agencies must act in accordance with

their established procedures which normally involve notice and time for public comment. Finding a procedural "glitch" can bring things to a halt. If you argue that a procedure has been violated, however, you will probably get only temporary respite from a requirement, while the agency goes back and follows correct procedures.

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 procedure 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 utilize agency appeal procedures lose, as 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, while not the rule, are far from rare.

If you have failed to document an argument in the administrative record, you may be foreclosed from raising it in court.

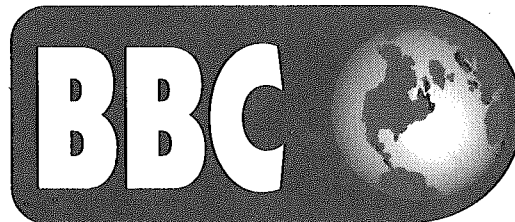
▼ **Conclusions.** Negotiations with environmental regulatory agencies are an inevitable part of the process where environmental remediation or compliance is concerned. Informal resolution is almost always the best approach, due to the difficulty of overthrowing agency decisions. To protect rights to appeal, agencies should be contacted, and agency records documented in such a manner as to assure that if it is ever necessary to "elevate" a discussion of agency requirements via an administrative appeal or a court, the administrative file will be adequate to support whatever position is advocated.

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