International Municipal Lawyers Association
2018 Annual Conference
October 17-20, 2018
Houston, Texas

Environmental Law Section Meeting:

Too Many Problems, Too Little Time: Tips on Handling Environmental Liability in Transactions and Litigation

Gene Tanaka and Rebecca Andrews
Best Best & Krieger LLP

©2018 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2018 Annual Conference, held October 17-21, 2018 in Houston, Texas. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

1. Introduction

With little or no warning, another 100-year storm hits your City on October 22, 2018. This is now the third 100-year storm in the last 5 years. Meteorologists say that the amount of water air can hold increases with the increase in air temperatures. In other words, the warmer the air, the more water it can hold. With the rise in air temperatures since 1880, experts say that the air can hold 7% more water. In turn, this mean that storms are more intense and more widespread.[1]

This storm causes widespread flooding and damage to City property and its citizens. Among other things, waters from a nearby river crest above flood stage and inundate your wastewater treatment facility causing it to shut down. Additionally, storm waters exceed the capacity of the storm sewer system, flood the City maintenance yard, and carry toxic pollutants through an adjacent residential neighborhood. While property damage is severe and several residents had close calls, fortunately, no one is harmed.

As the City struggles to recover, regulators assess the environmental harm. The United States Environmental Protection Agency (EPA) orders your City to address the toxic contamination carried by the flood waters into the residential neighborhood and remaining at dangerous levels after the flood waters recede. Never to be deterred, non-governmental organizations send you, as City Attorney, a notice of intent to sue under the Clean Water Act (CWA), and plaintiff's attorneys are recruiting clients from the residential neighborhood to sue the City to help pay for the damages suffered by the residents.

As lawsuits in federal court and state court are served on you, you wonder: how can we avoid these lawsuits next time, and how do we defend these lawsuits?

2. An Ounce of Prevention is Worth a Pound of Cure

Hindsight is easy, but particularly useful if you expect the problem to recur. In the above scenario, weather experts tell us the problem of powerful storms will only get worse. The risks of related environmental liability often follow familiar patterns. Fortunately, you can do something to get ahead of the curve.

A. Take a Due Diligence Approach to the Work of all Departments.

We all understand the importance of due diligence in real estate transactions. Consider giving similar attention to potential environmental liability in all other transactions. Obvious examples of environmental exposure include environmental remediation, asbestos abatement, wastewater treatment plant operations, and similar activities. Less obvious examples include: road construction, which may contaminate waterways, involve hazardous substances, and encounter soil that has been contaminated by others; issuance of encroachment permits, which may expose public property to contamination by others; and issuance of development approvals, which change drainage patterns.

[1] Tim Craig & Angela Fritz, Immense Rains Are Causing More Flash Flooding, and Experts Say It's Getting Worse, WASH. POST, June 24, 2018.

Taking a due diligence approach to the work of all departments means anticipating and mitigating environmental risks for all department actions. When contracts or permits are involved, this may mean including strong indemnity and insurance provisions. Pollution insurance policies come in many forms that may serve different types of environmental risk, including:

- First party clean-up of an insured's property;
- Third party clean-up and bodily injury if the insured's pollutants impact other properties;
- Cost cap coverage to protect the insured from cost overruns or surprises when cleaning up properties with known pollutants;
- Coverage for hazardous material/waste transporters;
- Landfill closure coverage.

Be aware that an insurance policy is useless if the exclusions are too broad, if the policy term ends before environmental damage is discovered or claimed, or if the policy covers a particular parcel, but contamination migrates or is transported away from that parcel.

B. Establish Strong Environmental Compliance Programs

A strong environmental compliance program will be inward and outward looking at the same time. Inward looking programs are designed to ensure that the city complies with applicable environmental regulations, permits, orders, and decrees. Outward looking programs are designed to ensure that those who use the city's services, such as the wastewater, stormwater, and waste disposal services, comply with applicable regulations.

- Keep permits up to date and work with departments to ensure modifications of operations as needed. A city with multiple environmental permits may be required to negotiate permit terms and revise internal operations on an annual basis. If a permit expires without administrative extension, reissuance, or renewal, the city is at risk for unpermitted activities.
- Keep ordinances up to date and enforce them. Every time a regulatory agency reissues an environmental permit, there is a possibility that permit requirements have changed. In part, because of the anti-backsliding and anti-degradation provisions in many environmental laws, regulations and permits may become more stringent with each term. For example, federal and state agencies revise air quality standards regularly and MS4 permits typically prohibit more and more types of discharges into storm sewer systems. Each regulatory change may require the city to adapt its ordinances and enforcement approach.

C. Remain Aware of Current Event

National and local events can provide clues about areas of potential liability. Remaining aware of these events allows a city to anticipate and adapt its programs as needed:

- National and statewide rulemaking. State and national regulatory agencies are constantly considering whether current regulatory standards are appropriate. Hot topics include lead and copper standards for drinking water, bacteria, toxics, and metals in storm water discharges, and greenhouse gasses in air pollution. Revised standards become incorporated into permits, often imposing additional requirements on city operations.

- Local weather events, new industrial activities, active citizen groups, public information requests, and audit reports can reveal areas where the city's compliance programs may need improvement. Consider the environmental implications of these events.

City staff can play an important role in avoiding or reducing liability:

- Preventative maintenance – if it has not done so, City should develop a maintenance plan to regularly inspect and repair storm water infrastructure, flood control facilities, sewer systems, and other public facilities. Of course, City should scrupulously adhere to the plan. The only thing worse than not having a plan, is failing to follow it.

- Analysis of performance – consultants can inspect the facilities to ensure that the infrastructure performs up to standard and the management procedures meet best practices. Depending upon the facility and its purpose, computer modeling can evaluate the performance under stressful conditions such as rainstorms, power failures, and other events.

- Daily satellite photography – staff may use a service that provides daily satellite photographs of your facilities that can detect leaks or rebut such claims, document water flows to determine whether property is a wetland or water of the United States, or show the effectiveness of best management practices and flood protection facilities.[2]

3. Don't Get Bogged Down in a War of Attrition

Litigation will strain any City budget, and environmental cases can be very expensive since they often involve complicated fact patterns requiring a great deal of discovery, arise in complex areas of law that need legal research and motion practice, and employ teams of expensive experts. The above hypothetical presents three separate litigation risks: (A) federal court citizen suits by a

[2] One such service is located at https://www.planet.com/products/monitoring/

non-governmental organization or other citizen to enforce the violation of federal environmental statutes; (B) state court private party lawsuits for personal injury and property damages under tort law and inverse condemnation; and (C) federal regulatory actions in an administrative proceeding or federal court for violations of federal law.

A. Citizen Suits

Many federal environmental statutes provide for citizen suits which, as the name suggests, allow members of the public to sue to enforce their provisions. These include the federal Clean Water Act (CWA), Comprehensive Environmental Response, Compensation and Liability Act (Superfund or CERCLA), Resource Conservation and Recovery Act (RCRA), Endangered Species Act (ESA), and Clean Air Act (CAA).[3] Under these statutes, citizen suits often include penalties and attorney's fees.[4] Therefore, there is a strong financial incentive to settle.

If you must fight a citizen suit, consider the following:

- Standing of private plaintiffs – most environmental groups are familiar with and address the "injury in fact" requirement to invoke federal court jurisdiction.[5] However, some environmental groups do not have members and in order to assert claims for their supporter/constituents, they must show "indicia of membership." This means the organization must be dedicated to representing its supporters, and conversely, its constituents' play a role in governing and financially supporting the organization.[6]

- Proper notice of violation – federal citizen suits usually require notice to the potential defendant of the specific standard, limitation, permit or other requirement that was violated, the activity alleged to constitute the violation, the person(s) responsible, the location of the alleged violation, the date(s) of the each such violation, and the full contact information of the person giving notice. The failure to provide proper notice requires that the case be dismissed.[7]

- Liability – where the alleged liability is based on self-reporting, it will be difficult to assert the city has not violated the relevant statute. On the other hand, where the city's alleged liability is based on an unpermitted discharge, there may be a factual defense to liability, e.g., the discharge under the CWA was not a pollutant, did not reach a water of the United States or was not from a point source.[8]

---

[3] 33 U.S.C. § 1365 (CWA); 42 U.S.C. § 9659 (CERCLA); 42 U.S.C. § 6972 (RCRA); 16 U.S.C. § 1540(g) (ESA); 42 U.S.C. § 7604 (CAA). Those same Acts authorize enforcement actions by federal regulators.
[4] 33 U.S.C. §§ 1319(d), 1365(d) (CWA); 42 U.S.C. § 9659(f) (CERCLA); 42 U.S.C. §§ 6928(a)(2), 6928(g), 6972(e) (RCRA);16 U.S.C. §§ 1540(a), 1540(g)(4) (ESA); 42 U.S.C. §§ 7604(a), 7604(d), 7413(b) (CAA).
[5] U.S. Const. art. III, § 2; Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).
[6] Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343-45 (1977).
[7] 33 U.S.C. § 1365(b); 40 C.F.R. § 135.3(a); Hallstrom v. Tillamook County, 493 U.S. 20, 33 (1989).
[8] Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 532 (9th Cir. 2001).

- Mootness – if possible, settle with the enforcement entity to fix the violation so that the lawsuit is moot. However, defendant must meet the heavy burden of proving that "'subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'"[9] Even if you cannot moot the claim, addressing the violations may help mitigate any penalties assessed against your city.

- Experts – involve experts early to help you assess your liability, and what needs to be done to comply. Experts are also essential to work with regulators to moot claims or mitigate penalties, frame your investigation and discovery, and prepare for trial.

- Settlement – early settlement will save city's legal fees and plaintiff's fees for which city will be liable if it loses.

The personal injury and property damage cases by the neighbors of your facility involve some similar and some different issues from citizen's suits:

- Liability – inverse condemnation claims often differ since liability is generally strict, which only requires proof that an agency's public improvement substantially caused the property damage, as opposed to negligence, which requires proof that the injury was reasonably foreseeable.[10] On the other hand, inverse condemnation is usually limited to property damage, and does not provide for personal injury harm. Therefore, plaintiffs' attorneys will often allege both types of claims.

- Experts – as in citizen's suits, it is important to involve experts at the outset to avoid missteps in discovery and assess whether early settlement is wise.

- Insurance – for cases involving significant exposure consider hiring an insurance coverage attorney early in the case to ensure your city's tender of the claim, motions challenging pleadings and discovery responses do not jeopardize coverage. Also, insurance policy archeologists will often uncover older liability policies through old court records, prior brokers and other public records. Your insurance coverage attorney should be able to recommend such a consultant and then make sure your client receives the protection from any environmental policies it purchased or older liability policies it uncovers.

- Bellwether proceedings – cases with very large numbers of plaintiffs present logistical challenges and may be unmanageable. Bellwhether proceedings accelerate a representative group of plaintiffs through discovery and trial. The goal

[9] Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 189 (2000) (citing United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968)).

[10] In California, strict liability is balanced with the reasonableness rule, which requires proof that the public agency's design, construction or maintenance of a flood control project posed an unreasonable risk of harm. Belair v. Riverside County Flood Control Dist., 47 Cal.3d 550, 559, 565 (1988).

is to encourage settlement of the remaining cases and resolve common issues or claims.[11]

Regulatory enforcement actions implicate other strategies:

- Review enforcement policy – when a regulatory agency takes an enforcement action against the City, it is generally guided by an enforcement policy that describes the facts and factors relevant to establishing the appropriate course of enforcement. Become familiar with any governing enforcement policy.

- Gather facts and evaluate allegations – it is not uncommon for a regulatory agency taking an enforcement action to misunderstand parties, monitoring locations, and other factual matters that form the basis of an action. Independently verify all factual allegations.

- Evaluate the availability of emergency immunity - in the scenario described in the opening paragraphs of these materials, certain liabilities may be cut off or limited by an Act's provisions regarding emergencies / disasters. It may be necessary to take certain actions to benefit from the emergency provisions, such as providing notifications or obtaining after-the-fact permits.

- Consider settlement options – resolution of enforcement actions often involves monetary penalties and operational and structural changes. State regulatory enforcement actions may be governed by unique state law provisions that allow penalty reductions for projects with a public benefit.

- Check insurance exclusions – insurance policies often will not cover liabilities associated with regulatory enforcement actions. Check policy exclusions before assuming that insurance will cover monetary penalties.

4. Novel Cases Pushing the Envelope

Predicting the future is always difficult, but it is fun to speculate. Several cases caught our eye and may foretell the next wave of litigation. From headline topics such as climate change, to policy issues about draining Hetch Hetchy Reservoir to international political issues like pollution from Mexico, environmental litigation is deeply involved.

- Many cities, counties and states have sued oil companies for the impacts to infrastructure and public health they incurred from climate change. In an echo of the tobacco litigation, Exxon's admission that it recognized the risk to the environment caused by fossil fuels has spawned numerous investigations by state

[11] In re Chevron U.S.A., Inc., 109 F3d 1016, 1019-21 (5th Cir. 1997).

attorneys general. The oil companies have pushed back aggressively.[12] Recently, a federal district court judge in California rejected a nuisance lawsuit by San Francisco and Oakland by deferring to the legislative and executive branches on this international problem.[13] Stay tuned.

- While Los Angeles' draining of the Owens Valley for water was made famous in the movie Chinatown, San Francisco has a similar story that may not be as well known. Shortly after the turn of the last century, San Francisco purchased land to dam the Hetch Hetchy Valley and use the water to fuel its growth. An environmental group sued to force the City to drain the Hetch Hetchy Reservoir formed behind the dam. In July, the California Court of Appeal rejected the environmental group's lawsuit on the grounds it was preempted by a federal law that authorized the construction of the dam and water system on federal land.[14]

- Volkswagen's "defeat device" allowed thousands of vehicles to emit pollutants. In Texas, counties sued Volkswagen under a provision of the state clean air act, which authorizes local governments to enforce violations of the act occurring in the local government's jurisdiction. After the counties sued, the state environmental agency and a dozen other counties initiated enforcement actions under the same act. The Texas Court of Appeals abated the later-filed county cases under the common law "dominant jurisdiction" doctrine.[15] Timing matters.

- Interstate pollution is always complicated. International pollution can be even more complicated. Along the U.S.-Mexico Border, sewage from Mexico often crosses into the United States by way of the Tijuana River. The U.S. government, through the International Boundary and Water Commission (IBWC), is tasked with addressing transboundary sanitation problems. Border cities and a port district are suing the IBWC for discharges without an NPDES permit, discharges in violation of an NPDES permit, and imminent and substantial endangerment under RCRA to force the IBWC to prevent sewage discharges originating in Mexico. This case was filed in March 2018.[16] Jurisdictional motions were heard at the end of August. No orders have issued as of the date of publication.

- Paying for environmental compliance programs is expensive, and many environmental regulations are imposed on local governments by state legislative

---

[12] David Hasemyer, Fossil Fuels on Trial: Where the Major Climate Change Lawsuits Stand Today, INSIDE CLIMATE NEWS, April 4, 2018, https://insideclimatenews.org/news/04042018/climate-change-fossil-fuel-company-lawsuits-exxon-children-california-cities-attorney-general.

[13] City of Oakland, et al. v. BP P.L.C., et al., Nos. C 17-06011WHA, C 17-06012 WHA, 2018 WL 3109726, at *6-9 (N.D. Cal. June 25, 2018).

[14] Restore Hetch Hetchy v. City and County of San Francisco, et al., No. F074107, 2018 WL 3343600 at *8-9 (Cal. Ct. App. July 9, 2018).

[15] In re Volkswagen Clean Diesel Litig., No. 03-16-00718-CV, 2017 WL 3224247, at *4 (Tex. App. July 28, 2017)

[16] City of Imperial Beach, et al. v. The International Boundary & Water Commission, No. 18-CV-0457 (S.D. Cal. Mar. 2, 2018)

and executive branches with limited consideration of cost. Many state constitutions include unfunded state mandate provisions, which require states to pay the costs of mandates it imposes on local governments. Cities in California have successfully proven that NPDES MS4 permits contain state mandated activities to the extent a permit exceeds federal requirements, and cities have successfully obtained determinations on specific permit provisions.[17]

[17] Dept. of Finance v. Comm'n on State Mandates, 1 Cal.4th 749 (2016); Dept. of Finance v. Comm'n on State Mandates, 18 Cal.App.5th 661 (2017).