CARLTON FIELDS

ATTORNEYS AT LAW

# REPRESENTATIVE ENVIRONMENTAL LITIGATION MATTERS

Recent or significant environmental litigation matters include the following:

- **Superfund Litigation**. The Firm has been involved in a number of cases covering several of the major Superfund/CERCLA sites here in Florida. Two of those, in the Pensacola and Miami area, involved litigation and claims both by governmental agencies and by private parties. The Pensacola litigation was resolved as to our client, a major lender, through mediation and a resulting nominal payment by the bank involved. The Miami proceedings were also the subject of state court litigation and appeal, when one of the PRPs attempted (in what might be termed a "reverse" quiet title action) to claim that it did not own a piece of contaminated land. In the Miami case, the principal defenses asserted the unconstitutionality of CERCLA as it was sought to be applied against our (landlord) client. The District Judge denied a motion to dismiss predicated on that basis, but acknowledged in her order that factual discovery could certainly provide a basis to renew these arguments at the summary judgment stage. Following some significant changes to the Department of Justice positions, a settlement was reached and a consent decree entered by the Court. We are now representing the same defendants in cost recovery litigation brought by one of the other potentially responsible parties at the site.

    - In a third CERCLA matter, the Peak Oil Waste Oil Recycling Site here in Tampa, the Firm has been involved for more than a decade. Members of the Firm have served as an Officer of the Steering Committee and Chair of the Technical Committee, and handled the allocation process and negotiation of de minimis settlements between hundreds of PRPs and the EPA, leading to the establishment of a trust fund in excess of several million dollars, the completion of the assessment the site, negotiation and lodging of a consent decree and implementation of remediation at the site.

    - At another Superfund site, the Firm defended a client that was sued for CERCLA cost recovery by the Department of Justice and EPA, after 15 years of ongoing negotiation with both EPA and the Florida Department of Environmental Protection ("DEP"). Our client in that case, a drum reconditioning facility, was sued by the Department of Justice for past and future response costs at the site. After two years of aggressive litigation defense, followed by intensive mediation, a settlement consent decree was approved by the Federal Court involved. Under the terms of the decree, the United States recovered in

excess of $3 million, being paid by the client's insurance carrier, and the client is undertaking the remediation required by EPA.

- In other cases, we have represented or are now representing clients with respect to private party CERCLA claims and analogous actions under Florida statutory law. In one instance, now completed, we represented a university that, for a period of time, through the bequest of an alumnus held stock in the company that allegedly cause a creosote contamination problem near Jacksonville. In a case of first impression, the U. S. District Court for the Middle District of Florida held on summary judgment that our client was not liable under CERCLA as an owner or operator of the site by virtue of its acts or capacity as the "parent corporation" of the site owner. The Eleventh Circuit affirmed the decision, and the opinion of the Eleventh Circuit now represents the controlling law in this Circuit, a position rejecting the view that a parent entity, or corporate officers or directors, can be held liable in a CERCLA action because of their apparent capacity to control a company's environmental procedures. The decisions are reported at 776 F. Supp. 1542 (M.D. Fla. 1991) and 996 F.2d 1107 (11th Cir. 1993).

- In another instance, involving an out of state CERCLA site, but a Florida defendant, Carlton Fields confronted the issue of whether the Federal CERCLA statute would pre-empt time limits for filing probate claims which would otherwise be applicable under the Florida Probate Code. The Federal District Judge in Kansas City, Missouri, held that the federal law would take precedence over the Florida Code. The Martin County Probate judge differed with that interpretation, and his decision was affirmed by the District Court of Appeal. Because of the conflict in these rulings, coupled with the potential application of innovative technologies for site remediation, the issues related to the Florida probate claims has been settled after negotiations by the counsel directly involved in the Missouri litigation. The Florida District Court of Appeal decision is reported at 764 So. 2d 24 (4th DCA, Fla. 1999).

- The Firm recently defeated class certification in a suit brought in state court in Pinellas County, Florida on behalf of former non-management employees at a Superfund site in that County. The site had been labeled a public health hazard by the Florida Department of Health, and the suit alleged that, during the time it had been an operating elemental phosphorous facility, our client had intentionally exposed workers to hazardous and carcinogenic materials (including radioactive slag and decaying uranium) and deliberately withheld safety equipment and knowledge of the risk from them. As a result of various challenges the Firm successfully advanced against the pleadings, the suit was reduced to one seeking medical monitoring for the putative class. Following discovery and a four-day evidentiary hearing (including testimony from several expert witnesses), the Court issued a lengthy decision denying class certification. Hoyte v. Stauffer Chemical Co., 2002 WL 31892830 (Fla. Cir. Ct. Nov. 6, 2002). In a separate case, the Firm obtained the dismissal of a wrongful death action brought by the estate of a deceased former worker at the facility.

- Also with respect to the Pinellas County Superfund site, the Firm defeated class certification in a second putative class action, this one brought in federal court in Tampa, Florida. This suit was filed by persons who owned property, lived, worked, or went to school near the Superfund site, and sought damages for diminished property value, actual contamination, personal injuries, and medical monitoring. The plaintiffs alleged that, during the period the site had been operating and thereafter, carcinogenic and other hazardous materials allegedly had migrated (through various pathways) into the off-site area. Among the allegedly hazardous materials were slag (a by-product of elemental phosphorous that contains quantities of uranium and radium and thus emits gamma radiation), arsenic, beryllium, lead, and manganese. Mills v. Stauffer Chemical Co., Case No. 97-1197-Civ-T-24A (M.D. Fla. 1999).

- In a similar case, the Firm recently defended a pesticide company that was sued by a putative class of present and former persons who were allegedly exposed to hazardous emissions (through a variety of pathways, including air, groundwater and surface water) from a Superfund site in Lakeland, Florida and whose residential properties near the site were allegedly impacted by those emissions. The plaintiffs sought damages for diminished property value due to actual contamination and attendant publicity regarding the Superfund site, as well as damages for personal injuries and medical monitoring. The firm aggressively challenged class certification, including full briefing on the issue, leading to a settlement of the case and broad relief for the Firm's client. Moore v. Agrico Chemical Co., Case No. G 99-2794 (04) (Aug. 7, 2001, granting motion for approval of settlement filed July 1, 2001).

- We represented a defendant in Superfund activity growing out of a coal gasification plant in downtown Miami.

- **Sinkhole Litigation.** Carlton Fields is one of the most experienced firms regarding claims and litigation for sinkhole loss, representing one of Florida's largest property insurers. Sinkhole claims have become a major issue for property insurers in Florida. West Central Florida is especially prone to the development of sinkholes. In recent years, sinkhole claims have become one of the leading perils for property insurers in Florida. The Firm has provided representation on behalf of an insurance company in hundreds of sinkhole claims involving single family homes, condominiums and commercial properties and has defended several sinkhole claims through trial. In addition to the law regarding sinkhole claims, the Firm's attorneys have developed expertise in the many causes of ground subsidence and structural damage: karst geology (sinkhole development), expansive clays, organic soils and debris, and defective design and construction and collapse.

- **Mold Litigation and Coverage Issues.** Once considered a prevalent but natural nuisance, mold contamination and infestation are now figuring prominently in many kinds of litigation, including construction defect cases, "sick building" litigation, products cases, class actions, and contract actions. Carlton Fields has extensive experience in all of these areas. Our recent cases include:

- The assessment and remediation of a large multi-story hotel with mold contamination and asbestos-containing building materials throughout the structure

- The assessment and remediation of a series of small hotel "lodge-style" buildings with both asbestos-containing materials and mold contamination

- Construction defect cases concerning moisture intrusion and mold infestation

- Representation of public and private owners of commercial locations which had mold-related claims of property damage

- Representation on insurance coverage issues regarding property damage caused by mold infestation

- Representation concerning employee OSHA complaints about mold contamination of the workplace

- Defense against ADA claims arising from workers' complaints about mold infestation

- Defense of product suits in "sick building" cases, where plaintiffs were exposed to mold and industrial chemicals

The Firm's attorneys have written and spoken in this area and have access to leading experts in pertinent disciplines, including toxicology; indoor air quality; pulmonary medicine, psychiatry, and other medical specialties; chemistry; and construction. Laurel Lockett was former Co-Chair of the ABA Real Property Section's Indoor Air Sub-Committee, which was recently merged into the Environmental Law Subcommittee, which she also co-chairs.

- **Other Environmental Litigation**. The Firm is also involved in a number of litigation matters arising out of solvent contamination, leaking underground storage tanks or the operations of dry cleaning facilities, or mold or microbial contamination. In some of these cases we are defending against statutory or common law claims of contamination, and in others we are negotiating or litigating (or both) to force entities or individuals to comply with existing consent orders, decrees and permit terms obligating them to accomplish site assessment and remediation. A sample of cases follow:

  - We represented a major national retailer in two litigation matters where it was a tenant on property which was the subject of on-going state and local cleanup efforts pursuant to the applicable state laws and local ordinances. Because the properties remained contaminated, even though assessment and remediation was proceeding in accordance with all regulatory requirements, the landlord sued for lease termination on the grounds that the property is contaminated and therefore allegedly violated provisions of the lease.

  - We represented plaintiffs who purchased a piece of commercial property later determined to be contaminated. We brought claims for breach of contract, misrepresentation and violation of state law. Case was tried to a decision by the judge in a non-jury trial.

- We represented several major national lenders in an action brought by the state environmental agency, which alleged that the lenders were responsible to the state for some of the expenditures the state had to make to repair and maintain the industrial facility that had been the recipient of the loan proceeds. The case was resolved by the lenders releasing their liens as a part of a bankruptcy settlement.

- We represented the defendant owner of a gasoline station accused of contaminating its neighbor's property. Claims were brought for trespass, nuisance and violation of state law. Issues included alternative causation (due to the presence of another potential source of contamination) which resulted in analysis of groundwater flows and the damages claimed by the plaintiff in light of mitigation efforts voluntarily undertaken by our client.

- We represent a former property owner/drycleaner that is alleged to have sold a contaminated parcel of real property. Claims include breach of contract and misrepresentation. Issues include alternative causation in light of groundwater flows and subsequent contamination by plaintiff owner who has continued the same type of business (commercial dry cleaning).

- On behalf of the owner of a large undeveloped parcel of prime residential and commercial land, we recovered from the adjoining land owner the amount of a lost sale of the land, where the adjoining landowner/manufacturer's operations had resulted in a plume of solvent contamination under the client's land that resulted in the loss of a sale. We later prevailed in a subsequent action against the adjoining property owner to recover additional damages as a result of its breach of the settlement agreement, which required remediation by a date certain.

- The firm has defended threatened actions by various current landowners for claims arising out of petroleum contamination against a client that had owned, operated and closed petroleum storage systems prior to implementation of state or federal petroleum storage tank regulations.

- We represented defendants in claims growing from the dry cleaning business and aquifer contamination. This case involved injuries as well as claims for medical monitoring.

- We represented an oil company sued for contamination of an aquifer in the U.S. Virgin Islands.

- We represent a former property owner in an action against an adjoining property owner in a case involving mixed plumes of naphthalene and chlorbenzene groundwater contamination.

- **Litigation for Public Bodies.** Some of this litigation has been performed for public bodies. Illustrative of this are the following matters which we have handled as special environmental counsel for the South Florida Water Management District.

Miccosukee Tribe v. South Florida Water Management District; USDC Florida Case No. 98-6056 & 98-6056 -CIV-FERGUSON; (Case involves a suit by Indian Tribe and environmental group for declaratory and injunctive relief alleging violation of § 402 of Clean Water Act, asserting water passing through S-9 pump station is polluting Everglades and requires an NPDES permit.)

U.S.A., et al. v. South Florida Water Management District, et al.; USDC Case No. 88-1886-CIV-Hoeveler; (Suit by United States against Company and DEP seeking enforcement of Florida water quality standards).

Barley v. South Florida Water Management District; Case No. CI 97-10228, Div. 34 (Punitive class action of all taxpayers in Okeechobee Basin for declaration that 1997 ad valorem taxes for Everglades restoration are unconstitutional and seeking refund of same. In connection with this case, we have consulted with the District concerning the Tribe's adoption of water quality standards, and other litigation brought by or involving the Tribe).

**Related Litigation.** Carlton Fields has handled numerous actions over the years that include significant environmental components, such as power plant siting cases, actions brought in administrative agencies or state federal court to block the construction of high powered transmission lines, nuisance suits, and actions brought to challenge the prudency of the decisions of various licensed environmental or engineering design professionals or to defend claims brought against such individuals or firms.