Round Table: Environment Law

We have spoken to some key figures from around the globe to dissect the issues which surround environment law such as recent regulatory changes and litigation risk. We also discuss the best strategy going forward for reducing emissions and attempt to predict what eco-friendly products could potentially dominate 2013 while also trying to foresee possible, future key trends.

Click or drag up to four experts into the centre of the table to read and compare their responses.
If using a smartphone just click on the expert's picture to select them.

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Lisa Bromberg is a principal of Porzio, Bromberg & Newman P.C. and a member of the firm's Environmental Law and Litigation department. Her practice encompasses the full gamut of compliance matters with a focus primarily on development and redevelopment work including permitting developments; marshalling support, financial and otherwise, from state and federal regulatory agencies; and negotiating the environmental provisions of property transfers. Ms. Bromberg counsels clients in the developing "green" movement by providing services in such green areas as renewable energy deals, lease provisions, financing for such transactions and newly emerging greenhouse gas emissions control and reporting obligations.

1) What Areas Are Currently Creating The Most Work For Environmental Lawyers?

The practice of environmental law has changed considerably over the last 25 years – from responding to notices of violation and understanding how best to comply with myriad regulations – to determining how to get ahead of the curve and be proactive. Areas such a green law and related marketing practices, issues pertaining to renewable energy and integrating it into the existing grids, introducing consumers into the renewable energy world, Power Purchase Agreements, understanding fracking and representing the various parties to agreements governing their respective rights (and managing the PR aspects of this divisive issue) are all matters creating work for environmental lawyers today. I strongly suspect that there will be a fair amount of litigation over the "green" claims that have become so ubiquitous and, in many instances, so misleading or inappropriate. I anticipate litigation arising from solar installations including property damage (to the roofs) as well as complex contract claims. Of course, any time an environmentally distressed property is involved in a transaction; environmental lawyers are needed to negotiate the terms of the agreement, allocating the environmental risks, liabilities and obligations. This provides significant work in the more industrialized states/areas where nearly all properties have environmental issues. Before the last economic downturn in the US, there was considerable interest in acquiring and rehabilitating environmentally contaminated properties. As the economy continues to recover, I am beginning to see renewed interest in this area, from entrepreneurs to investors (both private and public).

2) Have There Been Any Recent Regulatory Changes In Your Jurisdiction?

The regulatory program in New Jersey has experienced significant changes over the last several years. Through the promulgation of the Site Remediation Reform Act ("SRRA"), New Jersey has shifted from a program largely led by the state environmental agency, the New Jersey Department of Environmental Protection ("NJDEP"), to a privatized program led by Licensed Site Remediation Specialists ("LSRPs") or private environmental consultants, much the way both Massachusetts and Connecticut have done. This shift was necessitated by a long and large backlog of cases languishing at the Agency. The intention was to put compliance with the regulations into the hands of the LSRPs, who, hopefully, would expedite environmental compliance and avoid bureaucratic insistence on unnecessary regulation. The program has been mostly successful although the transition is ongoing. Some unfortunate results have arisen, however. As predicted, because their licenses may be on the line in the event of error or misjudgement, many LSRPs have become as or more conservative than the NJDEP had been. The allegiance of the consultant has, in many instances, shifted from serving the interests of the client to serving the interests of the NJDEP. This has also resulted in the need to employ two consultants – one to do the work and the other, the LSRP, to review that work for consistency with the applicable regulations and laws, resulting in higher costs to clients, which is, perhaps, ameliorated by a shorter compliance period.

3) Given The Fast Pace Of Change And An Increased Sensitivity To Litigation Risk, Is There A Greater Emphasis On Due Diligence?

The effect on due diligence depends on the transaction and the dynamics of the deal. There are instances in which other aspects of the transaction make the risks of environmental issues of less import. While there may, in fact, be other drivers for a transaction, the environmental issues associated with the assets being acquired should always be well and thoroughly vetted because in the end, whatever the original impetus for the deal, it is often eclipsed by environmental issues that were not fully delineated or understood. In a number of instances of which I am aware, the failure to properly and fully understand and track down all of the environmental concerns before the closing have totally "flipped" the economics of the proposed redevelopment. For example, significant contamination that was not detected prior to the closing could result in millions in unexpected remedial costs, rendering the redevelopment far more costly than had been planned and narrowing, if not totally eliminating, and the profit margin.

Because environmental issues carry such potentially expensive consequences, I consider the due diligence provisions of the transaction to be critical. They should be addressed early on in the deal in the Letter of Intent and subsequent documents. The more facilities involved at the more locations the more time is required.

Another wrinkle in the due diligence world in New Jersey was introduced with the SRRA, to which I alluded above. LSRPs are obligated by law to report to the NJDEP what are known as Immediate Environmental Concerns ("IECs"), potentially leaving the seller with lingering environmental issues while allowing the buyer to escape from the deal. While IECs are generally extreme environmental conditions that occur infrequently, the associated obligations for LSRPs lead many parties to elect not to have an LSRP conduct due diligence. Indeed, I generally counsel owners/sellers of assets with potential or known environmental issues to stipulate that an LSRP may not be used by the buyer to conduct the due diligence. For that reason, many environmental consulting firms in NJ have elected to have both LSRPs and non-LSRPs (who do not have similar obligations) on staff.

4) With Carbon Prices Plunging, What Measures Can Be Taken To Generate Real Incentives To Reduce Emissions Rather Than Just The Purchase Of Cheap Credits?

The Wall Street Journal has sponsored an "Economics: Creating Environmental Capital" conference for the last several years that generates ideas and innovations to economically stimulate change that could result in the reduction of emissions and stimulate renewable and alternative energies. There seems to be a clear consensus that the private market, through large investment funds such as the California Public Employees Retirement System ("CALPERS") and Dominion Resources Inc. can and are making a difference through their investment policies. Unfortunately, these investments have thus far been largely losing propositions, with CALPERS chief investment officer noting that such investments have been a "noble way to lose money." By way of solution, he posits perhaps taking illiquidity risks and getting paid for those risks. He notes that what would be needed to make these markets take off is for some entity to step in and either raise the price of carbon or lower the cost of the alternatives. Similarly, the CEO of Skoll Global Threats Fund believes that there can be no big change in the production of greenhouse gases unless there is a price on carbon that results in entrepreneurs knowing what to aim at and companies knowing what to produce. Others believe that as a country and world community we need to focus more on making green energy cheap and investing in research and development in that regard. Clearly, turning around the waning investments in the greenside of the energy spectrum would go a long way to stimulating change. While natural gas folks right now think it to be an attractive alternative, many warn that the energy needed to extract it bears more of a carbon footprint than was previously believed, even while it now accounts for some 30% of the US energy profile, up from 13% in 2000 and taking place only behind coal.

A tax incentive program tied into the reduction of emissions is always an attractive alternative to business and would, I believe, produce meaningful results. Since economics is always a powerful driver of change, I would challenge the economists to come up with a scheme that would induce business and industry to cut back on harmful emissions while impacting the bottom line. As a policy matter, it may be advantageous to first incentivise those businesses, such as power plants, that are creating a disproportionate amount of the carbon issues. A global solution, however, requires the participation of all countries in the world, a goal that has thus far proven elusive given the varying conditions of the world's economies.

A somewhat different economic approach to reducing emissions, while not specifically addressing industrial operations, is to continue to broker innovative approaches to the donation of land to Land Trusts across the country and world. This succeeds in protecting land from future development and increasing forests whose ecosystems can help to offset (NO HYPHEN) the escalation of the output of greenhouse gases. Approaching the top industrial entities as well as banks and other financial entities and discussing such options with them can lead to extensive and complicated negotiations but can ultimately result in very real tax, environmental and PR benefits.

5) Does Your Jurisdiction Offer Any Incentives For Organisations Which Meet Compliance With Environmental Legislation?

While New Jersey has no incentives, as such, for organizations complying with environmental regulations, a number of attractive funding programs provide monies to entities that are redeveloping environmentally contaminated properties. In many instances these monies are outright grants as opposed to loans (although lower cost loans are also available). We have worked extensively with many companies and the various state agencies (such as the New Jersey Economic Development Authority and the NJDEP) to successfully analyze and maximize the financial incentives available to developers and redevelopers from among the various programs. By way of example, one such program offers reimbursement of up to 75% of qualifying remedial costs at Brownfield sites. Because there are a number of such programs, it is advisable to review them all in the context of the proposed project so as to factor them into the economic pro forma. This has been a great boon to developers working in New Jersey.

6) Are There Any Natural Resources Being Factored Out?

I am not sure what this means. But, let me take an opportunity to comment on the issue of natural resource damages (“NRD”). For many years, NRD damages were a huge issue in environmental law in the US, generating significant funds for the state and federal environmental agencies and costing companies millions of dollars. In recent times, however, we are seeing less of an emphasis on NRD damages, except in the largest and most egregious instances. We are also seeing a shift from entirely monetary compensation in such cases to a mix of monetary compensation and environmentally advantageous projects such as the creation of wetlands, dedication of property to land trusts, and the like.

7) What Eco-Friendly Products Or Innovative Technology Can You See Taking 2013 By Storm?

We are seeing increasingly positive results coming from technologies such as In Situ Thermal Desorption that essentially heat up contaminated soil/groundwater for the purpose of volatilizing-off the contaminants. These technologies are becoming increasingly used and increasingly more effective and surgical in their application (i.e., targeting specific and carefully delineated areas of a site). Unfortunately, this technology requires significant energy, which is a drawback, not only in terms of cost but also in terms of the environment and the carbon footprint for the remediation. Indeed, I firmly believe that we are fast approaching a significant turning point in the treatment of contaminated soil and water, examining that carbon footprint and other consequences of these “fixes” that we have been applying over the last several decades. That I believe to be the biggest challenge to environmental law going forward. We will need to find ways to use renewable energy sources in remedial programs more effectively. We are making a start, for example, BY partnering solar panels on capped waste sites but have a long way to go.

10) What Key Trends Do You Expect To See Over The Coming Year? In An Ideal World What Would You Like To See Implemented Or Changed?

As noted above, I believe that over the coming year we will begin to start evaluating how and why we are remediating contamination in the soil and groundwater, from both risk/benefit and environmental perspectives. As energy continues to be a consideration, we must look at how and why we may be addressing these issues. While private industry can certainly evaluate these issues, I believe that the environmental agencies of the state and federal government must take the lead in identifying what must be addressed, what “contaminants” we might be able to leave in the soil and groundwater, and in stimulating the private sector to innovate.