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Helping Business By Building Predictability Into Environmental Regulations

The Editor interviews Andrew B. Robins, Chair of the Environmental Law Practice Group, Sills Cummis & Gross P.C.

Editor: Please describe your extensive practice in environmental law and land use.

Robins: For over two decades, I have focused on transactional matters, cost recovery litigation, penalty enforcement defense, compliance issues and obtaining permitting approvals. I've assisted clients in the environmental arena by identifying, quantifying and minimizing risks and liability exposure and addressing critical paths for approvals. My client roster includes mostly large to medium-size businesses throughout the greater metropolitan area. It has been an exciting practice that I hope to continue for years to come.

Editor: Tell our readers about your service in developing the Licensed Site Remediation Professional (LSRP) and Site Remediation Reform Act (SRRA) legislation in New Jersey.

Robins: As in many areas of environmental law, site remediation involves a myriad of complex regulations and requirements. In New Jersey, this was further complicated by a process that required detailed and often unnecessary review by the state on a step-by-step basis. In the past, the focus was process driven rather than result driven, causing significant backlogs and delays in achieving remediation goals throughout the state.

To the credit of the Department of Environmental Protection and then Commissioner Lisa Jackson (who is now the EPA administrator), the state recognized that the system was flawed. No one's goals were being achieved: sites weren't being cleaned up, projects were delayed and investors were not putting money into projects where remediation could take place because there was

no predictability for cost or for timing. For our clients, predictability and a degree of finality are critical components of the decision-making process.

In February 2007 the state convened a group of stakeholders to come up with a new system that would achieve the dual goals of allowing sites to move forward quickly with remediation and doing so in conformance with the legislature's established goals of protecting human health and the environment. Having had many years of experience working with remediation projects, I was asked to be part of that group. Massachusetts and to some degree Connecticut had already established models that we looked to. New Jersey adopted many but not all aspects of the Massachusetts program. It was a lengthy process – about 24 months – before legislation was drafted. That legislation was signed into law by then Governor Corzine in May 2009.

Some of the issues are still being worked out today, but the new process has been accurately described as a sea change in the site remediation process in New Jersey. I was privileged to be included representing the regulated community groups to help ensure that the program would work for those looking to develop and remediate sites in a time-efficient, cost-effective way. I worked with the DEP and other stakeholders to make suggestions on language that would reflect the stakeholders' vision, which you see today in the Site Remediation Reform Act legislation. My involvement continues as part of DEP's Site Remediation Steering Committee.

Editor: Please describe the change from state environmental inspectors to site remediation professionals. How will this



Andrew B. Robins

affect owners of contaminated properties in terms of land remediation?

Robins: In May 2012 the three-year phase-in process for the new program ends, and all sites in New Jersey will be under the review of Licensed Site Remediation Professionals, or LSRPs, with very few limited exceptions. Thousands of cases will come under review of one of the LSRPs. In the past an interested party hired a consultant who would investigate the site, work with the party to identify approaches to remediate the site and submit reports to the state of New Jersey every step of the way. Those reports were reviewed, commented on and revised as required by the state case manager, who may not have visited the site but was nonetheless involved in reviewing every minor and major detail. Frequently the case managers were overwhelmed by the number of reports waiting to be reviewed. But at the end of the day, the burden for developing the remediation approach was with the consultant and the party that hired the consultant, who then would need to get approval from the DEP.

The new system turns these private consultants into consultant-regulators. Not only must these individuals meet their clients' objectives, but they must also put their own licenses on the line when they verify that remediation work meets the goals established by the state. The clean-up standards – the ultimate goal of remediation – are still prescribed by the state of New Jersey, but instead of DEP staff reviewing every minute detail, they can now focus on big-picture issues, such as protecting public water supplies and other sensitive receptors.

Editor: Who sets the licensing standards for LSRPs?

Robins: The licensing standards for LSRPs are established by the statute. During this initial phase – where we are today – LSRPs are working under temporary licenses. The permanent license program, which has just been

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announced, requires a total of 5,000 hours of remediation experience over the last five years – at least three of them in New Jersey – and a bachelor's degree or better in science or other field related to remediation.

Applicants will take a test, which is currently being formulated. LSRPs will have ongoing continuing education requirements, and their work will be reviewed periodically by both the DEP and the LSRP licensing board. LSRPs have an extensive code of conduct. The enforcement and licensing entity for LSRPs is the board, whose members are appointed by the governor and confirmed by the State Senate.

Meanwhile, DEP reviews and audits the actual work done on behalf of the regulated parties and will also review a certain percentage of those cases on a detailed basis. DEP prioritizes the reviews based on specific concerns, such as protection of a nearby public water body or water supply.

Compensation for LSRPs is decided by the parties hiring the LSRPs and the LSRPs themselves in an entirely market-driven process. I expect that over the next few years, the market will establish accepted rates based on the effectiveness and skill of LSRPs.

Many of our clients achieve the optimal result both for themselves and for the environment by working with a team encompassing a range of skill sets – including legal expertise – that can facilitate checks and balances throughout the process.

Editor: You have been deeply involved in the DEP's programs as a member of the stakeholder group. Please describe the new programs.

Robins: The stakeholder process that led to the Site Remediation Reform Act became the template for current DEP Commissioner Martin to expand into other groups in the department. While budgetary concerns helped drive this, the primary goal was to create a more efficient, user-friendly set of programs that met the standards the legislature had set forth in protecting human health and the environment.

The site remediation program reform did not end with the Site Remediation Reform Act of 2009; rather, stakeholders continued to work with DEP in their efforts to draft the new regulations that are scheduled to come out this May. Stakeholders continue to be involved in DEP's drafting of a series of detailed technical guidance documents that will be used to assist LSRPs – which, while non-binding, will at least serve as the initial guide for LSRPs. The site remediation program also has a steering committee composed of many of us who were involved in the stakeholder process, and we meet periodically to identify issues of concern and work

toward solutions.

Discussions and stakeholder groups are underway across DEP, and I am involved with most of those. Meetings on reforming DEP's Land Use programs, which touches upon most aspects of development throughout the state that impact natural resources, have begun. There is robust ongoing discussion with the Solid and Hazardous Waste programs. DEP's Compliance and Enforcement program also has a transformation process underway. Overall, we are looking to increase efficiencies while still meeting the primary goals of appropriate waste disposal and minimizing waste in the first instance.

Editor: I assume these stakeholder groups are volunteers.

Robins: Yes, those of us involved are there because we can all take concepts learned in decades of reality on the ground and work for a better way of achieving DEP's goals. Each of us serves voluntarily. My perspective is that while the working groups get the benefit of my experience and insight, I am able to work with key DEP decision makers to create a better process. The potential to create a better process has great value for my clients, and I have gained a deeper understanding of how to work with DEP to achieve my clients' goals.

Some DEP personnel were skeptical, and some remain less than pleased with the reforms underway. Most of the DEP staff I continue to work with are highly motivated and skilled in their positions, and they are recognizing that there are better ways of working that actually increase their ability to influence businesses and households to help safeguard the environment. For example, we're in discussions with DEP's enforcement group about how they can work with regulated entities so that compliance assistance from the DEP comes first, and the threat of enforcement is used as a last resort. Most of us can agree that the more efficient the enforcement staff can be in working with people to be compliant without taking enforcement actions, the greater the likelihood that the goals of protecting the environment will be achieved.

Editor: In what ways have these new programs eased the burden on property owners?

Robins: The new LSRP program provides an amazing capability for private parties to obtain predictability of both cost and time in the remediation process. While previously there was no clear way to control how long DEP reviews would be, now an LSRP can be relied upon to achieve a predictable set of goals within a relatively defined range of

costs and time. This kind of predictability is essential for investment. Other innovations are being worked on that can have similar results.

Editor: What motivated the EPA to propose keeping greenhouse gas (GHG) permitting thresholds at current levels, and what are your thoughts on its new approach for streamlining the GHG permitting process?

Robins: Our clients have looked at the issue of greenhouse gas as a complex set of interlocking issues that requires a much more refined approach to understanding the true impacts both from an environmental and economic perspective. EPA's prior approach in many people's opinion was too aggressive, particularly with our country's economy still in a nascent recovery. I think a fair reading of EPA's action reflects their attempt to move towards a more complete understanding of how to achieve goals in an economically efficient way.

It is difficult for EPA to take approaches that allow for a greater level of flexibility, and I think all of us in the regulated communities recognize that efforts by EPA to increase flexibility should be applauded. EPA is under the leadership of Lisa Jackson, with whom I interacted when she was commissioner of DEP in New Jersey. I know her to be a highly competent, very intelligent person, who carefully thinks through approaches to the challenging goals that environmental agencies face.

Editor: Would you comment on the recent discussions about the Clean Air Act in the DC Circuit?

Robins: Resolving complex issues by judicial action should be our society's last resort. Regulatory changes should be sought through meticulous and thoughtful discussion. The more complex an issue, the less likely a judicial result will be balanced and/or effective. There is a need to have the GHG issues addressed comprehensively.

Editor: Is there anything further you would like to add?

Robins: Each client, each site brings with it nuances and needs that are unique. There is no cookie-cutter approach that can be applied universally. Those of us in the practice must be able to translate the needs and the specifics of a single site or client into the broader framework of programs that protect the greater health of our society, economy and environment. Because of that challenge and my ability to meet that challenge, I am able to provide value to my clients.