

Litigation and Allocation Support

In the current regulatory environment, companies of all sizes are faced with the challenge of having to litigate environmental matters involving lawsuits with state and federal agencies, insurance policy coverage, or issues related to third-party contributions. Successful litigation includes two critical factors: the development of strong, defensible technical positions, and the ability to communicate critical technical information to lay audiences.

Windward scientists and engineers have experience in supporting clients in all facets of environmental litigation, including serving as testifying experts and consulting experts. As testifying experts, we have written expert reports as well as testified. As litigation consultants, we have worked closely with clients to develop overall case strategies and identify appropriate testifying experts. In both types of support, Windward's strength resides in the combined experience of our staff and our range of expertise.

Windward regularly assists clients in managing a variety of environmental liability issues. The focus of our approach is to provide clients with comprehensive, cost-effective solutions—solutions that place the client in a strong negotiating position with regulatory agencies, insurance companies, and third parties. Understanding how liabilities, such as contamination or land development, affect local and regional natural resources and are perceived by the local community and stakeholders is key to developing liability management strategies.

Cost Recovery

Windward staff have been retained as testifying experts addressing response action costs at multiple Superfund sites, including providing descriptions of historical operations and the relationship between those operations and potential hazardous substances releases. To understand historical operations, Windward has used available records and public archives to synthesize historical photographs, site maps, documentation of site activities, and environmental investigation datasets to produce a coherent source history. The historical information is displayed using geographic information system (GIS) tools to better understand the relationship between possible locations of historical releases and the current distribution of contaminants. Such analyses are critical when separate releases may have occurred from multiple parties operating on the same parcel of land. Where appropriate, Windward has also combined the history of a chemical's development and use with historical operations to assess the probability of the chemical's release from a given site.

Windward has provided analyses and testimony on whether response costs are consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), and whether response actions are necessary under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the NCP. Analyses have involved cleanups conducted under CERCLA, as well as voluntary cleanup actions intended to determine whether the actions met the "Superfund-quality cleanup" definition that passes the "substantial compliance with the NCP" threshold.

Allocation

Working with a number of confidential clients, Windward has provided technical support in cost allocation efforts at multiple cleanups sites. As part of these efforts, Windward has developed conceptual site models that combine upland characterization data and current and historical activities with an assessment of transport pathways and sediment contamination patterns. In addition, specific source locations, sediment transport modeling, dredging history, and forensic analysis results were integrated into the site models to provide weight-of-evidence support. Graphics, timelines, and data-rich maps that integrate historical property use and ownership information with site characterization data were produced to facilitate communication and understanding of the conceptual site model.

Litigation Support

Senior Windward staff have served as testifying and consulting experts assisting attorneys on a number of environmental cases involving or anticipating litigation. These cases have involved CERCLA, state-lead cleanups, natural resource damages, National Pollutant Discharge Elimination System (NPDES) permits, water quality standards, and environmental response and insurance cost recovery. Cases have included both domestic and foreign environmental matters.

For example, Windward has assessed the potential range of ecological impacts associated with a submerged ship off the coast of a foreign country, identifying key issues; interpreting foreign environmental regulations; coordinating with a multinational team of legal, insurance, and technical experts; and producing a comprehensive technical document that evaluated onboard contaminants released and potential impacts on local fisheries and marine habitats. The vessel was permitted to remain based, in part, on Windward's evaluation, which returned a \$2.6-million bond to the client and a saving more than \$20 million in potential salvage costs.

Other projects concerning litigation support have involved:

- Showing that discharges under an agency NPDES investigation were tidal backwaters, not illicit discharges, and identifying process water issues and solutions
- Presenting technical testimony at NPDES permit appeal hearings, developing technical strategies for settlements, and negotiating permit conditions
- Helping testifying experts develop hearing testimony for new water quality standards for metals and site-specific criteria; working with a coalition to evaluate new standards
- Designing and implementing special field studies and evaluating historical data to defend against NRD claims and NPDES permit effluent limits
- Crafting expert reports to defend against allegations adverse to cleanups and NPDES permits