Plain Language

To speak effectively, plainly, and shortly, it cometh 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. 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 initialed 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, or injunctive or declaratory relief, 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. 278, MCLA 323.1 et seq.) prior to January 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.

"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.

"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-
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1137 South Adams • Birmingham, Michigan 48011
(313) 644-1633

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.