ENVIRONMENTAL CONSIDERATIONS IN CORPORATE AND INTERNATIONAL TRANSACTIONS

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ENVIRONMENTAL DUE DILIGENCE - MERGERS, ACQUISITIONS, AND FINANCING TRANSACTIONS

ENVIRONMENTAL DUE DILIGENCE

Environmental "auditing" has in the past been used primarily as a tool for assuring that ongoing production operations comply with pertinent environmental regulatory requirements. The audit may have resulted from detection of a single incident of environmental non-compliance, may be imposed as a condition of a consent agreement in settlement of an environmental enforcement proceeding, or may be undertaken as an exercise of corporate prudence in light of recent federal and state guidance (including the December 1995 EPA environmental audit policy), providing reduced sanctions for companies which audit and self-report. Audits may also be driven by new ISO 14000 series standards which, as adopted in some countries during recent years, require independent audits as a condition of doing business.

Risk Avoidance Techniques

Today, however, the emphasis is changing as management becomes increasingly aware of the potential significance to the corporate balance sheet of the costs of dealing with the cleanup of past waste disposal areas. Under the federal and state Superfund programs, cleanup costs are often in the range of tens of millions of dollars. To avoid unintentional assumption of such liabilities, a thorough investigation of the current and past waste handling practices of an industrial concern (and its predecessors), both on-site and off-site, is essential. This evaluation should consider all potential sources of contamination, including toxic, radioactive, and hazardous materials. The development of full environmental information is also necessary for valuation of the transaction and proper allocation of risk between the parties. Moreover, some states such as New Jersey and Connecticut require an environmental review (and cleanup of any contamination) as a prerequisite to a business or financial transaction involving industrial property. Other states (such as Michigan) have created a special "innocent purchaser" status for companies that perform audits and disclose results.

Environmental due diligence in support of business and financial transactions typically involves an initial database and paperwork review of permits, compliance records, and governmental regulatory files concerning the existing or former facility or facilities in question, and evaluation of any off-site waste management facilities used. A search to develop information on prior uses of the properties may be undertaken. Visual inspections of the properties for obvious signs of problems with past disposal practices, such as stained soil or leaking underground storage tanks, must also be done. Structural hazardous substance issues such as those arising from lead paint, asbestos, PCB-containing equipment, and radon are evaluated. Additional sampling and analysis may be undertaken based on the results of this initial effort.

The standard of due diligence in the environmental area is rising with the increased recognition in the business community of the potential liabilities involved. These concerns have been heightened by the establishment in the 1986 Superfund amendments of the "innocent purchaser" defense (subsequently adopted by many states), which contemplates minimum standards of pre-acquisition environmental due diligence. This would include both a records review and an on-site inspection of the property. Minimum requirements have been further clarified in recent environmental due diligence guidelines issued by the American Society for Testing and Materials (ASTM). Similar guidelines have been

promulgated by the FDIC and lending organizations for use by lenders in the credit review process. For radiological wastes, the NRC has placed a renewed emphasis on cleanup of contaminated sites, including sites no longer holding NRC licenses.

Morgan Lewis Due Diligence Activities

- Determine successor liability for acquired companies and assets.
- Perform due diligence activities required under ASTM, Innocent Landowner Defense, international requirements (such as ISO 14,000), and other standards.
- Assess liabilities associated with on-site and off-site contamination.
- Evaluate the potential for non-governmental third-party claims such as toxic tort suits, diminution of property value claims, and private cost-recovery actions.
- Evaluate and quantify costs of complying with current and foreseeable environmental compliance requirements such as those arising under the Clean Air Act Amendments of 1990.
- Perform environmental audits of industrial, commercial, and institutional facilities to increase levels of compliance and provide for self-reporting in appropriate instances.
- Review federal, state, and local environmental enforcement and regulatory compliance files; perform searches of relevant environmental databases to identify facilities targeted for governmental enforcement or subject to super-priority liens.
- Assure compliance with state and local environmental transfer laws such as those described below.
- Identify and ensure compliance with disclosure obligations under federal securities law.
- Evaluate as necessary the regulatory and other implications of on-site radioactive contamination.
- Evaluate corporate environmental compliance programs and report to management or board of directors respecting the same.
- Consider potential recovery for environmental costs from insurance, indemnity funds, governmental "brownfields funds" and contractual indemnities.

Morgan Lewis uses its own comprehensive guidelines for performing environmental audits and due diligence reviews, enabling our team of experts to concentrate quickly and cost-effectively on client concerns. Kenneth Rubin and Eric Rothenberg, who hold graduate engineering degrees from Cornell and Harvard, respectively, coordinate Morgan Lewis environmental auditing and due diligence work, having conducted dozens of environmental audits at industrial and commercial facilities throughout the United States and abroad. Other attorneys participating in environmental reviews include Bill Lewis, Randy Visser, John McAleese, and David Ashton. In addition, Don Silverman is experienced in radioactive cleanup and waste management requirements.

CORPORATE AND FINANCING TRANSACTIONS

Business and financial transactions should be structured with careful consideration of potential and often uncertain environmental liabilities. These concerns must be properly reflected in transactional documents, including representations and warranties, indemnities, waivers, hold harmless agreements and escrows, risk allocation provisions, and survival clauses.

Morgan Lewis Transactional Activities

- Prepare environmental provisions for transaction documents.
- Design transactions so as to eliminate, reduce, or transfer environmental liabilities (including use of baseline studies and specialty environmental insurance in appropriate circumstances).
- Prepare environmental disclosures in connection with initial public offerings and other securities transactions.
- Negotiate affirmative covenants and provisions apportioning environmental responsibilities, including environmental reserve and compliance accounts, environmental monitoring provisions, technology-forcing requirements, and notice and survival provisions in loan documents, including bankruptcy and DIP loan documents.

Morgan Lewis addresses environmental issues in structuring transactions involving both publicly- and privately-held companies. Eric Rothenberg and Kenneth Rubin and other firm lawyers counsel companies on environmental concerns in many merger and acquisition transactions, joint ventures, and financings. They also advise industrial clients on documentation of contractual relationships with customers, suppliers, subcontractors, and others. Howard Shecter and Eric Rothenberg also focus on the special needs of the waste management and chemical bulk transportation industries. Kevin Gallen is experienced in structuring transactions to address the assessment of responsibility and liability for radioactive contamination.

State Transfer Laws

Laws in some states, such as New Jersey and Connecticut, require notice and remediation of environmental contamination before business transactions involving industrial properties can be completed. The notification statutes of California and several other states require the transferor to notify state agencies and other parties to the transaction of environmental conditions on the property. The New Jersey Industrial Sites Recovery Act requires an owner or operator to investigate possible contamination and arrange to perform necessary remediation prior to closing.

John McAleese and Eric Rothenberg represent clients in proceedings under the Connecticut and New Jersey transfer statutes and can negotiate consent orders, non-applicability determinations, and negative declarations to allow real estate transactions to be consummated.

Super Liens

Many states have also enacted statutes which provide environmental authorities with a first priority lien over property subject to a remedial action. These liens can often take priority over transfers and other encumbrances, even in the absence of recordation. It is necessary to ensure that all transfer documentation protects against the imposition of such liens.

Pre-Transactional Government Settlements and Brownfields Agreements

Under a guidance issued in May of 1995, EPA has shown an increased willingness to furnish pre-transaction covenants and releases to parties who commit to defined remediation or community development undertakings. Several states have also recently enacted laws allowing state authorities to furnish releases and covenants not to sue in consideration for certain cleanup obligations prior to the consummation of a transaction. Such statutes reflect a growing trend under national and urban revitalization programs.

Environmental Claims in Bankruptcy

Environmental and private authorities have asserted claims in bankruptcy for environmental cleanup costs and penalties. Under emerging case law, such claims are often allowed. Michael Bloom in Philadelphia and Neil Herman in New York lead an environmental bankruptcy practice group which includes John McAleese, Eric Rothenberg and Randy Visser.

State and Federal Brownfields Programs

EPA estimates that there are as many as 400,000 vacant or under-utilized contaminated "Brownfield" industrial and commercial sites in the United States. In January of 1995, EPA announced its Brownfields Action Agenda, a program designed to rejuvenate and expedite cleanup activities at these sites.

To date, the Agency has implemented many of its action agenda items: (1) On September 30, 1996, Congress enacted an amendment to Superfund extending and clarifying the Superfund exemption for non-foreclosing secured creditors or creditors who foreclose on contaminated property and who thereafter seek to convey the property with reasonable diligence (the amendments also adopt the Agency's 1992 Lender Liability Rule); (2) EPA has deleted from its CERCLIS database approximately 30,000 sites which EPA has designated as "no further remedial action planned"; (3) The Agency has adopted a policy of not seeking enforcement action against owners of uncontaminated land situated above ground water systems which have been contaminated by sources outside the property (1995); (4) The Agency has established a program providing grants of up to $200,000 each and loans of up to $500,000 each to establish Brownfield development programs in qualified urban areas (with over 300 funded to date); (5) In August 1997, President Clinton announced further initiatives under the Protecting All Communities from Toxic Pollution Program, which includes a tax deduction for clean up expenses at qualified brownfield development sites and $30 million in federal appropriations to support state programs; and (6) In August 1999, EPA indicated its intention to provide relaxation of cleanup criteria at NPL (or NPL quality) sites and at RCRA sites where parties agree to undertake a redevelopment initiative designating "pilot" sites in each of the 10 EPA regions.

EPA has also issued revised Guidance on Agreements With Prospective Purchasers of Contaminated Property. Under the guidance, the Agency has provided over 120 prospective purchasers of contaminated property with releases and covenants not to sue that are assignable to subsequent purchasers. To qualify for such an agreement, parties need either to commit to undertake some (though not all) remediation (or government cost reimbursement) or take other action which will confer an economic benefit on the affected community. Examples would include creation of jobs, establishment of conservation and recreation areas, and improvements in public transit or other infrastructure.

Most states have separately moved to undertake Brownfield initiatives and have also established voluntary cleanup programs (VCPs), programs that allow current owners of contaminated property to receive Agency release or "no action" letters for undertaking pre-approved remedial work plans, which typically contain relaxed, risk-based, cleanup standards. In 15 states, agencies have signed a memorandum of understanding with EPA that provides that federal actions will not be pursued once a state has approved a VCP work plan.

Morgan Lewis attorneys Eric Rothenberg and Maxine Woelfling have represented parties in federal and state Brownfield negotiations. An example of one such negotiation is the Croyden TCE site in Montgomery County, Pennsylvania, for which local, state, and federal prospective purchaser agreements were secured.

ENVIRONMENTAL JUSTICE

In the last several years, environmental justice has emerged as a significant consideration for industries that site or operate facilities and for federal, state, and local government agencies making environmental regulatory decisions and issuing permits, approving and funding transportation plans, determining land uses, and making other decisions that affect the environment. Although the notion of environmental justice was raised a number of times during the last two decades, it gained significant momentum after 1994, when President Clinton issued Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" ("E.O. 12898"). E.O. 12898 directs federal agencies to avoid actions that would impose disproportionately high and adverse impacts on minority and low-income populations. Since issuance of E.O. 12898, environmental justice concerns have routinely been raised in environmental impact statements ("EISs") under the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. ("NEPA"). Environmental justice concerns with siting, permitting, planning, and funding approvals also are receiving increased scrutiny under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. ("Title VI"). Title VI prohibits discrimination on the basis of race, color, or national origin in programs or activities that receive federal funding. Although Title VI itself prohibits only intentional discrimination, federal agency regulations to implement Title VI prohibit programs and activities that have the "effect" of racial discrimination. Federal agencies thus may terminate funds for programs and activities that impose "disparate impacts" on different racial groups. Citizens and public interest groups have filed administrative and judicial complaints that allege specific projects have disparate impacts on minority and/or low-income populations, in violation of federal agency Title VI regulations, other federal civil rights and regulatory statutes, and E.O. 12898. These disputes are particularly vexing because the disparate impacts allegedly result from the cumulative effect of diverse facilities and decisions, over many of which the governmental agency may lack authority.

Additional environmental justice challenges address whether federal, state, or local governmental agencies have provided meaningful and equal access and consideration to minority and low-income individuals, and whether government agencies have fairly and equally enforced environmental requirements in minority and low-income communities. Environmental justice challenges, moreover, may be a precursor to or may be combined with toxic tort suits. Environmental justice concerns are continuously being fueled by the increasing availability of information regarding industrial pollutants, such as provided by toxic release inventories ("TRI") under the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11001 et seq. (See page 27).

Morgan Lewis Environmental Justice Activities

- Assistance in preparation of environmental justice aspects of EISs and evaluation of litigation issues regarding NEPA compliance.
- Evaluation, developing responses to, and negotiating with federal agencies regarding environmental justice administrative complaints.
- Litigation under Title VI regarding private rights of action to enforce agency disparate impact regulations and other environmental justice issues.
- Preparation of comments on and advice regarding federal agency Title VI regulations and guidance documents.
- Review and preparation of environmental justice policies for industrial facilities, evaluation of environmental justice concerns associated with TRI data, and negotiation of community disputes regarding environmental justice concerns

P Evaluating and responding to environmental justice concerns in toxic tort litigation.

Morgan, Lewis lawyers stand at the forefront of environmental justice issues. Michael Steinberg, author of *Making Sense of Environmental Justice*, filed an amicus brief in the U.S. Supreme Court opposing private rights of action to enforce EPA disparate impact regulations for environmental justice claims brought under Title VI. Mr. Steinberg was lead counsel in administrative litigation in which the EPA's Environmental Appeals Board held that EPA must issue permits that meet applicable environmental regulatory requirements even if they raise environmental justice concerns. He has advised regional transportation agencies on complying with environmental justice requirements for EISs, and has advised and represented them in regard to administrative complaints. Mr. Steinberg has developed comments on EPA's draft Title VI implementation guidances. He has provided advice regarding the National Environmental Justice Advisory Council's deliberations, lectures and writes on environmental justice issues, and routinely provides advice to companies regarding environmental justice concerns at all phases of disputes.

ENVIRONMENTAL LEGISLATION

Planning for the future requires careful consideration of pending legislation, particularly in the environmental area. Unlike most legal concerns confronting business today, environmental requirements are almost entirely a product of federal and state legislation. Morgan Lewis attorneys and paralegals routinely monitor legislative developments, both in Congress and in state legislatures, that could affect our clients.

Morgan Lewis Legislative Activities

- Testifying before the Senate and the House on Superfund reauthorization, including liability and remedy selection issues.
- Drafting proposed legislation on Superfund reform and amendments to the NWPA and LLRWPA for major trade associations.
- Communicating with members of Congress on behalf of various clients interested in specific RCRA and Superfund provisions.
- Assisting a major trade association with proposed amendments to the Clean Air Act and the Energy Policy Act.
- Advancing technically sound and responsible legislative proposals addressing ground water protection.
- Advocating specific provisions in legislation regulating asbestos in buildings and indoor air contaminants.

Several of Morgan Lewis' environmental attorneys are registered lobbyists who devote considerable time to briefing Senators, Representatives, and their staffs on issues of special concern to our clients. With assistance from John Quarles, William Lewis, Michael Steinberg, Alan Coffey and other attorneys, Morgan Lewis has been successful in securing legislative action on behalf of our clients.

Activities in the 106th Congress; Looking Ahead to the 107th

During the 106th Congress, all attempts to act on any of the major statutes, incuding a CERCLA (Superfund) small-business liability carveout, failed. Congress did not pass any major environmental legislation in 2000. However, a conference committee report accompanying the appropriations bill (Pub. L. No. 106-377) included controversial language regarding dredging of contaminated sediments. The report language directs EPA to await the results of a forthcoming National Academy of Sciences (NAS) study on contaminated sediments before launching any new dredging or invasive remediation technology activities. There are exceptions for voluntary agreements and urgent cases. EPA is allowed to propose new dredging remedies before the NAS report is received, but it may not finalize them until June 30, 2001, or until it reviews the NAS report, whichever comes first.

In the 107th Congress, there will continue to be debate on the reauthorization of several major statutes. Despite some activity in both Houses on these matters in the previous Congress, it remains uncertain whether these issues will enjoy a high priority in the next session, and the prospects for legislation are unclear. President-elect George W. Bush indicated that he will support elevating EPA to the status of a Cabinet department, an idea that has been dormant for the past several years. Cabinet status for EPA may be linked in the 107th Congress to substantive action on one or more of the major statutes that are overdue for reauthorization. Alternatively, the confirmation hearings on EPA Administrator-designate Christine Todd Whitman may spill over onto some of the thorny unresolved issues from the last few sessions of Congress.

ENVIRONMENTAL LITIGATION

Whether it takes the form of a government enforcement action, an industry challenge to new regulations, or a "citizen suit" brought by private parties, environmental litigation is extremely important to our clients and accounts for much of the firm's environmental practice. Morgan Lewis litigation activities span the full range, from the rapid assembling of a legal team to oppose a temporary restraining order that would block construction of a new industrial project to the challenging of EPA regulations in the federal courts following years of involvement in the underlying administrative process. Some cases involve defending clients against allegations of criminal conduct, while others involve consideration of thousands of pages of technical data and testimony in adjudicatory hearings before an administrative law judge.

Because the basic elements of litigation are more generally understood, this *Deskbook* does not undertake to provide the detailed type of explanation regarding environmental litigation that is furnished for the regulatory components of our practice. Instead, the material below is intended simply to suggest the major types of environmental litigation that have particular prominence in our practice.

The Necessary Mix of Skills

The Morgan Lewis Litigation Practice is one of the the nation's largest, with over 200 lawyers. Many highly skilled, experienced litigators devote all or a major part of their time to environmental matters. These include Jim Pagliaro, Glen Stuart, Thomas O'Brien, Ralph Albright, Randy Visser, and Howard Weir.

Many Morgan Lewis lawyers who devote most of their time to environmental regulatory matters also have extensive litigation experience. Michael Steinberg and Michael McCord each served in the Justice Department as Assistant Chief of the Environmental Defense Section. In that position, each supervised and handled litigation under all of the federal environmental statutes. William Lewis, an expert in the application of constitutional law defenses in environmental litigation, succeeded in persuading the Fifth Circuit that federal law preempted local legislation barring the incineration of PCBs. Other regulatory attorneys with extensive litigation experience include John Quarles, Kenneth Rubin, and Joshua Sarnoff. Kenneth Woodrow has managed multi-party Superfund cases and challenged rulemakings in the D.C. Circuit.

The recurring theme of all environmental litigation is the need to combine classic litigation skills with technical environmental capabilities. This routinely requires not only knowledge of the intricacies of environmental laws and regulations but also an ability to find and work with environmental consultants and technical experts. Morgan Lewis uses an interdisciplinary approach to staff each major case with a hand-picked team of litigation and regulatory experts whose combined talents will provide the greatest likelihood of success.

More specific information on particular subjects of note is provided below.

Toxic Tort Litigation

Corporate clients are acutely aware of the constant stream of cases filed in recent years claiming damages for present or future harm allegedly suffered as a result of exposure to chemicals and other "toxic" substances. Two trends have developed in recent years. First, trial lawyers have sought to achieve "critical mass" by joining hundreds or thousands of plaintiffs in the same action, thereby creating very high risk stakes and a potentially unmanageable situation for defense lawyers. Second, the plaintiffs' bar has made increasing use of claims of medical monitoring, which promises large up-front fees for counsel and invasive, potentially harmful, and usually unnecessary, medical tests for individual plaintiffs. Our Tort, Environmental and Construction Practice Group has wide experience, and has enjoyed great success, in the defense of cases that present these issues.

Government health assessments around landfills, chemical spills, chemical emissions from products, noise and odor have all spawned this new type of toxic tort litigation. The cases necessarily involve complex issues of scientific and epidemiological expert data and testimony,

and require a mastery of these subjects as well as the ability to use procedural mechanisms and recent Supreme Court and appellate decisions to break up large cases or prevent "inflation" of cases. Our practice group has handled many mass cases in a wide variety of jurisdictions around the country, including a Texas action involving 8,000 plaintiffs, one of the largest in the country. Morgan Lewis lawyer Jim Pagliaro has the distinction of having actually tried a class action toxic tort matter involving the neighbors around a lead plant in an urban setting. Such cases also often involve claims that nearby property owners are entitled to "stigma" damages for diminution in value of their property, a claim that we successfully fought in a case for a major oil company, requiring complex statistical and economic analyses.

Others in our Group have been involved in nationwide, "serial" litigation involving chemicals and asbestos, which have required the special skills necessary to ensure a uniform defense strategy across many jurisdictions. John Linsenmeyer and others have addressed the special issues presented by toxic tort cases involving exposure to pesticides, which require vigorous advocacy of such issues as dose-response and risk assessment. Finally, we are extremely mindful of the role that media coverage plays in these often high profile cases, and the need to successfully control, and indeed use, such coverage in our clients' interests.

Enforcement Proceedings – Civil, Criminal, Administrative, Citizen Suits

Federal and state environmental laws provide for the imposition of substantial civil and criminal penalties for most violations of environmental requirements. Such statutes typically authorize civil penalties at levels of up to $27,500 for each day of violation, with many violations deemed "continuing" for months or even years, and the government has become increasingly aggressive in seeking maximum penalties. Federal and state prosecutors are also expanding their environmental criminal staffs and are more frequently seeking criminal penalties and imprisonment for infractions that were once handled through civil or administrative action. These criminal cases bring with them the potential for serious collateral consequences, such as "debarment" of the violating facility from future receipt of federal government contracts or grants.

In addition, most federal and state environmental laws authorize private citizens to seek court-imposed sanctions. Historically, most citizen suits have arisen under the Clean Water Act because of the relative ease of proving NPDES permit violations using a facility's Discharge Monitoring Report (DMR). However, CAA citizen suits have become much more prevalent in the last few years, particularly those focusing on Title V permits. RCRA violations are much more difficult to prove, but the number of RCRA citizen suits has increased significantly in recent years. In California, Proposition 65 has inspired an even greater number of lawsuits of this type because, unlike federal law, it authorizes the successful plaintiffs to recover a portion of the civil penalties assessed by the court.

Morgan Lewis Enforcement Litigation

- Civil cases filed by EPA and DOJ or their state counterparts.
- Citizen suits brought by private parties.
- Criminal enforcement cases.
- Grand Jury proceedings.
- Defense of EPA and state administrative enforcement actions under the Clean Air Act, Clean Water Act, RCRA, TSCA, and FIFRA.

Morgan Lewis has represented clients in all types of enforcement proceedings. Bill Lewis, Kenneth Rubin, and Jeff Hurwitz have been especially active in handling civil enforcement proceedings. Kenneth Rubin is currently defending a large electric utility that suffered an oil spill into a tributary of the Chesapeake Bay in Maryland, coordinating the defense of multiple regulatory proceedings and several class action suits pending in both state and federal courts.

John Quarles and Michael Steinberg played a major role in persuading the Justice Department not to seek felony indictments under RCRA's "knowing endangerment" provisions against a company that accidentally discharged hazardous wastes into a municipal sewer system. Bill Lewis, Mike McCord, and Kenneth Woodrow are currently involved in defending companies in several industries targeted by EPA in a massive CAA enforcement initiative. Edward Dennis, former Assistant Attorney General of the Criminal Division for the Justice Department, represents clients in criminal enforcement cases, as do Bill Gardner and Eric Kraeutler. William Gardner has counseled major corporate clients facing both RCRA and Clean Water Act criminal investigations. Jack Dodds recently defended a county in Missouri charged with criminal violations of the Clean Water Act. We have appeared before EPA Administrative Law Judges to defend clients against multi-million dollar penalty assessments under TSCA and RCRA.

Superfund Cases

Superfund has generated far more litigation than any other environmental statute. The large number of cases reflects several unique aspects about environmental controversies arising under this statute. First, these cases tend to involve a large number of parties, adding great complexities to the most simple litigation tasks. What in ordinary circumstances might take two adversaries a few days to resolve takes several months when the dispute involves several hundred companies. Second, the financial stakes in these cases are usually quite large, often in the range of many tens of millions of dollars and sometimes even higher. Third, the particular circumstances of many companies in a multi-party Superfund litigation are often quite different. Some companies may have sent only a few drums of relatively innocuous material to a site, while others may have sent much greater amounts of more toxic material. Yet because liability is typically joint and several, any company may theoretically face liability for the entire amount in controversy. Allocating to each company its fair share of liability to promote settlement is a difficult task, but one that is essential if transaction costs are to be minimized.

Morgan Lewis Superfund Litigation

- Prosecution of private party cost recovery actions for expenses incurred by purchasers in cleaning up contamination from prior owners.
- Defense against the federal government's largest claim for natural resources damages.
- Service as common counsel to PRP groups at numerous NPL sites and state Superfund sites.
- Creative use of alternative dispute resolution techniques to avoid unnecessary transaction costs.
- Prosecution and defense of discovery proceedings to identify PRPs and their respective contributions.
- Examination of expert witnesses regarding nature and extent of contamination and assessment of risks to public health.
- Efforts to block NPL listings, using rulemaking comments, strategic removal actions, and/or judicial challenges in the D.C. Circuit.

Morgan Lewis lawyers have been involved in many of the major Superfund cases across the country. Our roles have ranged from lead counsel for large groups of similarly situated parties to a focused effort on behalf of a single party with unique concerns that do not allow for joint representation. In addition to defending companies in Superfund cost recovery actions brought by the federal government (typified by our work in the *BROS, Conservation Chemical, Helen Kramer, Stringfellow, New Bedford Harbor*, and *Price's Pit* cases), the firm has also been in the forefront of prosecuting private party cost recovery actions. The following attorneys have devoted a substantial portion of their time to Superfund litigation throughout the country: John Quarles, Charlies Swinburn, Michael Steinberg, Kenneth Rubin, William Gardner, Ralph

Albright, Michael Dillon, Denis Brenan, Frank Thomas, Howard Weir, Kenneth Woodrow, Randy Visser, Glen Stuart, Thomas O'Brien, Anthony Roth, and Joshua Sarnoff.

Judicial Review of EPA and State Regulations

As mentioned previously, Morgan Lewis has been extensively involved in rulemaking proceedings on behalf of several trade associations and corporate clients concerning new regulatory provisions, such as the definition of "hazardous waste" under RCRA, the regulation of air toxics under the Clean Air Act, the effluent limitation guidelines under the Clean Water Act, and the Title V operating permit regulations under the Clean Air Act. These statutes typically allow only a limited time in which affected parties may file a petition for review following EPA's promulgation of final regulations. Failure to file such an action during this limited time for appeal will usually bar any subsequent challenge in a later enforcement proceeding.

Morgan Lewis Regulatory Challenges

- Judicial challenges to numerous RCRA, Clean Air Act, Clean Water Act, Safe Drinking Water Act, Superfund, and TSCA regulations on behalf of trade association and corporate clients.
- Petitions for stay of regulations pending review.

Most proceedings involving judicial review of regulations take place in the U.S. Court of Appeals for the District of Columbia Circuit, although a significant number are filed in other courts. Success in these cases depends primarily on a detailed knowledge of both the statute and the administrative record, not simply on traditional trial lawyer skills.

Many Morgan Lewis attorneys are involved in litigation challenging EPA rules. Michael Steinberg won major victories under RCRA by convincing the D.C. Circuit to set aside EPA's "mixture rule" in the *Shell Oil* case and, more recently, to overturn EPA's listing of certain pesticides as hazardous wastes. Bill Lewis and Michael McCord recently succeeded in convincing the D.C. Circuit to invalidate EPA's federal enforceability requirement in its definition of "potential to emit" in Clean Air Act regulations – a definition first promulgated in 1980. For seven years at the Justice Department, Michael McCord supervised the litigation of all challenges to EPA's rulemaking activities. At Morgan Lewis, Michael McCord recently reached favorable settlements in two significant CAA cases – one involving air toxics standards for the pharmaceutical industry, and one involving the general provisions for all air toxics regulations. He is now working with Kenneth Woodrow on a challenge to an air toxics rulemaking for the aluminum recycling industry. Other Morgan Lewis attorneys with extensive experience in judicial review proceedings include John Quarles, Kenneth Rubin, Kenneth Woodrow, and Joshua Sarnoff.

Administrative Proceedings

Much of the work of an environmental regulatory lawyer takes place in administrative proceedings before EPA and state environmental agencies. Under the federal Administrative Procedure Act and corresponding state laws, these agencies must base their decisions upon an administrative record, which includes comments of all interested parties. A court reviewing the agency decision typically considers only the evidence already compiled in the agency's administrative record.

The EPA makes use of two basic types of administrative hearings in connection with its rules. In legislative hearings, which are essentially open forums for discussion without any formal rules of evidence and usually without any cross-examination, interested parties speak before a panel of EPA employees. Administrative adjudicatory proceedings, on the other hand, are held before an Administrative Law Judge. These hearings are sometimes used in connection with permitting issues or pesticide cancellations. They resemble typical trial court proceedings, although there is greater flexibility

on the presentation and consideration of evidence. Many Morgan Lewis attorneys have had substantial experience in these matters and have developed special skills to ensure, to the maximum extent possible, that the administrative record contains not only the necessary information to justify a ruling on behalf of their clients but also appropriate documentation to rebut any conflicting positions that might be taken by the agency or opposing parties.

Morgan Lewis Administrative Proceedings

Many Morgan Lewis lawyers have had substantial experience with administrative proceedings on both the federal and state levels, including challenges to permit conditions under the Clean Air Act, the Clean Water Act and RCRA. Maxine Woelfling of the Harrisburg office has had many successful outcomes in appeals filed before the Pennsylvania Environmental Hearing Board. She successfully defended the issuance of a landfill permit against challenges by the county that issuance of the permit violated several state statutes, and also defended a developer's sewage planning approval against the objections of the municipality that the approval violated the Pennsylvania Sewage Facilities Act and the municipality's agricultural preservation ordinances. Jeff Hurwitz and John McAleese of the Philadelphia office also regularly litigate matters before the Board.

Randy Visser and Steve Oppenheimer of the Los Angeles office have made numerous appearances before California's South Coast Air Quality Management District Hearing Board to obtain variances from rules and permit conditions, defend against the imposition of orders for abatement, and challenge the failure of the District to issue emission reduction credits. Randy Visser has appeared before the California Coastal Commission in hearings regarding Coastal Development Permits, and Steve Oppenheimer has appeared before the City of Los Angeles Zoning Commission and the Board of Zoning appeals defending against a challenge to the issuance of local Coastal Development Permits.

Radioactive Materials and Waste

Under the Atomic Energy Act of 1954, the National Environmental Policy Act, and pertinent Nuclear Regulatory Commission regulations, the NRC prepares an environmental impact statement or environmental assessment for the issuance of each license or license amendment. The license or license amendment may, however, qualify for a categorical exclusion. Morgan Lewis lawyers have assisted electric utilities that own nuclear power reactors and industrial companies that use radioactive materials in the preparation of applications for licenses and amendments that appropriately reflect environmental considerations. When these applications are contested, the focus of issues raised in administrative hearings before the NRC is frequently the adequacy of the review of the alleged environmental impact of NRC licensing decisions. Many Morgan Lewis attorneys have had extensive experience in litigating both unique and conventional radiological and environmental issues in NRC hearings and before the federal appellate and district courts.

- Participation in rulemaking and other proceedings concerning high-level and low-level nuclear waste management and disposal.
- Representing utilities in litigation supporting DOE and EPA actions involving the high-level waste repository.
- Advising on storage, treatment, management, and disposal of low-level wastes and mixed wastes.
- Litigation on behalf of low-level waste generators before the U.S. Supreme Court regarding responsibility of the states for disposal of low-level wastes.
- Litigation over disposal facility development fees.

Over the past few years, Morgan Lewis attorneys have also had substantial experience relating to cleanup of sites licensed by the NRC, including the development and submission of decommissioning plans to the NRC in conjunction with the submission of remediation plans for hazardous materials to the EPA or state agencies. These efforts have included representation of the licensees in contested NRC administrative hearings relating to the termination of licensees and to the decommissioning of facilities. They have also represented a group of major nuclear fuel cycle companies in the NRC's enhanced rulemaking on the establishment of radiological criteria for decommissioning, and have participated in EPA's parallel rulemaking efforts on radiological cleanup criteria.

MORGAN LEWIS SPECIAL PROJECTS

We have undertaken a number of special projects to assist our clients in efficiently responding to the challenges of Superfund and RCRA proceedings and Clean Air Act implementation. A capsule summary of some of these special projects is provided below.

The Information Network for Superfund Settlements

Since its creation in 1987, the Information Network for Superfund Settlements has occupied a unique niche in the national debate on highly controversial issues and played the central role in shaping proposals for the Administrative Reforms that have brought major improvements to the program.

The Information Network is a clearinghouse for essential documents and cutting edge developments. It gives its members access to settlement agreements and EPA orders and guidance documents that are not routinely available. Members receive a bi-monthly *Report from Washington* and may request special on-line document searches. INSS conferences enable members to discuss critical issues with senior EPA officials and other leading Superfund experts.

John Quarles and Michael Steinberg lead the Morgan Lewis team serving The Information Network. They are assisted by Joshua Sarnoff and Linda Eaton, who regularly contribute to the bi-monthly reports. The Network maintains a unique library of Superfund Records of Decision, Consent Decrees, Unilateral Administrative Orders, Administrative Orders on Consent, and EPA guidance documents. Publications released by the Network include: a survey report entitled *Superfund Municipal Liability Settlements*, the *Superfund Cleanup Decision Handbook* (second edition) that analyzes EPA's 1995 revised model consent decree for Superfund cleanups, and the *Superfund Negotiation Handbook* (which provides a thorough analysis of EPA's model AOC for RI/FS work).

Superfund Settlements Project

John Quarles and Michael Steinberg serve as counsel to the Superfund Settlements Project, a group of 10 major corporations that have united to seek constructive solutions to the recurring problems that delay the resolution of Superfund cases. The Project's primary goal is to resolve Superfund cases in a prompt and equitable manner and to minimize transaction costs associated with Superfund implementation. Toward this end, the group has worked closely with EPA and the Department of Justice and has frequently testified before Congress regarding both liability and settlement issues. The Project recently issued an in-depth report on EPA's implementation of the 1995 Superfund administrative reforms. The group provides a unique forum for industry leaders to speak with EPA about the Superfund program and also gives governmental officials an opportunity to voice their opinions about how industry could make Superfund work.

RCRA Corrective Action Project

Patterned after the Superfund Settlements Project, the RCRA Corrective Action Project is a group of major corporations working together to develop constructive suggestions for EPA's implementation of the RCRA corrective action authorities. The group has been instrumental in many of EPA's RCRA corrective action program improvements, including the "stabilization" initiative, the Corrective Action Management Unit (CAMU) rulemaking and the Agency's corrective action Administrative Reforms announced in July of 1999. The Project also maintains a compendium of RCRA corrective action-related documents, including EPA guidance documents and administrative decisions, for use by the membership. John Quarles provides leadership for the RCRA Corrective Action Project.

Clean Air Implementation Project

The Clean Air Implementation Project comprises about 20 industrial corporations that united to participate more effectively in EPA's development of regulations under the Clean Air Act and to provide educational materials to members in implementing the federal clean air regulations. The organization places particular emphasis on federal permitting and enforcement

requirements under the 1990 Clean Air Act. Under the guidance of Bill Lewis, the Project has filed extensive comments on most of EPA's proposed regulations that affect a broad cross-section of American industry. In addition, the Project has prepared a State Permit Program Manual, a Model Permit Rule, and various documents providing guidance on key clean air issues. The Project was the lead industry petitioner in challenges to EPA's operating permit rule.

Clean Air Act Information Network

Launched in January 1995, the Clean Air Act Information Network was organized to provide important educational and informational services to corporations, law firms, and other entities in connection with implementation of the 1990 Clean Air Act Amendments. The Clean Air Network provides three principal services to enable members to be knowledgeable about, and respond to, complex and evolving clean air requirements. First, the Clean Air Network develops and distributes Bimonthly Reports to members. Each Report contains articles summarizing recent regulatory, judicial, and legislative activities. Reports sometimes include a comprehensive Issue Analysis addressing a timely subject that environmental professionals and lawyers must grapple with in complying with federal and state clean air requirements. Second, the Clean Air Act Information Network sponsors a conference each year at which members discuss important issues with knowledgeable EPA and state officials. Third, for its members' use, the Clean Air Act Information Network has created an extensive computer accessible database containing hundreds of EPA policy documents, guidance memoranda, final rules, technical documents, and consent decrees.

Bill Lewis heads the Morgan Lewis team staffing the Clean Air Network which has about 50 members. Michael McCord and Linda Eaton contribute to preparing Bimonthly Reports, arranging for conferences, maintaining the Network's database, and providing other services to members.

Spill Reporting Handbook

Morgan Lewis' large compendium of spill reporting requirements, identifying in detail all applicable federal and state environmental laws, was first published in 1992 by Clark Boardman Callaghan and was recently updated as the *1999 Environmental Spill Reporting Handbook* (West Group). The handbook serves as a guide to reporting obligations and provides telephone information, the text of regulations, and lists of hazardous substances. Because of the substantial penalties that have been imposed for failure to report a spill promptly, this handbook was designed to facilitate the identification of reportable quantities and the filing of any necessary reports. Contact Kenneth Rubin for further information.

Arbitration, Mediation, and Alternate Dispute Resolution in Superfund Cases

Eric Rothenberg and Mike Steinberg have counseled groups of potentially responsible parties in resolving allocation and related disputes arising in connection with state and federal Superfund enforcement matters. These efforts are facilitated by an in-house consulting staff that prepares customized, site-specific allocation databases.

INTERNATIONAL ENVIRONMENTAL PRACTICE

A complex set of environmental requirements applies to international transactions. In the age of a global economy, companies with foreign operations seeking to manage their global environmental risk effectively must understand current developments in international environmental treaties and codes of conduct as well as rapidly changing environmental law in host countries. For example, exports of chemicals from the United States to a member of the European Union are subject both to TSCA and other U.S. transportation and regulatory requirements as well as to the European Union Directive on the Classification, Packaging, and Labeling of Dangerous Substances. Morgan Lewis, with a worldwide network of offices, is well-positioned to assist our clients in identifying the environmental issues involved in international business transactions.

Morgan Lewis International Activities

- Counseling our clients on environmental issues arising in acquisitions, financings, and other business transactions in Europe.
- Participating in environmental activities of the European Union through members of our Brussels, Frankfurt, and London offices.
- Advising clients doing business in Eastern Europe on (1) environmental requirements of foreign subsidiaries and joint ventures; (2) environmental conditions included in loans from the Bank for European Reconstruction and Development and the World Bank; and (3) environmental provisions imposed under export and investment incentives from the U.S. Export-Import Bank and the Overseas Private Investment Corporation.
- Advising U.S. companies doing business in Asia and the Pacific Rim on international codes of conduct, environmental conditions imposed by the Asian Development Bank, World Bank, and International Finance Corporation, and international treaties affecting foreign operations.
- Counseling on the development of environmental risk management programs to minimize potential liability under international and foreign domestic law.

Kenneth Rubin authored a book published in Japan entitled *Environmental Law in the U.S.A. and the European Community*, and Morgan Lewis published a special report by Mr. Rubin on "What the Business Executive Needs to Know About Environmental Laws in the European Community." This report was later translated for publication in a Japanese legal journal. Our Brussels office monitors environmental developments within the European Commission.

Morgan Lewis attorneys monitor environmental aspects of the agendas of the World Trade Organization and regional trade organizations, including the European Union, the Asia Pacific Economic Council (APEC), the Organization for Economic Cooperation and Development (OECD), and the North American Free Trade Agreement (NAFTA).

Morgan Lewis attorneys are involved in the ongoing governmental and private sector efforts to deal with global climate change and other environmental issues. Morgan Lewis attorneys have advised domestic and non-U.S. clients on preparatory meetings for the United Nations Conference on Environment and Development. The firm monitors other environmental conventions, including the Ozone Convention and the Convention on Transboundary Movement of Hazardous Waste. Additionally, the Firm counsels clients regarding U.S. laws and regulations governing the export of low-level radioactive waste and mixed waste for disposal in other countries. James Glasgow has extensive experience in environmental issues associated with international shipments of spent nuclear fuel, plutonium, and high-level vitrified waste.

ENVIRONMENTAL INSURANCE PRACTICE

The continuing increase in Superfund, toxic tort, and other environmental litigation has been accompanied by a dramatic growth in insurance-related litigation. Companies faced with the costs of defending environmental suits, particularly those with potentially large judgments and cleanup responsibilities, have sought to obtain coverage from their insurance carriers. Given the high stakes involved in such litigation, the insurance industry asserts every conceivable coverage defense.

More than 30 years of coverage litigation involving environmental and other long-term toxic tort claims has revolutionized insurance law throughout the United States. Still, because coverage issues are a matter of state law, litigation continues in virtually every state to obtain decisions of the highest court of the state on each important coverage issue. Choice of law determinations in insurance coverage disputes are often case dispositive, and securing a favorable forum by winning "the race to the courthouse" remains an important consideration. Frequently, the receipt of a decision from a state supreme court on an issue simply generates additional litigation on related or unresolved issues. Thus, despite the extraordinary number of coverage decisions in recent years, there is still no shortage of novel, emerging issues of first impression to be decided. Even where a state provides clear guidance as to the governing law, application of the facts of a particular case to the law can be difficult and can result in complex and hotly contested litigation which requires experienced trial lawyers. Given this dynamic and constantly changing legal landscape, it is now more important than ever for your companies to be creative and proactive in order to maximize insurance coverage for environmental liabilities.

As coverage litigation moves from the resolution of abstract coverage issues to determining how those principles apply in particular cases, knowledge of the underlying environmental matter becomes crucial in developing a coherent, comprehensive and winning strategy. The Firm's ability to represent companies in both environmental and insurance matters provides clients with a distinct advantage in pursuing insurance claims. Morgan Lewis environmental lawyers who have intimate knowledge of the underlying environmental dispute work closely with insurance litigators to develop the company's position on a myriad of issues that bear directly on the availability of coverage, including the state of the art at the time of the waste disposal in question, the company's intent and expectation in disposing of its waste, and the nature and timing of the remediation effort. This team approach helps to avoid re-learning the facts, thereby controlling costs and leading to a more focused and effective coverage presentation.

In addition to the effective integration of firm resources in the environmental, insurance, and litigation areas, Morgan Lewis also recognizes the importance of real "partnering" between outside and in-house counsel. The Firm welcomes the valuable insights and information that in-house counsel can provide when acting as team members in settlement, litigation, depositions, witness interviews, hearings, strategy sessions, and trials. Further, coordination with clients in the areas of document organization, imaging, retrieval, computer support and other logistical matters greatly reduces costs and improves efficiency. The experiences gained in our insurance coverage cases provide a model partnering approach which can serve to defray litigation costs, increase efficiency, and expedite successful results.

Morgan Lewis Insurance Activities

- Evaluating potential coverage for environmental loss under comprehensive general liability policies, first party property policies, excess and umbrella policies, environmental impairment liability and pollution legal liability insurance, marine insurance policies, directors and officers liability insurance,

fidelity bonds, and other business policies.

- Representing policyholders in coverage litigation; evaluating potential for success on the merits of such litigation proceedings.
- Counseling policyholders in connection with insurance carrier settlement negotiations.
- Performing insurance coverage reviews, including use of insurance archaeology techniques to locate policies.
- Identifying and negotiating insurance vehicles to cover identified environmental risk, including the use of costcap insurance, pollution legal liability coverage, lender and mortgageholder programs, environmental imparement liability coverage, environmental title and risk-transfer insurance, structured settlements, and annuity-based coverages.

Sara Alyea, Denis Brenan, John Failla, Richard McMenamin, Joel Nied, John Rousakis, Glen Stuart and Howard Weir have extensive experience litigating and settling large, complex environmental and toxic tort coverage cases on behalf of insureds. These lawyers, as well as Eric Rothenberg, also have significant experience in counseling insureds on coverage issues.

ENVIRONMENTAL CONTRACTS

Government and private environmental compliance and restoration activities become more complicated each year. At the federal level, spending on compliance, restoration, and waste management is growing slowly. As this market matures, opportunities for environmental firms become more competitive and the challenges of environmental contracting grow immensely.

Industry Challenges

- Performing hazardous waste and nuclear cleanup work imposes unique potential liabilities.
- Facility compliance requirements are being directed at contractors along with government agencies.
- Contracting reforms at DOE place contractors at greater risk.
- "Privatization" of governmental functions in waste cleanup and water treatment expose contractors to unique governmental funding risks.
- Greater emphasis is being placed on conflicts of interest, procurement integrity, and government ethics.
- Continuing federal acquisition reforms make significant changes to the government procurement process.
- Preferences for multiple awards of federal environmental contracts create new procurement problems.
- Government assertions of rights in contractor-owned or -developed technologies and processes raise ownership concerns about technology.
- Trends toward use of fixed price contracts pose different business risks for environmental firms.
- Government "cradle-to-grave" indefinite quantity type contracts increase needs for permits, licenses, and approvals.

Through its wide range of legal expertise, including not only contract law but also environmental laws and regulations as well as experience drawn from design and construction law, Morgan Lewis can provide comprehensive counsel in the environmental contracting field.

Experience

Environmental Contracts attorneys have been involved since the early days of the hazardous waste and nuclear waste cleanup business in the cutting edge issues presented by this industry. These issues have ranged from negotiating contracts uniquely structured to deal with the new problems of the remediation industry to litigating some of the first disputes under remediation contracts.

Morgan Lewis Environmental Contracts Activities

- Counseling EPA, DOD, and DOE contractors, negotiating teaming agreements, and negotiating DOE environmental restoration teaming arrangements and subcontracts.
- Creating corporate structures and risk management mechanisms to address Brownfield cleanups and "privatized" environmental control activities.
- Developing corporate-wide contract compliance programs and responding to audits.
- Counseling contractors on requirements of Federal acquisition reforms.
- Pursuing and defending bid protests involving all departments and agencies.
- Counseling contractors on new DOE contracting requirements and procedures, including "privatization."
- Advising DOE contractors on intellectual property rights issues related to technologies employed or developed during environmental cleanup.
- Counseling on EPA and DOE conflict of interest issues.
- Performing regulatory and contracting due diligence in acquisitions.

- P Resolving disputes regarding scope of work, site conditions, and time lines of performance involving all agencies.

John Daniel co-authored a concise but comprehensive survey of the liability issues facing environmental restoration firms, which was published by the Environmental Business Action Coalition (EBAC) as "Trends in Contractor Liability for Hazardous Waste Cleanup: The Current Legal Environment."

Providing comprehensive counsel in the environmental contracting field requires a wide range of legal expertise. John Daniel has represented many clients in government and nongovernment contract law matters and counseled environmental engineering firms on a breadth of legal, regulatory, and legislative issues.