How to Work with Insurance Carriers in Complex Environmental Cases

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This article is about early cooperation between parties and insurers in resolving complex environmental problems. It is presented as a case study, summarizing strategies that worked in a recent case that started as a six-way dispute over the costs of investigating and remediating an extended plume of PCP groundwater contamination. It moved rapidly from a traditional lawsuit, where resolution eventually was to be reached through written discovery, oral depositions, expert testimony, motion practice and trial to a voluntary "alternate" mediation process aimed at identifying the most economical and reliable remedial approach to cleaning up the contamination, and to allocate the costs of doing so among all parties. Although the parties agreed to refrain from traditional court-mandated procedures, they always retained the right to fully prepare and try the case without prejudice to any party if the cooperative process was unsuccessful in resolving all disputed issues among the parties. The good news is that the process was successful and the need for trial was eliminated.

The case involved a dispute among six parties over the costs of cleaning up PCE contamination in the groundwater. Each party was either a landowner or dry-cleaning operator associated with one of three neighboring properties. The relevant environmental regulatory agency had named each party as potentially responsible for contributing to groundwater plume that presented a potential threat to local drinking water wells. Participants in the mediation were lawyers, clients, insurance carriers and environmental consultants for each party.

Early in the lawsuit, the parties agreed to mediate and put the court proceedings, including discovery, on hold in order to avoid unnecessary litigation time and expense. Instead they chose to work together in mediation and develop a joint remediation plan to present to the environmental regulating agency. The parties united in the following mediation goals: (1) to share their independent, on-site investigation results; (2) to jointly share the costs of investigating the off-site "regional" groundwater contamination plume; (3) to agree on the most effective and least costly remedial approach; and then (4) to prepare a joint remedial action plan agency approval. After the agency approved their joint approach, the parties returned to the mediation table and negotiated an equitable allocation of past and future costs -- and agreed to settle the lawsuit.

In the mediation, as the parties evaluated shared investigation results, they decided to bid out the remedial work to a single contractor who would perform the work specified in the approved work plan – at a fixed price -- on behalf of all parties. With that "all in" price

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in hand, the parties were able to reliably allocate future remediation costs. The parties knew exactly, to the dollar, what the fixed costs of all future work would be. Accordingly, the settlement was not based on a "battle of the experts;" i.e., the more common practice of negotiating among the differing cleanup estimates provided by the various party-specific environmental consulting firms. This facilitated the parties' agreements to final, "cash out" settlements with full releases and maximum contractual protection against future litigation among the settling parties.

What did this "alternate" dispute resolution process achieve?

It resulted in an informed settlement based on the true costs of cleanup and a fair division of those costs among the parties. It facilitated agreement on reliable and final, payments with full releases and maximum contractual protection. Once paid, the parties and their insurers were legally and financially "done" with the case.

In agreeing to defer discovery and other unnecessary litigation procedures, including, motion practice and trial, the parties avoided fees and costs associated with trial and its preparation. And by jointly investigating off-site contamination and sharing their independently obtained on-site data, the parties and their insurers avoided duplicative and expensive environmental investigation costs, which otherwise would have been separately performed by each party's own environmental consultant in preparation for trial.

Importantly, this approach enabled the parties to present a unified and cooperative face to the regulatory agency and to the court, which ultimately led to regulatory approval of a remediation plan that was consistent with the interests of, and agreeable to, all parties. There was a further benefit to all in the minimization of unproductive partisanship and the stresses litigation brings – and in the fostering of a professionally collegial environment where valuable services were delivered to all clients. The problem was jointly solved.

As this case study shows, early education and positive involvement of the insurance representatives can lead to a dynamic resolution. This may seem worrisome at first due to the tension that exists between environmental and insurance coverage law -- wherein facts that tend to establish coverage may also be harmful to the policyholder in the underlying environmental case. This tension often creates an adversarial relationship between the policyholder and its insurers and pushes apart, rather than unifies, entities whose separate interests are better served by working together. Both policyholder and insurer have a common interest in keeping defense fees and costs in check while negotiating the best settlement with available coverage.

This case demonstrates that a cooperative approach, begun early in the life of an environmental dispute, can achieve a near-perfect outcome at a significantly lesser cost. And it may be done without prejudicing anyone's right or ability to actively litigate and try the case if a negotiated settlement cannot be reached.

So why not try it? ●

Lester Levy is one of the most experienced environmental mediators in the country today, having mediated disputes in almost every area in environmental legal practice over the past 20 years. He is among a select group of experienced environmental mediators chosen by the United States Environmental Protection Agency (EPA) to serve as a Neutral Allocator in its National Program designed to equitably allocate the costs of investigating and remediating contamination at Superfund sites around the United States. He can be reached at llevy@jamsadr.com.

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