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The Uses and Abuses of Cleanup and Cost Recovery Delay

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Every environmental lawyer, whether dealing with cleanups or cost recovery actions, knows that delay can be your friend. But a client who delays a cleanup ordered by an agency can wind up in hotter water than before, with stipulated penalties, fines for violations and even criminal sanctions, including prison. The key to success is knowing when delay is appropriate, ethical and effective to obtain your goals.

Conventional wisdom is no help. "Look before you leap" would seem to counsel delay, while "Don't put off 'til tomorrow what you can do today" seems to encourage immediate action. There are, however, some guidelines for lawyers.

As a litigator early in my career, I was taught the following rubric: plaintiffs should always push their cases forward; defendants should delay, delay, delay. Despite changes to state and federal civil procedure rules, allowing and in some cases requiring judges to move cases along and to clear their dockets, this basic theory hasn't changed much. Where a defendant has a deep pocket and would rather pay "anything for defense, but not a penny for tribute," even a case on a rocket docket can be delayed for years of appeals, injunction proceedings and similar tactics to delay the inevitable. As the attorney general of California, Evelle J. Younger, said many years ago, "An incompetent attorney can delay a trail for years or months. A competent attorney can delay one even longer."

Why would a party delay? In litigation, whether environmental or not, it is often because the party wants to hold on to his or her money as long as possible, making investments and earning interest. In environmental litigation, it is often not so much a strategy decision as the inevitable result of the complexity of the issues — toxicity, amount of waste, responsibility for waste, hydrogeology of a site, dating the spill.

Where the issue is cleanup, not litigation, a remediator who believes an agency is being unreasonable in its demands often has no options other than delay. Because of the policy — both in state and in federal agency cleanups — of expediting remediation of polluted sites, in most cases, a court challenge to an agency's directive to perform a cleanup in a particular way cannot be made until after the remediation is complete. A remediator who buys time can benefit when environmental laws change, regulators change, or interpretations of regulations change.

For example, the Pennsylvania Department of Environmental Protection has changed course over the years as science has evolved and politics have ebbed and flowed. Gov. Tom Ridge's major environmental contribution to the commonwealth was encouraging the passage of Act 2 and encouraging the PaDEP to administer it in the spirit it was designed for — encouraging cleanup of contaminated sites while making the burden on remediators less onerous.

For example, Act 2 allows a remediator to choose a cleanup standard, so that a residential cleanup is not required for a property intended to be used industrially. This was a major change in policy; before, the agency wanted all cleanups to be as close to pristine as possible. The owner of a polluted site who waited long enough, who dragged out the negotiating process with the PaDEP, would have been able to obtain the benefits of the new direction symbolized by Act 2.

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Science, too, often comes to the aid of remediators. Over the years, the regulators' experience with pump-and-treat systems to handle polluted groundwater caused them to realize that often the remedy didn't work. Some pollutants, such as TCE, stick to the bottom of the aquifer, and pump-and-treat won't budge them. One of my clients, by elongating negotiations with the PaDEP and repeatedly making suggested changes to its cleanup plan, delayed implementation of a pump-and-treat system for polluted groundwater on its property until the science caught up with the client's consultant's belief, that pump-and-treat was a waste of money. PaDEP agreed to a much less expensive and effective plan, to treat groundwater as it entered neighboring homes.

Of course, delaying can be catastrophic in the wrong circumstances. A client who receives a notice of violation for failure to implement a remedy, and who continues to drag his feet, can pile up expensive penalties. Willful violations are penalized more heavily than merely negligent ones. One client who came to me many years after entering into a consent order to remove leaking hazardous waste drums from his property, which he failed to do, was faced with millions of dollars of fines and, ultimately, prison. His rationale was that no one would notice and that he could save money by not doing the cleanup, so he ignored the cleanup plan — to his peril. He was convicted of willful violations of federal and state environmental laws and received a six-month prison sentence.

In environmental litigation, strategic delay can often cost a defendant more than he or she expects. An extremely aggressive defense to a cost recovery action I tried in Pennsylvania for the plaintiff resulted in an award to my client that he couldn't touch for years, as the defendant filed motions and appeals that took us up to the appeals court twice. When my client was finally vindicated and there were no more avenues for delay, the award to my client had doubled because of post-judgment interest. The lawyer for the defendant wanted to appeal the interest, but his client said "enough," and decided to pay my client instead of her lawyer.

Probably the most successful instance of delay I've experienced was one that was not my idea. My client, a commercial seller of heating oil in New Jersey, had been ordered to remediate a heating oil spill on his property. He dug out the contaminated soil and then hit groundwater, which had a sheen of oil on the top. NJDEP required him to pump the water out and dispose of the soil at a hazardous waste landfill. He said he would do it, but he didn't. Every few months I would remind him, and he said he would do it. But he didn't.

Finally, the NJDEP issued an order for him to test the soil, put in three monitoring wells and delineate the plume of contaminated groundwater. Finally, I was able to nag him enough so that the monitoring wells went in and the soil was tested. Lo and behold, testing of the wells showed that the groundwater was clean and soil samples showed the soil was no longer contaminated. Natural attenuation had taken care of the groundwater, and volatilization of the contaminants in the soil had rendered the soil clean.

My client's delay resulted in the adoption by the NJDEP for the first time of natural attenuation as an appropriate response to certain groundwater contamination. However, my client was running a big risk of sanctions. Today, he would have been in very deep trouble with the NJDEP, which has re-tooled its "grace period" rules to provide for severe sanctions for delay.

Even the government has used stalling tactics in the environmental area. Nevada sued the federal government to halt the placement of nuclear waste in the state, knowing full well that the grounds for the suit were shaky. A law professor, Bret Birdsong at Boyd School of Law, says that in a lawsuit like Nevada's, time is on the side of the plaintiff. "If you can just throw enough sand in the gears it can slow things until different science emerges or the political winds change," Birdsong said. Municipalities or neighborhood groups often use lawsuits challenging the DEP's granting of permits, for example to fill wetlands, to forestall development.

The lesson to be learned is to figure out if stalling is the right tactic scientifically, ethically and legally. Delay may be a business decision on your client's part, but it is not one you should sign onto if it is not defensible. •