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Environmental Site Investigations and Remediation: Forensic Issues from Assessment to Zero-Valent Iron

I. Initiating a Proper Environmental Claim Investigation

Get all parties involved early

Once a claim has been initiated it is imperative to assemble the personnel and information necessary to properly address it. At the initial notice of a claim, there may already be public or private emergency responders present at the site. Police, firefighters, emergency remediation teams, and landowners may all be present attempting to assist in the immediate aftermath of an environmental incident. Getting the preferred claims managers, attorneys, engineers, and scientists involved early and communicating with each other can prove invaluable in obtaining a mutually beneficial resolution for all involved. This presentation will address strategies and best practices for legal, claims and engineering management for dealing with environmental events.

It is important to actively capture and preserve as much information from first responders as possible. If the incident occurred on public property (and often on private property as well) there will be police reports of the incident. There may also be reports from the local or state government, if their agents arrived at the incident site in a timely manner. If the matter occurred at a private facility, internal reports of the incident were likely prepared by the owner-operator. These reports may have valuable information about the material at issue, the actors involved, what occurred, and preliminary impressions of liability and damages. There will almost certainly be information about what actions the initial responders took, what was done to clean up, capture, or store any spilled material, and what still needs to be done.

In the event that the incident is one that attracts media attention, it important to be both organized and accurate and establish what local actor or representative can provide statements to the media. To the extent that details or consequences of the incident are unknown, do not provide statements that could be construed incorrectly.

Conduct a proper investigation

The first step in conducting a proper investigation is preservation of evidence. In order to preserve evidence, once emergency response has controlled any immediate issues at the incident site, the site should be left as unaltered and protected from third parties as possible. If necessary, spoliation letters should be sent immediately to the owners and operators of the

facility where the incident occurred. The site should be preserved as much as possible to allow for subsequent analysis. If it is necessary to obtain approval to gain access to this site from a third party private actor, begin that process as soon as possible. A balance of interests must be struck between accuracy and cost when it comes to getting engineers and inspectors on-site for an accurate and trustworthy analysis. In a perfect world it would be possible to get the best inspector to every site. The logistics and costs necessary to make this a reality are too large a hurdle. The goal should be to find a professional in the jurisdiction, with knowledge of the local statutes and regulations of that jurisdiction that can provide a thorough inspection without exorbitant cost. This can be obtained by using the networks and knowledge base of the interested parties.

This forensic analysis by the chosen engineers and inspectors, along with a review of all established facts from the previous reports by attorneys and claims managers, must identify the cause of the incident, the source and make-up of any lost material, the timing of all aspects of the incident, and all potentially responsible parties. Additionally important is to obtain knowledge of the site itself, including historical uses, previous releases, land uses, landowners, and topography. Claims managers and counsel should be simultaneously reviewing all relevant insurance policies thoroughly to ensure the appropriate insurance carriers are involved. In many cases, multiple policy periods with different carriers may be triggered by a single incident. Often it can take time to determine the various contributions of the carriers involved, but the initial carrier on notice has the duty to respond to the claim and initiate the investigation until those issues can be resolved.

It is critical that the forensic analysis include all possible options for remediation. The engineers and consultants on the ground, as well as attorneys and claims managers, should be aware of the possible solutions for remediation and the relative costs of each. Inherent in this analysis, particularly when the site is a bulk facility, is knowledge of the location and composition of previous releases. The goal of any investigation is to identify proper clean-up parameters for the incident at hand, and not to provide the owner or operator a free ride to unlimited services at a cost to the client or their carrier.

Parties must also consider alternative sources of funding like a tank fund or other government funding. Specific notification may be necessary due to an above-ground storage tank (AST) or underground storage tank (UST) release. In this situation, state funding may be available to assist with the forensic investigation into the spill. In these situations, there can be negotiated agreements between the insurance provider and the insured, with the assistance of counsel, to see that there is a mutually beneficial arrangement for all parties.

Know the science

Basic knowledge of the relevant scientific principals is a massive advantage to working in this field and dealing with environmental claims in general. For those that do not have an in-depth background in geology and chemistry, it is important to both learn as much as possible, and surround oneself with other knowledgeable trustworthy parties in every step of the claim investigation and remediation process. Even for those with a thorough understanding of the science, it is important to keep updated on the issues, including changes in both regulatory framework as well as investigation and remediation technology. We must be aware of the

limitations of our knowledge and surround ourselves with qualified professionals that can positively influence the project

Determine strategy of claim resolution

It is important to recognize that the policyholder, the carrier, and the legal and scientific experts that work for them may have differing interests at various times in the project. While one party may have a greater interest in keeping up-front costs as low as possible, another party may prioritize eliminating long-term liability or secondary exposure. It is the job of all actors within this investigation to properly identify and provide notice to all potentially responsible parties. Claims managers should also work to establish an accurate reserve for a specific claim as early as possible. It is important to work with engineering consultants to get an accurate projection for different remedial strategies based on the likelihood of the strategy being utilized. Agencies often take longer to approve remediation strategies than carriers want to wait to post reserves. Additional investigation can be required, which can mean months or years pass before the agency provides a final determination of what remedial techniques will be used. Claims managers must project what is likely to happen at the site even when a regulatory agency has not approved the activities necessary to complete the work.

Insurance carriers also need to identify any possible contractual or indemnification issues with any other party, whether directly involved or not. This may affect their role in the investigation over time.

Controlling remediation costs

An important factor in minimizing costs is that all parties agree on the project scope, rates, expenses, and mark-ups prior to beginning work on the project. Once again it should be emphasized the importance of retaining experienced counsel and consultants in this matter and optimizing existing relationships if possible. Service agreements between carriers, attorneys, and engineers can reduce cost and conflicts down the line. Competitive bidding and direct payment to subcontractors can minimize costs as well. Master Services Agreements with contractors should include final approval over subcontractors and scope of work.

Any contractor's complete scope of work cannot be predicted upon retention, but certainly the investigation and analysis aspect of the project can and should be controlled immediately. Even the most qualified engineers and scientists need to sometimes be reminded that a site assessment is a very specific job and not a science experiment. Phased budgeting can be used to control runaway contractors. Analysis should be done in accordance with what is necessary to identify the damage created by the incident and also to satisfy regulators at all levels in accordance with statutes and guidelines therein. Sampling should be extensive enough to include areas both certainly affected by the incident, as well as "control" areas that were most certainly not. Samples should be analyzed by labs that are approved by local regulators so as to avoid repeating steps and increasing costs.

Once a site has been evaluated and analyzed, a remediation plan with a clear start and end goal should be established and approved. To the extent that the forensic analysis shows the contribution of other historical releases or contributions from other potentially responsible parties, they should once again be notified, along with environmental regulators. A project

should be closed out with future liability in mind; and additional monitoring should be used as a last resort – particularly when the insured is not the owner or operator of the incident site.

Collaboration between carrier, counsel, and consultant

In almost any site investigation there will be at least four different actors: the carrier, the insured, the consultant, and counsel. In many cases there are more. It is important to establish communication guidelines between these parties. Often weekly or bi-weekly phone conferences or emails are necessary to ensure all parties are informed. The carrier and policyholder should be a part of every aspect of the decision-making process. All parties should be continuously informed and aware as indemnity and defense costs are incurred.

II. Case Studies

The key to handling an environmental claim properly is not one-size-fits-all, but the processes and principles espoused above can be used to properly address a huge variety of issues.

Scenario #1: Tanker accident in a rural area

A tanker truck was involved in a single-vehicle accident in a rural area, causing a large spill and accompanying fire. The local volunteer fire department was the first responder and washed the spilled fuel into a neighboring ditch. A down-gradient tenant drank water allegedly contaminated with this fuel and, on the poor advice of a state toxicologist, terminated a pregnancy, and then subsequently brought suit. Analysis of fuel in the tank and at its source facility revealed the tanker spill to be unleaded fuel, while the free product encountered on the down-gradient tenant's property was shown to be leaded fuel from historical releases. Thus, a very advantageous settlement was obtained on behalf of the tank line.

Scenario #2: PCE site contamination lawsuit

A dry cleaning chain brought suit against multiple parties for PCE site contamination based on failure-to-warn equipment defect claims. The issue at stake in the suit was whether product literature or equipment warnings made any difference in the handling of dry-cleaning solvents. Site data obtained during discovery demonstrated that patterns of contamination were similar for hydrocarbon solvent as well as chlorinated solvent. Thus, the carrier's position that sloppy operations and storage procedures, rather than lack of warnings or equipment defect, caused releases, leading to favorable settlement.

Scenario #3: One-time surface release at bulk facility

A one-time delivery at a bulk facility resulted in a surface release of hazardous material. After surface cleanup was conducted, property owner, through a lawsuit, and state environmental regulator, claimed the subsurface contamination was the result of that surface release. Borings conducted in the vicinity of surface release documented a below-ground level stop to the extent of the surface contamination followed by a gap of no contamination before deeper contamination was found. Investigation outside of the spill footprint also revealed subsurface contamination at depth. The data supported a conclusion that above-ground bulk tanks were leaking, resulting in the extensive subsurface contamination, rather than the one-time surface spill. An above-ground tank subsequently lost thousands of gallons of product overnight through a tank defect. The state regulatory agency dropped its contentions. The lawsuit by the property owner was successfully resolved with minimal further expense.