



“Who is Going to Pay for this Mess?!”

Allocating the Costs of Sediment Cleanups

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Overview

- Allocation overview.
- Methods to allocate liabilities for sediment cleanups.
- Allocation arbitrations.
- Cost recovery/contribution actions.
- Leveraging insurance assets to cover cleanup costs.
- Practice tips.
- Questions.

Why is Allocation an Issue?

- CERCLA and MTCA's joint and several liability scheme.
- Seek cost recovery or contribution from other parties to reach "fair share" of responsibility.
- Parties are attempting to avoid imposition of liability or at least avoid payment of costs beyond "fair share."
- Responsibility for past and future costs and/or work performance.
- Burden is on PRPs to pursue allocation and/or cost recovery.
- EPA and the Department of Ecology rarely perform allocation activities.

What Costs are Potentially Recoverable under CERCLA and MTCA?

- Remedial Investigation/Feasibility Study costs.
- Remedial Design/Remedial Action and Cleanup Action Plan.
- Agency oversight costs.
- Natural Resource Damages.

Cost Recovery Options

- MTCA Contribution Action litigation under RCW 70.105D.080.
- CERCLA Litigation.
 - Contribution Action under CERCLA §113(f).
 - Cost Recovery Claim under CERCLA §107(a).
- Mediation.
- Arbitration.
 - Binding v. Non-binding
- Arbitration followed by Mediation.
- Other hybrid models.

Advantages of Different Allocation Approaches

- Efficiency and costs.
- Control over process (e.g. Allocator selection).
- Certainty.
- Confidentiality.
- Experience of Allocator/Judge.
- Timing.
- Performing party negotiations, including interface with EPA.

Common Goals for an Allocation Process

- Provide a mechanism for liable parties to participate in an assignment of relative shares of responsibility for the remedial action costs associated with the Site.
- Facilitate resolution of claims arising from the Site in an equitable and efficient manner—often without the need for litigation.
- Gain closure and resolution of costs and claims.
- Secure interim and/or final funding for the investigation and cleanup process.
- Create a neutral process with critical mass of parties.
- Maintain confidentiality of PRP information and documents.
- Develop a framework for reaching an agreement with EPA and/or the Department of Ecology and other liable parties for the future cleanup of the Site.
 - Avoid unilateral administrative orders.

Structuring an Allocation Process

- Third-party neutral selected to serve as Allocator.
 - Qualifications. Legal? Technical?
 - No conflicts of interest.
 - Experience.
 - Technical or legal support?
- Preparing an Allocation Process Agreement.
 - Outline procedural steps.
 - Governing body.
 - Voting.
 - Confidentiality.
 - Tolling/Standstill provisions.

Typical Phases of an Allocation Process

- Convening of PRPs.
 - By performing PRPs and/or Agencies.
 - Who should be invited? Role of Federal Government PRPs?
 - Look at General Notice Letters and EPA §104(e) Requests.
- Creation of allocation group.
 - Development of Allocation Process Agreement.
 - Joint Defense Agreement/Confidentiality requirements.

Typical Phases of Allocation Process

- Fact Gathering/Discovery.
 - Creation of a document management system.
 - Initial Disclosures.
 - Disclosure Questionnaires.
 - Submission of CERCLA §104(e) Responses.
 - Marshaling relevant public records.
 - Interviews/Depositions of key fact witnesses.
- Preparation of Allocation Methodology/Criteria.
- Expert Witness Opinions.
 - Preparation of expert reports.
 - Opportunity for rebuttals and responses.
 - Deposition of experts?

Typical Phases of Allocation Process

- Advocacy briefing by PRPs.
 - Submission of Position Papers.
 - Response briefing.
 - Oral argument?
- Allocation Decision.
 - Allocator's proposed allocation with opportunity to comment.
 - Percentage shares.
 - Reallocation of orphan/non-participant shares?
- Settlement opportunities for cash-out parties.
 - Post-Arbitration mediation?
 - Identify performing parties for implementation of the remedy.
 - Orphan/non-participant share reallocation.
 - Cleanup cost estimates.

Settlement of Claims

- Early cash-out settlements (e.g. for de minimis parties) are typically available.
 - Timing.
 - Settlement premium.
 - Consent Decree with EPA v. Private settlement with indemnity.
 - Full settlement – Frequently settlement without reopeners.
- Final settlement via Consent Decree with EPA or Ecology.
 - Covenant-not-to-sue.
 - Contribution protection.
- Settlement with other PRPs.
 - Resolution of claims for past and future cleanup costs.
 - Indemnification.

What Standards are Used to Allocate the Costs?

- Methodology.
 - Cost causation approach.
 - PRPs are allocated responsibility based upon the cause/effect relationship between the type, quantity, and location of the contaminant releases to the requirement that sediments undergo remediation.
 - Focus on “Remedy Drivers.”
 - What is driving remedy costs?
 - Certain contaminants?
 - Certain sources?
 - Certain areas of contamination?
 - “Gore Factors” and additional equitable considerations.
- CERCLA recoverability requirements.
 - Consistent with the National Contingency Plan (NCP).
 - Reasonable and necessary.
- MTCA recoverability requirement.
 - Substantial equivalent of a Department of Ecology remedial action.

Common Equitable Factors in Cost Allocations

- Volume.
- Toxicity.
- Culpability/fault.
- Care.
- Cooperation with agencies.
- Knowledge/acquiescence.
- Ability to pay.
- Economic benefit.

Dealing with Complicated Technical Issues

- Complex scientific and engineering arguments.
- Competing expert witness opinions on wide range of issues.
- Forensics analysis, fingerprinting, and source tracing.
- Fate and transport modeling.
- Major uncertainty on potential future costs.
- Evolution of industrial activities over time.
- Disparate levels of information and sampling data.

Challenges Posed by Allocation/Cost Recovery

- Structure of allocation proceedings to encourage both efficiency and fairness.
- Frequently involves high transaction costs.
 - Legal fees.
 - Experts.
 - Process costs.
 - Document management.
- Pursuit of Recalcitrant Parties/Non-Participants.
- Orphan Share reallocation.
- Participation of Federal Government PRPs.
- Synchronizing allocation with cleanup process.
- Interim remedy/adaptive management.
- Source Control/recontamination concerns.

Insurance Cost Recovery for Sediment Cleanups

- What types of insurance coverage are likely applicable to Sediment Cleanup costs?
 - Historic Comprehensive General Liability (CGL) policies.
 - Excess and umbrella liability policies.
 - Specialty environmental pollution products.
 - Pollution Legal Liability policies.
 - Contractors Pollution Liability policies.
 - Cost-Cap.
 - Negotiations over scope, triggers, reporting, and issues involving historic contamination.

Contractual Obligations under Liability Policies

- Insurer's duty to defend.
 - Determine the source, type, and extent of contamination.
 - Broad obligation that is easier to trigger than indemnity.
 - Claim within insuring agreement?
 - Without application of exclusions.
 - What does "suit" mean?
 - What is included in duty to defend?
 - Legal defense costs.
 - Consulting and expert costs.
 - Remedial Investigation issues.
 - Does not count against policy limits.

Contractual Obligations under Liability Policies

- Insurer's duty to indemnify.
 - Subject to policy limits.
 - Includes evaluation of exclusions.
 - Triggered by an "occurrence."
 - MTCA liability sufficient to trigger indemnity coverage.
 - What is covered?
 - Cleanup costs as "Property Damage."
 - Feasibility Study costs.
 - Implementation of ROD or Cleanup Action Plan.
 - Interim Actions.
 - Work performed by EPA or Ecology.

Tendering the Claims and Claims Handling

- Notify carriers of claims and tender defense ASAP.
- Require carriers to fully comply with lost policy requests.
- Submit pre-tender defense costs to carriers for reimbursement.
- Closely monitor reimbursements from carriers.
- Promptly respond to information requests from carriers.
- Provide carriers with opportunity to comment on proposed work and defense activities.

Gull Industries v. State Farm

- Court concludes that the term “suit” is ambiguous.
- “Suit” does not require filing of a Complaint or commencement of an administrative action.
 - Includes administrative enforcement acts that are the functional equivalent of a “suit.”
- Under a functional equivalent standard, “the duty to defend is triggered if a governmental agency communicates an **explicit or implicit threat of immediate and severe consequences** by reason of the contamination.”
 - “Explicit or implicit threat” means “adversarial or coercive in nature.”

Jorgensen Forge Corp. v. Ill. Union Ins. Co., No. 13-1458-BJR

- April 29, 2015: Court Rules on Motion for Summary Judgment.
- Involves the Lower Duwamish Waterway.
- Pollution Liability Policy at issue.
- Court grants Summary Judgment on four of five claims and thereby requiring the carrier to defend JFC.
- Court denies Summary Judgment as to defense obligation for Lower Duwamish Waterway Group's request that JFC participate in CERCLA allocation.

Jorgensen Forge Corp. v. Ill. Union Ins. Co., No. 13-1458-BJR

- Request to participate in LDW Superfund Allocation is not a “claim.”
 - LDWG “strongly encouraged” JFC to join.
 - Not an assertion of a legal right.
- The court determined that LDWG’s Allocation Demand Letter did not constitute a “**concrete threat of imminent harm should [JFC] refuse to join.**”
- Citing *Gull Industries*, the court concluded that the LDWG letter did not meet the threshold requirement of “**immediate and severe consequences.**”

Jorgensen Forge Corp. v. Ill. Union Ins. Co., No. 13-1458-BJR

- “Unlike the other claims in this case, Claim 2 is merely an ‘invit[ation]’ for voluntary participation. JFC faces no concrete threat of imminent harm should it refuse to join. *See Gull Indus.*, 326 P.3d at 790 (requiring threat of ‘immediate and severe consequences’). Accordingly, Claim 2 is not a qualifying claim.”
 - Court blurring “claim” and “suit” definitions by citing *Gull* decision.
 - Ruling will further embolden carriers.
 - Increased difficulty in prompt resolution of defense issues.

Triggering Defense Obligations after Gull Industries

- Practice pointers.
 - Tender as early as possible.
 - Push carriers for prompt defense determination.
 - Handling by carriers varies widely.
 - Be prepared to fight.
- Administrative responses by Ecology.
 - Revise MTCA program's VCP correspondence.
 - Where appropriate, include express statement of enforcement authorities under MTCA.
 - Consider issuance of PLP Notice Letters in more circumstances.

Strategic Considerations

- Maximize insurance coverage:
 - Historic research into liability coverage.
 - Pursuit of insurance claims.
- Pursuit of PRP cost-recovery claims against “Up the Pipe” Dischargers.
- Pursue Orphan Share compensation and de minimis cash-out settlements.
- If performing sediment remedy, properly managing PRP cash-out funds:
 - Maximizing funds contributed by other parties.
 - Pursue realistic remedy cost estimates with contingencies.
 - Pursue non-participants.



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