

## **AREAS OF PRACTICE EXPERIENCE**

### **POTENTIALLY RESPONSIBLE PARTY COMMON COUNSEL REPRESENTATION**

Federal and state Superfund laws impose joint and several liability upon certain parties who either owned or operated sites where hazardous substances were released. These laws also impose liability on parties that generated hazardous substances that have been disposed of at such sites. Certain sites, such as landfills, junkyards, scrap yards, dump sites, abandoned buildings industrial sites and other facilities where hazardous substances have been treated, stored or disposed, may be identified as Superfund sites.

Under federal and Superfund laws, the U.S. Environmental Protection Agency (EPA) and state environmental authorities may determine that “potentially responsible parties” (PRPs) should be held liable for the investigation and cleanup of these sites. The potential exposure at any one site can be staggering. Liability exposure can be multiplied when waste materials were disposed of at large facilities such as landfills and open dumps. In these types of cases, where wastes are commingled there may be massive contamination of soil or groundwater as well as vapor impacts. Hundreds of parties may be named as PRPs.

If the EPA or state authorities seek to recover their costs or compel potentially responsible parties to undertake an investigation and clean up, it is often in the best interests of the parties to organize a group to address the demands. Groups of PRPs often name Common Counsel to coordinate a response. The advantage to naming Common Counsel is that work that benefits entire group can be completed in an efficient manner and the overall costs of defense can be shared and minimized. Typically individual members of such a group may seek to retain their own counsel who can provide advice to each individual client.

Because we are experienced environmental litigation attorneys, we have been chosen to serve as Common Counsel in a number of Superfund matters. As Common Counsel we have:

- Represented the interests of PRP Groups;
- Drafted PRP Group Agreements;
- Retained environmental consultants to conduct technical studies and investigations on behalf of groups of potentially responsible parties;
- Responded to demands from federal and state environmental authorities;
- Conducted negotiations with federal and state agencies;
- Assisted in developing allocations of liability among various classes of potentially responsible parties (owners, operators, transporters and generators of hazardous substances).
- Conducted investigations to identify other unnamed potentially responsible parties; and
- Initiated and defended cost recovery actions against previously unnamed PRPs.

## **INSURANCE COVERAGE LITIGATION**

Parties that face environmental liability arising out of past operations or releases of hazardous substances that result in property damage and cleanup liability should consider whether they may be able to recover monies from insurers who issued comprehensive general liability (CGL) policies. After the enactment of federal and state Superfund laws in the late 1970s and early 1980s, insurance companies changed policy terms to preclude coverage for pollution by adding pollution exclusions to their policies.

Despite the changes in CGL insurance policies, insureds may be able to assert claims for coverage as a result of contamination and property damage. In many cases the insureds may have disposed of hazardous substances during the 1960s and 1970s when the language on the face of the CGL policies did not preclude coverage. We have been involved in the review of insurance policies, coverage evaluations, retention of experts and the representation of insureds in litigation in federal and state courts seeking declarations of coverage. In recent years insurance companies have decided to provide specialized environmental policies.

We assist clients in evaluation new environmental insurance products and determining whether such policies can be utilized to address liability concerns and facilitate the cleanup and transfer of contaminated property.

## **CONTAMINATED PROPERTY LITIGATION**

Federal and state environmental laws impose liability on owners of contaminated real estate. Purchasers and sellers of real estate need to carefully follow pre-purchase due diligence processes to avoid cleanup liability. Even when due diligence procedures are strictly adhered to, it is possible that owners of property may face the prospect of cleanup liability. A tenant or neighbor may be responsible for the release of hazardous substances that impairs property.

As experienced environmental litigation attorneys, we regularly evaluate cases involving property damage. We appear regularly in federal and state courts representing parties with claims arising out of contamination of property.

## **DEFENSE OF ENVIRONMENTAL CRIMES PROSECUTIONS**

Federal and state environmental laws provide criminal sanctions for knowing violations of environmental laws. Prosecutors may charge businesses and individuals with environmental crimes. If convicted of an environmental crime, a business may face a still fine of \$25,000 to \$100,000 or more. Individuals who are charged and convicted may face significant fines and jail time.

We counsel clients on compliance matters, including the development of environmental audit and management programs, which are designed to correct conditions that may constitute violations. We assist clients in responding to search warrants and accompanying demands for

compliance through administrative or civil matters referred to as parallel proceedings. We partner with criminal defense counsel to serve clients who face prosecution. When clients face parallel prosecutions – administrative or civil investigations occurring contemporaneously with criminal charges – we provide advice on the administrative and civil matters.

### **ENVIRONMENTAL, HEALTH AND SAFETY AUDITS**

An environmental audit is an environmental compliance assessment. A business owner or management team may utilize an audit as a means to track and report internally on the compliance status of a business operation. An environmental audit may assess a facility's compliance status, including a review of wastewater discharges, solid and hazardous waste handling and disposal practices, air emissions, community right to know reporting compliance with permitting or monitoring requirements and OSHA or health and safety compliance.

We have helped clients design audit programs and develop environmental health and safety audit forms. Typically, the auditor, an environmental consultant or qualified professional who is well versed with all of the applicable compliance requirements, visits the subject site and completes an environmental health and safety checklist noting issues of potential concern. We partner with environmental consulting firms that are involved in compliance assessments across the country.

We advise clients as to the potential applicability of the attorney client privilege to audit reports and findings. We advise clients with regard to recommended corrective measures, including filing reports, obtaining permits or otherwise reporting spills and/or violations to federal, state or local environmental authorities. When appropriate, we counsel clients as to the effect of reporting and other means of voluntary disclosures and governmental audit and self-disclosures policies that may provide protection from enforcement and, where appropriate, civil penalty mitigation or reduction.

### **PHASE I ENVIRONMENTAL SITE ASSESSMENTS UNDER THE “ALL APPROPRIATE INQUIRES” STANDARD**

We assist purchasers of real property and parties involved with business and corporate transactions with pre-purchase due diligence activities, including Phase I Environmental Site Assessments, which are designed to reveal the existence of “recognized environmental conditions” that may affect future use or redevelopment of property.

We partner with environmental consultants who conduct comprehensive reviews of environmental site assessment requirements including site visits, regulatory reviews, interviews of property owners and examination of historical information sources including aerial photographs, fire insurance maps and business directories as is required under the ASTM Standard Practice and the newly promulgated All Appropriate Inquiries standard.

We have been involved with Phase I Environmental Site Assessments assessing sites across the country. We recommend and review Phase I Updates when report information is no longer

reliable. We obtain reliance letters from consultants for our clients. We prepare environmental risk assessment opinion letters that discuss specific Phase I findings and, if appropriate, recommendations for Phase I assessment of soil and groundwater conditions.

We advise clients of potential liability associated with “recognized environmental conditions” and whether liability assurances or protections may be available under federal or state law and voluntary cleanup programs. We evaluate Phase I findings of soil, soil vapor and groundwater impacts and other conditions that may require remediation or special handling during future use or redevelopment of property.

### **SITE INVESTIGATION AND REMEDIATION THROUGH STATE VOLUNTARY CLEANUP PROGRAMS**

Purchasers or sellers of real estate and parties involved in business and corporate transaction often learn that the property involved in a real estate transaction is subject to contamination. Historic use of the subject property or an adjacent property may have resulted in soil, soil vapor or groundwater impacts. In certain instances, findings of actual or potential impacts may require the landowner to file a report with state authorities. Reporting may trigger responsibilities under state or federal law to conduct a follow up investigation.

We assist clients in evaluating environmental issues and risks identified in a Phase I Environmental Site Assessments that may be considered “recognized environmental conditions” (RECs) or in evaluating soil, soil vapor and groundwater tests in Phase II reports. A party who purchases a property that is contaminated may be subject to liability for the investigation and remediation of the site. The provisions of state and federal environmental laws have been amended to provide that purchasers and sellers of contaminated property may receive liability assurances or project approval letters available from federal authorities and state voluntary cleanup programs. We have been involved in assisting clients in obtaining such assurances in many states across the country.

### **BROWNFIELD SITE DEVELOPMENT**

The term “Brownfield” is used to describe polluted properties, including former gasoline or bulk petroleum storage sites, old or abandoned industrial or manufacturing sites, landfills, open dumps or other properties, which are contaminated. Soil and groundwater at Brownfield sites may be impacted by petroleum or hazardous substances.

When federal and state Superfund laws were initially enacted, the prospect of paying for the cleanup of these Brownfield sites deterred many parties from purchasing these properties. Many of these sites were abandoned and some were forfeited to local taxing authorities. State and federal agencies began to evaluate the risks posed by these abandoned Brownfield sites. The U.S. Environmental Protection Agency (EPA) and many states, including Minnesota, have promoted redevelopment of Brownfield properties. EPA and the State of Minnesota have developed programs to provide grant and loan funds for Brownfield investigation and

remediation to facilitate the redevelopment of Brownfields properties. Grant and loan monies are available to communities and private partners who are interested in redeveloping contaminated property.

### **ASSESSMENT OF LIABILITY IN MERGERS AND ACQUISITIONS**

Businesses involved in mergers or acquisitions need to take care to assess and allocate environmental liability. In mergers or acquisitions, the acquiring entity needs to conduct due diligence to ensure that any real property that is part of transaction has not been adversely impacted by contamination. The seller typically is required to disclose instances of past noncompliance (including spills or releases), pending claims and issues related to the condition of any real property. An acquiring entity should consider the compliance status of the target company that is being purchased.

Purchase agreements typically require a disclosure of all permits and unresolved compliance issues. Attorneys in our Environmental, Real Estate and Business Law Departments work as a team to advise clients on mergers and acquisitions. We prepare and negotiate the business terms in these deals. We assist with a review of all aspects of these transactions including a comprehensive review of environmental issues that may arise in these transactions. We negotiate indemnification provisions that are designed to appropriately allocate risks and protect the interests of our clients.

### **LAND USE AND ZONING**

When our clients seek to expand existing operations or to acquire and develop property, we provide assistance on land use and zoning matters. We work with a team of professionals, including architects, design firms and other professionals, to develop project plans and proposals. Attorneys in our Real Estate and Environmental Practice Groups provide advice on all aspects of these development projects. We regularly represent clients before units of local government and other public bodies that review such projects.

### **PROJECTS APPROVALS, PERMITS AND ENVIRONMENTAL REVIEW**

We assist our clients as they seek to expand their operations and acquire new businesses. We evaluate business and manufacturing operations and complete compliance assessments. We review existing permits and evaluate whether additional permits or project approvals may be required. We provide assistance to clients when permits must be transferred to new operating entities.

When new or expanded operations are planned, we assist in a review of project plans and technical issues to determine whether environmental review is required. We work with a team of

design firms, architects and our clients to assess whether Environmental Assessment Worksheets or Environmental Impact Statements may be required.

### **EVALUATION OF LIABILITY IN BUSINESS AND REAL ESTATE TRANSACTIONS**

Parties considering the purchase of real estate or a business need to be aware of potential environmental claims and liability. Attorneys in our Environmental, Real Estate and Business Law Practice Groups assist clients in conducting due diligence reviews on pending transactions. We review and analyze documents, public records and operations to assess potential concerns. As business and transactional attorneys, we evaluate the compliance status of operations and review their enforcement history and the sufficiency of permits.

We complete Phase I Environmental Site Assessments to determine whether any “recognized environmental conditions” (RECs) may exist on real estate that may be part of a transaction. If subsequent Phase II testing reveals soil, soil vapor or groundwater contamination or other issues of concern, we provide advice as to next steps including the appropriateness of seeking liability assurances through state voluntary cleanup programs.

### **ADVICE ON FEDERAL, STATE AND LOCAL REGULATIONS**

We assist clients in determining whether federal, state and local regulations apply to specific operations. We advise clients of requirements for existing operations or to planned expansions. We review federal and state statutes, local ordinances and permit terms and where appropriate, we recommend that environmental consultants and engineers be retained to assist with more complex and technical compliance evaluations and permit determinations. Often the work of these technical experts is completed under the attorney client privilege. We recommend corrective actions and assess the applicability of audit and self-disclosures policies that may preclude enforcement. In cases where violations are detected – through government inspections or audit disclosures – we provide advice in responding to federal, state and local regulators.

### **RULEMAKING PROCEEDINGS**

Federal and state environmental laws provide direction as to the broad policy goals of a particular statute. Legislative bodies often provide directions to regulatory authorities, such as the U.S. Environmental Protection Agency (EPA) or state environmental agencies, to promulgate specific regulatory requirements and standards through the rulemaking process. Increasingly environmental agencies are promulgating policies through guidance.

Under general principles of administrative law, environmental agencies must provide notice of a pending rulemaking to the public and offer regulated parties and the public an opportunity to provide comments on any new rule or regulation. The agency charged with the task of promulgating a rule is required to consider comments and, where appropriate, revise the

proposed rules. As attorneys who practice in the area of administrative law, we assist clients in evaluating proposed rules and preparing comments for submission in rulemaking proceedings. We advise clients as to the rulemaking process, including the possibility of seeking judicial review of the rulemaking processes.

### **PUBLIC RELATIONS PROGRAMS**

Environmental issues are often subject to intense public scrutiny. In many cases, inaccurate information can be produced and the public's perception of an issue may be incorrect. We work with clients and their internal and external public relations specialists to develop appropriate responses to media inquiries. We organize public meetings to help answer questions about the impact of manufacturing operations or releases on neighbors and other who are in the vicinity of an operation. We assist our clients and their in house staff with the development of public relations programs to help disseminate factual information.