Plain Language

To speak effectively, plainly, and shortly, it becometh the gravity of the profession.
— Sir Edward Coke, 1600

Plain English and Common Sense in Settling Environmental Litigation

By Stewart H. Freeman

Where a polluter and the government are negotiating a settlement agreement in environmental litigation, the agreement should, if possible, close the books on the dispute.[1] Generally, that means that the government will ask for an abatement program, or alternatively, money to pay for a cleanup, while the alleged law violator will ask for a release from all future obligations under potentially applicable legal theories.

Counsel for a potentially responsible party should not, however, simply go to the library and pull out a form book — probably written long ago and likely never updated — to find the redundant legalese used by a past generation of lawyers to settle individual tort claims.

In a recent case, the government, lawyers for the potentially responsible party and two environmental organizations reached an agreement. Everyone present initialled a document, shook hands, and declared the matter settled. Two days later, lawyers for the company circulated an additional document which — as the mayor once said to the Pied Piper of Hamlin — contained just "a clause of sorts, required by the law of torts."

The new document (entitled "Agreement") was three pages of form book legalese, including such quaint antiquities as:

> **"1. The State hereby releases, discharges, and absolves . . . (the Company) its divisions, subsidiaries, affiliates, parent corporations, and their officers, directors, agents, servants, employees, successors, and assigns (collectively referred to as "Company") from any and all claims, damages, penalties, fines, causes of action (whether equitable, declaratory, legal or administrative), known or unknown, arising out of or relating to any discharge, directly or indirectly, into the waters of the State of Michigan (as defined in PA 1929, No. 245, MCLA 323.1 et seq.) prior to July 1, 1988, or any release (as defined in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 USC 9601 et seq.) prior to July 1, 1988, or failure to prevent any such discharge or release, of any waste, wastewater, effluent, pollutant or chemical substance.**
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> **"2. Further, the State covenants not to sue or institute, initiate, intervene, or otherwise participate in any judicial or administrative proceeding against the Company relating to or arising out of any release or discharge (as defined in paragraph 1 above) or failure to prevent any such release or discharge, of any waste, wastewater, effluent, pollutant, or chemical substance.**
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> **"3. This Agreement shall release the Company from any and all claims, damages, penalties, fines or causes of action which could have been, or might have been in the future but for this Agreement, commenced by the State against the Company for acts or omissions specified above under any state or federal common law, statute or regulation including but not limited to the following statutes, as amended, and any regulations or rules promulgated thereunder . . ."**

The bureaucracy and the environmental groups were outraged. How dare the company come in at the eleventh hour with such an outrageous demand?

Yet appropriate release clauses are routinely included in environmental settlements. A recent judgment resolving litigation concerning a hazardous waste site provided (at p 18):

> **"19. *Discharge of Claims.* Compliance with this Decree and Order is in full discharge and release of all claims of the parties."**

The issue, therefore, is not substance but language and style. The state agency officials and the environmental leaders, who were agreeable to a complex settlement with a simply worded release, ultimately to appear at page 18 of a long document, refused to agree to a long separate document of archaic legalese.

Compare the two approaches. The goal, after all, is to close the books on the dispute. The target audience for a complex hazardous waste settlement is comprised of state officials, environmen-

This is the eighth in a series of articles coordinated by the Plain English Committee of the State Bar of Michigan. The articles are written by sections, committees, groups and individuals interested in promoting plain language in the law.

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tal organizations and, usually, a discrete population who perceive themselves as victims of the situation. Such an audience has little sophistication in legal phraseology. Phrases such as "any and all claims . . . known or unknown" frighten them. In trying to achieve the goal of settlement, it is only reasonable to keep the legal jargon as simple as possible.

The same rule applies to language defining the obligations of the parties. If the obligation may be stated simply, it should be.

Citizen concerns need to be anticipated in drafting an environmental settlement. After all, of what practical use is a proposed "settlement" which is never finalized because of public objections?[2]

Addressing a community concern that a settlement between the company and the government would adversely impact third-party litigation, the *Hooker Chemical* judgment[3] provided:

> **". . . the rights of persons not parties hereto shall not be affected by the terms of this judgment."**

Addressing a community concern that the moving plume of groundwater would contaminate residential wells, the *Bofors*[4] judgment provided:

> **"20. If residential or municipal water wells within or adjacent to the plume of contaminated groundwater to be identified pursuant to Paragraph 10 are found unfit for domestic use by the Michigan Department of Public Health and/or the Muskegon County Health Department because of chemical contaminants from Bofors, Bofors shall immediately provide a potable water supply, approved by the State of Michigan and local Health Departments, to affected well users for all domestic purposes. That obligation shall continue until the Michigan Department of Public Health or Muskegon County Health Department determines in writing that the water wells have become fit for domestic use. Affected landowners can reject the potable water supply to be offered pursuant to this paragraph."**

Similarly, a dispute resolution mechanism need not devolve into paragraph after paragraph of legalistic verbiage. A recent example provided:

> **"14. *Dispute Resolution.* If the parties fail to reach an agreement on any matter required to be accomplished herein or should the State withhold any approval or disapprove any plan, activity, proposal, or requirement, or portion thereof, set forth in this Decree, either party may, upon prior written notice to the other party, promptly petition the Court for a resolution of the dispute."**

Finally, while . . . a few, very general releases — referred to as "pay and walk" — were negotiated by the Federal government to settle litigation over hazardous waste sites, it is unlikely that future hazardous waste cleanup actions will be settled for a release broader than the scope of work. Whether the potentially responsible parties agree to perform according to the scope of work, or alternatively, agree to pay the cost of implementing the prescribed work, it is not reasonable (and, hence, poor negotiating) to demand a release of liability which is broader than the scope of work.

If, for example, the scope of work agreed upon involves only a surface cleanup, leaving for study and later decision the issue of whether any groundwater restoration is needed, the release given by the government won't include groundwater. Why should it? ■

Footnotes

1. For an excellent discussion of settlement goals from the perspective of corporate defense counsel, see Steven Tasher, "Practical Issues and Hazardous Waste Litigation — Cleanup Negotiations," *Hazardous Waste Litigation 1982* (H4-4870), Practicing Law Institute, NY.
2. For a discussion of this subject, see *Dumpsite Cleanup: A Citizen's Guide to the Superfund Program*, published by the Environmental Defense Fund, Washington, D.C.
3. *Kelley, Attorney General v Hooker Chemical & Plastics Corp.* Ingham County Michigan Circuit Court No. 79-22878-CE, Consent Judgment of October 30, 1979.
4. *Kelley, Attorney General v Bofors Lakeway, Inc.* Ingham County Michigan Circuit Court No. 79-31180-CE, Consent Judgment of September 21, 1981.