Key Questions When Mediating Environmental Disputes

By **Edward Cohen** (April 29, 2025)

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The U.S. Environmental Protection Agency has proposed dramatic changes to environmental regulations in recent months, including its announcement, in March, of what it called the "biggest deregulatory action in U.S. history."

Such sweeping changes inevitably create uncertainty — and uncertainty affects the ability to assess risk.

An unstable regulatory climate may give rise to additional disputes. Environmental disputes, by their nature, are generally complex and unique. However, almost every substantial environmental dispute involves several common issues that arise over and over — and there are proven approaches to successfully dealing with these issues in mediation.

This article examines some of these issues, and how to handle them. While each of the points noted below may not be directly relevant to every environmental dispute, it may prove helpful to consider these issues as a double-check before heading into the mediation.

Key issues that often are front and center — or at least lurking in the background — in many major environmental disputes include these general considerations:

1. What are the basic facts?
2. What are the claims?
3. What are the anticipated defenses?
4. Can you achieve finality and, if so, how?
5. What is the status of insurance, indemnity and contribution?

These questions can help the mediator, counsel and clients focus on the core issues at stake. In turn, this will hopefully increase the likelihood of a successful mediation.

1. What are the basic facts?

A threshold step in many environmental disputes is determining what substances constitute contaminants of concern, or COCs. Often equally basic is the question of whether the COCs moved from one property to another.

For example, assume a chemical from a manufacturing facility allegedly migrated to a nearby residential community. If offsite contamination is an issue, how did the COCs get offsite?

Did COCs migrate or spread because of air stack emissions, surface dust blowing, surface water runoff, groundwater migration, storm drains or sewers, or something else? And what properties are actually or potentially affected? Is this contention supported by modeling, or is it based on actual test results from the offsite properties?

If groundwater contamination is an issue, the parties need to know in which direction the groundwater flows. Likewise, if surface water, sewers or air emissions are the suspected vehicle for contaminant migration, the litigator needs to know in which direction surface

water flows, in which direction sewers flow or what the direction of the prevailing winds is, respectively.

Almost every environmental dispute involves the question of what will be needed to address or remediate the COCs. Are the parties dealing with a "forever chemical" or, instead, a chemical that may biodegrade over time?

Related questions can include: Are there human exposure routes? Is drinking water affected? Is vapor intrusion an issue? Are people exposed to chemicals on the ground surface — such as kids playing in yards containing high levels of heavy metals?

Knowing some or all of these basic facts is important when trying to resolve an environmental dispute.

2. What are the claims?

Just as with nonenvironmental cases, the environmental litigator needs to know what is being claimed. Relatedly, what is the basis of liability — owner, operator, arranger, transporter or another statutory basis?

Is a duty owed by statute, tort or common law? Some environmental cases are based solely on claims under statutes such as the Clean Water Act; the Clean Air Act; the Resource Conservation and Recovery Act; or the Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA — also known as the Superfund law.

Consider what statutory and state law claims have been or may be brought — and what relief could potentially be available from those claims. As with any dispute, the parties need to know the types of potential damages that may be sought.

Will there be a basis for claims of actual damages, punitive damages, remediation costs or injunctive relief — e.g., costs associated with cleaning up the site, or with conducting medical monitoring? Will attorney fees be sought? It is elemental to know, prior to a mediation, the types of damages claims that could be at issue.

3. What are the anticipated defenses?

Again, as in any case going to mediation, the parties should know the anticipated legal and factual defenses. Some cases involve contentions to the effect of, "My client only contributed a small amount of the COC compared to the other codefendants."

In contrast, a party may contend, "Yes, my client released a lot of a chemicals by volume — but my client's waste was not as toxic as other chemicals at issue."

A common question arising in multidefendant cases is whether the defendants will have joint and several liability. Because environmental litigation often focuses on corporate actions and activity from multiple decades ago, another common question is whether the entity in court today is indeed a legal successor to the entity that released the COCs decades ago.

For CERCLA claims, there are specific statutory defenses, such as the bona fide prospective purchaser defense. Environmental disputes also give rise to other defenses, including, by way of example, statutes of limitations, coming to the nuisance and federally permitted release questions.

Of course, there can be many more. These are just some commonly recurring issues to consider.

4. Can you achieve finality, and if so, how?

The resolution of environmental disputes often does not include the same finality achieved in other types of litigation. Managing client expectations on this issue is always important in advance of a mediation.

If trying to resolve a dispute with an environmental regulatory agency, will the resolution include a consent order? Will the resolution include a reopener provision? In a CERCLA action, will a settlement involving some potentially responsible parties yield contribution protection to those parties — or are additional claims still possible?

Another question affecting some environmental disputes is whether there still may be separate natural resource damages claims. Also, what about citizen groups or neighboring property owner claims? Consider whether such potential claimants could assert environmental statutory claims or state law claims, such as nuisance, trespass, property loss, personal injury and the like.

The type of environmental dispute at issue may largely dictate whether resolution of the pending lawsuit will provide the client with finality or whether resolution of the lawsuit is just one of several issues the client will eventually need to address.

5. What is the status of insurance, indemnity and contribution?

A key question to ask, simply put, is this: Is there someone else who may be able to pay for some or all of the costs that have been or will be incurred in resolving the environmental issue?

The separate concepts of insurance, indemnity and contribution in the environmental context are each the subject of countless articles if not treatises. These topics are combined here solely to remind the litigator to consider whether there are any options for getting some other entity to pay or help pay for a client's anticipated costs and expenses.

Is insurance available? Many environmental actions that involve historic liability may implicate older general liability policies. Policies issued in 1986 and before ordinarily do not contain absolute pollution exclusions. Thus, there are sometimes opportunities to obtain insurance coverage when these older policies can be implicated.

If older policies can be located, consider whether there is an argument for coverage. Did any events — e.g., incidents, releases, leaks — possibly trigger policies prior to the time that insurance policies contained absolute pollution exclusions? If so, did the policy contain a sudden and accidental pollution exclusion, or did the policy not contain any pollution exclusion language at all?

Even if a business can find an older policy with no pollution exclusion language, there are still other potential obstacles to coverage, including other policy exclusion issues to address. Also, consider whether there is an argument that a business can tap into a policy's broader duty to defend, even if it is presently unclear whether a duty to indemnify under the policy may ultimately exist.

If a policy may be available to help a company facing an environmental lawsuit, there are additional considerations. Does the policy erode? What are the policy limits? Are there excess policies?

More complexities arise when there may be multiple policies at issue, such as how much can be obtained from each policy — i.e., whether an issue will arise as to the pro rata method versus the all sums method of apportioning between policies.

Also, it is good to explore whether the company has any pollution liability policies that may provide pollution coverage in certain situations. And a final insurance consideration — particularly before a mediation — is whether notice to the carrier has or should be given.

Is there a basis for contractual indemnity separate and apart from the insurance context? A common contractual indemnity situation can arise in the buyer-seller context. For example, assume OldCo sells a former manufacturing facility to NewCo, and OldCo agrees to indemnify NewCo if any environmental issues arise due to OldCo's historic operations.

This situation, depending on the facts, could give rise to a contractual indemnity claim. Contractual indemnity could also arise under a commercial lease.

For example, if a strip center owner leases space to a dry cleaner, the lease may contain an indemnity obligation on the part of the dry cleaner to protect the building owner in the event the dry cleaner had a release of cleaning solvents.

Counsel must also consider contribution claims. Contribution claims, and contribution protection, can be very complex in the environmental context. CERCLA provides statutory provisions for contribution.

Also, contribution claims can arise from common law claims. Much is written on the topic of contribution in the environmental litigation context. The point here is just to ensure counsel reflects on this issue prior to the mediation.

Conclusion

One final consideration is what happens if there is no settlement at mediation. What is your client's best alternative or best outcome if the case does not settle? What will it cost the client to get to this best alternative to a negotiated resolution?

What is the worst scenario or outcome for the client if there is no settlement? How much might that worst case scenario cost the client? These concepts, and related calculations, are helpful to consider before mediation, so that counsel and client have estimated dollar figures at the ready from which the client can compare offers or demands received during the mediation.

Each of the considerations mentioned in this article may not apply in every situation — and, of course, many of these may apply equally well in nonenvironmental cases.

Because every dispute varies, there are also most certainly items not covered by this article. Nevertheless, the above points should help counsel prepare for an environmental mediation, by noting a number of key concepts commonly at issue in resolving environmental disputes.

Discussing the relevant items and considerations in a mediation statement, and during the

mediation, will hopefully help the parties, clients and mediator achieve a mutually satisfactory mediated resolution — even if the larger regulatory framework surrounding environmental issues is unsettled.

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