

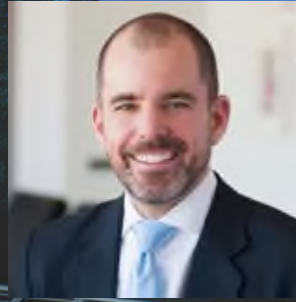
# **BENEFICIAL REUSE OF CONTAMINATED SEDIMENTS: LEGAL LIABILITY CONSIDERATIONS PANEL**

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10:40 am

# Presenters



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**Part I (A):**

# **Potential Federal Liabilities Associated With the Beneficial Reuse of Sediments**

# Federal Statutory Schemes

- Distinguish between sediments removed during navigation dredging (CWA or MPRSA) and sediments excavated for environmental remediation (Superfund).
- Placement cannot take place until a project-specific review has been conducted and the required permit or authorization has been issued.
- Different types of permits must be secured for the placement of sediments:
  - The dumping of sediment in the ocean (under the MPRSA)
  - Inland waters or wetlands (under CWA)
  - The construction of land or containment facilities (under the RHA)
  - The containment of contaminated sediments on land (under the RCRA)

# Regulating dredged material as a “waste”

- limits beneficial use projects because the philosophy behind solid waste management is one of containing wastes to prevent their escape into the environment.
- strict numerical standards are applied
- the least costly alternative for placement of dredged material is most often open water disposal or, when the material is prohibited from open water disposal, placement in a confined disposal facility (CDF).
- Negative public perception

# CERCLA Liability

- CERCLA establishes a framework to hold the parties connected to contaminated sites responsible for cleanup costs either through EPA enforcement actions (§ 106) or by private parties seeking to recoup cleanup costs (§ 107).
- Private parties and federal, state, and local governmental entities who own, operate, dispose of, or arranged for the disposal of hazardous substances at a facility can be liable.
- Natural resource damages resulting from sediment contamination may be recovered by the United States, State, and foreign governments, and Indian Tribes and their members.
- CERCLA include exemptions and protections for categories of parties who meet certain criteria
  - Including for Federally Permitted Releases

# CERCLA Section 121(d)(3)

- CERCLA Section 121(d)(3) applies to any CERCLA response action involving the off-site transfer of any hazardous substance, pollutant, or contaminant (CERCLA wastes).
- CERCLA wastes may only be placed in a facility operating in compliance with the Resource Conservation and Recovery Act (RCRA) *or other applicable Federal laws* and State requirements.
- EPA's Regional Offices will determine the acceptability of any facility selected for the disposal of CERCLA waste.
  - These principles are interpreted in the Off-Site Rule (OSR), set forth in the National Contingency Plan, at 40 CFR 300.440.

# The Marine Protection, Research, and Sanctuaries Act

- Section 1413 of the MPRSA provides that the Secretary of the Army may issue permits for the disposal of dredged material that “will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities.”
- Regulatory criteria for site designations is established by EPA pursuant to Section 1412(a)
  - sediment quality criteria regulations found at 40 CFR Part 227
  - a set of memoranda or “manuals” developed under the regulation to provide national technical guidance for determining the suitability of dredged material for disposal in ocean and inland waters through physical, chemical, and biological evaluations.



# The Coastal Zone Management Act (CZMA)

- Under the CZMA, coastal jurisdictions may develop their own coastal zone management programs, which are subject to federal approval by the National Oceanic and Atmospheric Administration (NOAA) in the Department of Commerce.
- Once a given coastal zone management program is approved, activities that affect the coastal zone shall be carried out in a manner consistent with the State management programs.
- Federal agencies must issue a consistency determination to the relevant State agency no later than 90 days before final approval of a federal activity

# Clean Water Act

- CWA directs the Corps to issue permits for discharges of dredged or fill material based on the application of EPA guidelines, published at 40 C.F.R. Part 230.
- These guidelines establish that:
  - (1) no discharge will be permitted if “there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystems, so long as the alternative does not have other significant adverse environmental consequences,” 40 C.F.R. § 230.10(a); and
  - (2) “no discharge . . . shall be permitted which will cause or contribute to significant degradation of the waters of the United States.” Id. § 230.10(c).

**Part I (B):**

# **Select Potential State Liabilities Associated With the Beneficial Reuse of Sediments**

# California

- Hazardous Substance Account Act (HSAA)
  - Substantially like CERCLA, incorporates definitions of covered persons.
- California Hazardous Waste Control Act (HWCA)
  - covers those who transported and arranged for the disposal of hazardous substances at hazardous waste sites.
  - regulations issued under the HWCA are substantially more stringent, especially in the classification of what constitutes hazardous wastes.
- The Porter-Cologne Water Quality Control Act
  - uses the National Pollutant Discharge Elimination System (NPDES) permits for point source discharges and waste discharge requirements (WDRs) to maintain water quality in the State.

# Wisconsin

- Wisconsin Spills Law requires a person who possesses or controls a hazardous substance discharged to the environment to take the actions necessary to restore the environment and minimize the harmful effects from the discharge to the air, lands or waters of Wisconsin.
- The owner of a contaminated property has “possession and control” of the hazardous substances discharged on that property and is responsible to take remedial action regardless of whether that person caused the discharge.
- Penalty provisions of the Wisconsin Spills Law apply in equal force against the owner of the property as well as the party that caused the contamination.

# New Jersey

- Spill Compensation and Control Act (The Spill Act)
  - imposes liability on property owners and any person that discharges a hazardous substance or is in any way responsible for the discharge of a hazardous substance.
- Site Remediation Reform Act
  - Any remediation conducted in New Jersey must follow the Technical Requirements for Site Remediation under the supervision of a Licensed Site Remediation Professional (LSRP)
  - allows LSRPs to use professional judgment to apply technical requirements and guidance
- Industrial Site Recovery Act
  - requires owners of industrial establishments to investigate and remediate sites prior to the transfer of ownership or when operations cease.

**Part II:**

# **Case Studies**

# DuPont Grasselli Landfill Site, NJ

- From 1885 to 1928, the site was used for chemical manufacturing by Grasselli.
- From 1928 to 1990, the plant was used by DuPont for manufacture of chemicals and pesticides.
- The site underwent pre-consolidation with dredge material and was graded for development above the base flood elevation line.





**Part III:**

# **Potential Solutions**

# Potential Liability/Risk Shifting

- Material Acceptance Agreement or project contract provisions
- Releases and Covenants Not to Sue from State and Federal Agencies
  - Expanded scope to include emerging contaminants

# EPA Model Consent Decree

## XV. COVENANTS BY PLAINTIFFS

**68. Covenants for Settling Defendants.** Subject to ¶¶ 71 and 72, the United States covenants not to sue or to take administrative action against Settling Defendants under sections 106 and 107(a) of CERCLA regarding [the Site] [the Work], Past Response Costs, [and] Future Response Costs].

“Site” means the \_\_\_\_\_ Superfund Site, [comprising approximately \_\_ acres, located at [address or description of location] in [city], \_\_\_\_\_ County, [state], and depicted generally on the map attached as Appendix C.]

“Work” means all obligations of Settling Defendants under Sections VI (Performance of the Work) through IX (Indemnification and Insurance).

# EPA Model Consent Decree

## 71. United States' Pre- and Post-certification Reservations

- a. Notwithstanding any other provision of this Decree, the United States reserves, and this Decree is without prejudice to, the right to issue an administrative order or to institute proceedings in this action or in a new action seeking to compel Settling Defendants to perform further response actions relating to the Site, to pay the United States for additional costs of response, or any combination thereof. The United States may exercise this reservation only if, at any time, conditions at the Site previously unknown to EPA are discovered, or information previously unknown to EPA is received, and EPA determines, based in whole or in part on these previously unknown conditions or information, that the Remedial Action is not protective of human health or the environment.

# EPA Model Consent Decree

**72. General Reservations.** Notwithstanding any other provision of this Decree, the United States reserves, and this Decree is without prejudice to, all rights against Settling Defendants regarding the following:

b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Site;

“Waste Material” means (a) any “hazardous substance” under Section 101(14) of CERCLA; (b) any pollutant or contaminant under section 101(33) of CERCLA; (c) any “solid waste” under section 1004(27) of RCRA; and (d) any [“hazardous material”] under [**insert appropriate state or tribal statutory terminology and citation**].

# Interagency Task Force

- Advance beneficial use and ensure more effective administration of projects.
- Establish Uniform Testing Protocols and evaluation procedures for identifying appropriate beneficial end uses.
- Develop guidelines and regulations pertaining to the beneficial use of dredged material.
- Be responsible for overseeing beneficial use projects.
  - Coordinate public education campaigns
  - Develop long-term monitoring programs
- Be the point of contact for soliciting or responding to private interests in utilizing dredged material

# Regulatory/Statutory Change

- Expand the current federal program for beneficial use of dredged material (Section 204, WRDA) to all beneficial uses
- identifying specific applications that define beneficial use of dredged material
  - In New York, dredged material ceases to be a solid waste if it is used in a manner that conforms to state regulations governing beneficial use. This practice is called a “Beneficial Use Determination,” or BUD. In practice, this process is used specifically to avoid placing dredged material into the solid waste framework, which would complicate, if not prohibit, beneficial use.
- defining and regulating dredged material as a type of excavated material
  - In Minnesota, regulating dredged material as an “excavated material” avoids having to manage it as a waste and provides opportunities for beneficial use.

# Regulatory/Statutory Change

- Development of a consistent or parallel set of risk-based requirements for evaluating dredged sediments
  - Do not differentiate (absent a compelling technical justification) among inland, estuarine, and ocean placement
  - Do take into account site-specific biological, chemical, and physical conditions that bear on risks to the environment and human health.
  - Do consider the relationship between environmental and economic costs and benefits.



# Q&A/COMMENTS

A photograph of a modern building's glass and metal facade at dusk. The building features a grid of dark metal frames and translucent glass panels. A prominent, curved spire is visible on the right side. The sky is a deep blue, and trees are silhouetted in the background.

# Biography



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John McGahren is the Princeton litigation practice leader and deputy chair of the firm's global environmental practice. John counsels clients on litigation, enforcement, and transactional matters. He prosecutes and defends citizen suits, Superfund and RCRA disputes, Clean Water and Air Act litigation, state law actions, and natural resource damage claims. He represents clients in commercial litigation, products liability, toxic tort, class actions and government contract claims. John frequently provides counsel on US federal and state regulatory matters and investigations.

# Biography



**Duke K. McCall, III**

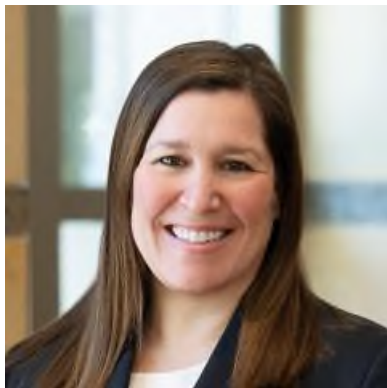
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Duke McCall's practice focuses on environmental law and complex litigation. He represents clients in contribution actions, enforcement proceedings, citizen suits, toxic tort litigation, and regulatory matters, including actions brought under the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, and analogous state laws.

# Biography



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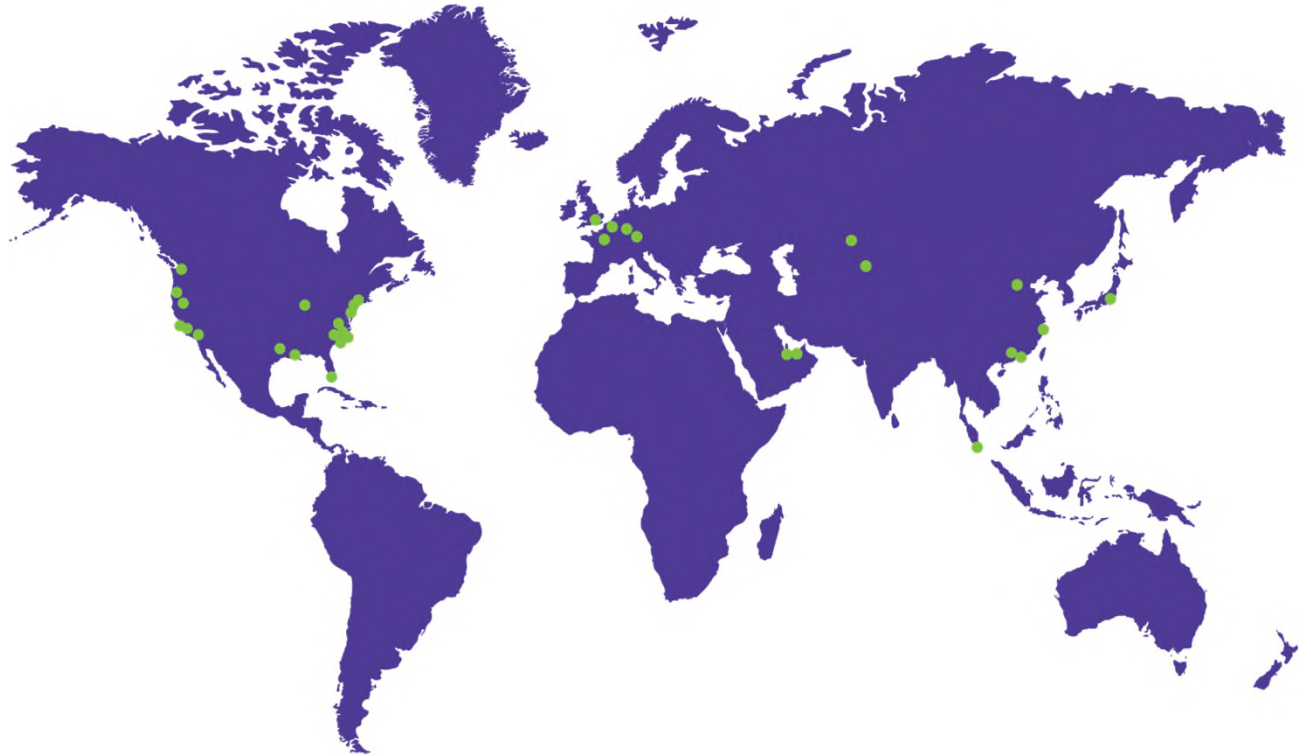
Debbie represents national and international clients in complex litigation and crisis management, focusing on environmental, toxic tort, and administrative law matters. As a former trial attorney and senior trial counsel for the Environmental Defense Section of the Environmental and Natural Resources Division at the US Department of Justice, Debbie's practice focuses on environmental litigation and matters requiring complex statutory and regulatory interpretation. Debbie is adept at negotiating and litigating matters involving government agencies or flowing from government agency actions and rulemakings.

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