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ENVIRONMENTAL DISPUTES

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MINI-ROUNDTABLE

ENVIRONMENTAL DISPUTES



PANEL EXPERTS

**Lynn L. Bergeson**

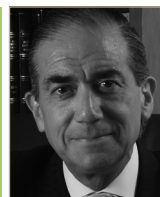
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Lynn Bergeson counsels corporations, trade associations and business consortia on a wide range of issues pertaining to chemical hazard, exposure and risk assessment, risk communication, minimising legal liability, and evolving regulatory and policy matters pertinent to conventional, biobased and nanoscale chemicals, particularly with respect to TSCA, FIFRA, Food Quality Protection Act (FQPA), REACH and REACH-like programmes, and Occupational Safety and Health Administration (OSHA) matters.

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Anabela Aldaz specialises in environmental law. She actively participates in a number of organisations, including the environmental commission of the Law School of Uruguay, Lex-Mundi Environmental Group, RIELA (Interamerican Network specialised in Environmental Legislation) and the World Services Group Environmental Group. She has vast experience in environmental regulations and has participated in setting up proceedings, acquisitions and transformations of Uruguayan industries, in areas such as chemicals, pharmaceuticals, pharma-veterinary, meat packing, agriculture and energy.

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Daniel Basurto-González is a founding partner of Iniciativa para el Desarrollo Ambiental y Sustentable, S.C. (IDEAS) and graduated from the Universidad Anahuac Mexico Norte in 1983. He has studied and obtained specialised diplomas and recognitions in environmental law, and has practiced Mexican Environmental Law since 1987. Mr Basurto has headed business sector environmental commissions since 1994 and currently chairs the Environmental and Energy Commission of the International Chamber of Commerce (ICC) Mexico. He represents and counsels national and international corporations to comply with Mexican environmental, energy and health and safety laws.

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Christopher McNevin leads Pillsbury's environmental litigation team. He has twice won Best Lawyers' "Lawyer of the Year" for Natural Resources Law. He has extensive experience handling environmental litigation in federal and state court and agency tribunals, as well as investigations, remediation actions and regulatory compliance matters. He advises on water rights, climate change matters, soil, groundwater and sediment contamination, and air and water quality issues. He has successfully handled variance petitions, mandamus, CERCLA and real property contamination cases and NOVs, as well as spearheaded precedent-setting litigation involving trans-border pollution claims.

CD: Reflecting on the past 12 months, what are some of the key trends and developments you have seen in environmental disputes?

Bergeson: A major change, brought about by the November elections, is the uptick in citizen suit litigation, and lawsuits brought by third parties against the government. Given the current administration's position on climate change, environmental regulation generally, and the perception that regulations impede economic growth and job development, there has been a significant slowdown in regulatory and administrative activity and the initiation of enforcement actions. NGOs and third-party activists will continue to fill this void by private lawsuits as citizen litigants.

Aldaz: Over the 12 past months there have been a number of developments regarding environmental disputes. One such example is the bill on waste management. It is generally understood that waste management is an issue on the national agenda of every government. In Uruguay, waste management is the responsibility of private institutions, such as the Uruguayan Industry Chamber, without any intervention from the government. The bill aims to create a national waste fund with a recycling trust which would be managed by the national government. Another development in environmental

disputes that have taken place over the last few months has been in connection with the conflict relating to the use of the country's natural resources. There are mining projects in Uruguay that are considered to be particularly harmful to other natural resources, such as water.

Basurto: Over the past few years, the trend in disputes over environmental issues has been based on the right to an adequate environment, to which Mexicans are entitled. This right is safeguarded in the Mexican constitution. Social participation is an important variable, due to its possible impact, as well as the human rights that are impaired as a result of various projects. An instrument has been drafted, the Assessment of the Social Impact (EIS), which, though linked to energy projects, is designed to relate to the assessment of environmental impact. Damage to the environment and environmental responsibility in industrial, tourism and conservation matters are two fundamental issues, based on which, environmental disputes have developed.

McNevin: We have seen increased citizen suit litigation, particularly following the 2016 election, likely related to the new administration's objective of reducing the EPA's budget and deemphasising federal environmental regulation and enforcement. We also have seen increased state and local promulgation of environmental regulations and commitment to environmental enforcement, all

of which can result in an elevated number of environmental disputes. In this vein, we have noted increased tension between scientific data and proposed environmental policy, leading to a number of challenges to state and local regulations. Finally, we continue to see significant activity associated with contaminated real property – enforcement actions, cooperative voluntary clean-ups, and multi-party disputes – as infill development progresses in urban environments.

CD: Have there been any legal or regulatory developments which have had a particularly significant impact in this area?

Basurto: Energy reform that was initiated in 2013 triggered the latest legislative publications on the subject of the environment, but though publication of the Regulations of the Electrical Industry Law and the Hydrocarbons Law included the issue of the EIS, albeit with flaws, there have not recently been legal provisions with an impact on disputes with respect to the environment. Notwithstanding the foregoing, there are various bills that are currently under discussion in the Senate that will most certainly have an impact on environmental disputes. One relevant example is the bill pertaining to amendment of Title Six of the General Law of Ecological Balance and Environmental Protection.

Title Six regulates the subject of environmental inspection and monitoring; that is, the procedures available to the authorities to monitor compliance with environmental legislation.

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McNevin: The Trump administration’s intent to limit federal enforcement of environmental laws, scale back existing regulation, and delay or table pending regulation has prompted several state and local governments to commit to increased vigilance with respect to environmental compliance. Some state and local politicians have initiated efforts to promulgate regulations or draw focus to environmental health and safety or environmental justice issues, which can drive disputes. For example, in California there are ongoing efforts to implement the Low Carbon Fuel Standard, intended to reduce greenhouse gas emissions, and to increase

regulation of stationary sources of emissions through indirect source rules, which have drawn significant opposition. In parallel with this trend, there has been a call for direct regulation of emission sources, as opposed to the market-based mechanisms currently in effect that are not always perceived to deliver local benefits to impacted communities.

Aldaz: Since 2016, the government has been developing a national strategy which includes the drafting of a bill on waste management and the assumption of responsibility for the treatment of the waste that currently is in charge of private institutions, by the national government. The bill includes provisions with regard to the recycling of urban waste and other 'special waste' which is not necessarily hazardous, such as lead acid batteries, mercury lamps, batteries and electronic devices. Moreover, provisions regarding technical and financial assistance for the municipal governments are included in order to work on the disposal of waste. It is important to note that the bill on waste management has been very controversial in Uruguay and is still in the drafting stage.

Bergeson: In the US Environmental Protection Agency (EPA) toxics area, there has been an increase in the number of Toxic Substances Control Act (TSCA) Section 21 petitions. Under Section 21, petitioners can ask the EPA to initiate rulemaking or take such other administrative action as necessary to achieve





a particular purpose. The EPA must either grant or deny the petition within 90 days of filing. We would expect a general uptick in the submissions of Section 21 petitions under TSCA, and similar provisions in other federal environmental statutes. We expect to see a jump in TSCA Section 20 citizen suit actions as well. Virtually all federal environmental statutes contain citizen suit provisions, and we expect to see many such lawsuits in the months ahead.

CD: What particular types of environmental disputes are generally being seen? Could you give any recent examples of cases which have had important implications for companies?

Aldaz: In recent years, Uruguay has witnessed conflicts with regard to the installation of regasification plants. This has been very controversial due to the negative environmental impacts these plants are believed to have on the local ecosystem. Additionally, it is claimed that regasification plants have caused disputes with the local fishermen that have affected their work and, as a consequence, they often claim for financial compensation. Currently, there is a new project of installing a cellulose plant in Río Negro, Uruguay. This plant may cause high pollution in the rivers next to the plant.

Bergeson: On 27 February 2017, the EPA announced in a Federal Register notice that it was

denying a TSCA Section 21 petition that requested regulatory action under Section 6 to “prohibit the purposeful addition of fluoridation chemicals to US water supplies”, and that it was making available its response to the petition. The petition was received by the EPA on 23 November 2016, and the EPA had 90 days in which to respond, by either granting or denying the requested action. The EPA’s response was comprehensive, as it went through and provided its views on numerous aspects and issues at play including: first, the EPA’s interpretation of the Section 6 provisions regarding conditions of use which asserts that TSCA requires EPA to comprehensively consider and address all conditions of use for a chemical or category of chemicals when considering and taking action under Section 6(a). This point was first made in the EPA’s proposed procedural rule for risk evaluations that is currently open for comment. Second, the EPA’s belief that Congress, under the new law, did not intend to empower Section 21 petitioners for regulation under Section 6 to promote chemicals of particular concern and force expeditious action based on risks arising from individual uses of those chemicals. Third, the scientific adequacy of the petitioners’ risks claims for the general public from exposure to fluoridation chemicals in drinking water. The EPA identified and discussed, in some depth, the

numerous weaknesses it saw in health, exposure and risk aspects. Finally, the petitioners’ inadequate consideration of the public health benefits of fluoridation of drinking water.

“Significant environmental events have impacted public perception of the need for increased scrutiny of industry, bringing environmental health and safety and environmental justice issues to the fore.”

*Christopher J. McNevin,
Pillsbury Winthrop Shaw Pittman LLP*

McNevin: Today, environmental disputes run the gamut. The decision in *Friends of the College of San Mateo Gardens v. San Mateo County Community College District* has important implications for agencies and project developers in California, by providing guidance as to whether, and what type of additional environmental review documentation may be required when there are changes to a previously-approved project. Significant environmental events have impacted public perception of the need for increased scrutiny of industry, bringing environmental health and safety and environmental justice issues to the fore.

Basurto: In Mexico, the environmental disputes with the most important implications are those involving indigenous communities or villages or those in which evidence of changes to the environment cannot be ignored and where citizens' right to be consulted has been violated, or projects related to tourist developments and, more recently, with energy developments. One of the most notable recent disputes concerned a dispute in Tajamar over the construction of a real estate project, which was questioned with respect to the legality of the permits obtained for a change in use of the soil and the environmental impact. Over two years later the matter has not yet been resolved, though the project has been halted.

CD: What dispute resolution options are frequently used in cases involving environmental transgressions? How do alternative dispute resolution (ADR) methods stack up against litigation, for example?

McNevin: There are a variety of effective mechanisms. Litigation is one option, but it can be time-consuming, expensive and leave the parties with less control over the outcome. Alternative dispute resolution mechanisms, such as mediation, can be utilised to reach settlement and avoid costs associated with litigation. There are also a variety of negotiated, administrative consent orders and

political solutions available. For example, in an agency enforcement action, a company may be well-served to negotiate with the regulator and reach an agreement regarding a compliance schedule and any potential penalties in the form of a consent order.

Basurto: Though so-called alternate means of resolving disputes exist, with methods such as conciliation and mediation, for environmental conflicts, and due to their nature and poor regulation in Mexico, only some very specific projects are suitable for ADR. Organisations such as the International Chamber of Commerce (ICC) are promoting implementation of these dispute resolution mechanisms. Generally, when the government gets involved in issues of this nature, it resorts to the Mexican court system. By publishing the Federal Environmental Liability Law, several dispute resolution mechanisms, such as mediation, were recognised in Mexico. The law provides that any person is entitled to resolve the legal and social disputes deriving from damage caused to the environment, through cooperation proceedings wherein dialogue is privileged, and more positive resolution alternatives, from an environmental and social nature, are facilitated. However, no information of any issue resolved to this day through ADR exists in official data.

Bergeson: While we lack specific metrics on the use of traditional litigation means as dispute

resolution versus ADR methods, there is a strong sense that traditional litigation is the more common dispute resolution option. This is largely because this mechanism is identified in federal environmental laws.

Aldaz: In case of environmental transgressions, one of the dispute resolution options in Uruguay consist of the cases being carried out by the prosecution. One example of a case being carried out by the prosecution is the intervention in projects of installation of cellulose plants that may cause a negative environmental impact. Moreover, the National Directorate of Environment has the ability, and in some cases the obligation, to gather public opinion through public hearings, which take into account the considerations of all the propositions made by the inhabitants when analysing the environmental impact of certain projects listed in the Environmental Impact Assessment Law.

CD: In your opinion, how important is it to develop a quick and decisive strategy for resolving an environmental dispute? Are organisations paying sufficient attention to dispute prevention and resolution strategies?

Bergeson: Organisations pay a great deal of attention to prevention and conflict avoidance for many reasons. The cost of litigation is high,

reputationally, as any organisation is damaged by litigation even if it ultimately prevails because litigation is seldom viewed as a sign of success, and because when the outcome of the litigation is unknown, it adds an element of business uncertainty that corporations are loath to embrace or welcome. Once an organisation finds itself in a dispute, having a decisive plan and executing it are essential to success. The absence of a plan invites devastating consequences legally, operationally and optically.

Aldaz: Recently, companies in Uruguay have become increasingly aware of the relevance of environmental issues. To that end, companies are constantly applying methods of prevention and precaution of non-compliance with the environmental regulations, such as internal audits and legal advice in connection with authorisations and permissions to develop their own activities. Therefore, we consider that having internal supervision of compliance with all the environmental regulations applicable will enable companies to properly face up to any environmental disputes in which they find themselves and enable them to develop an effective resolution strategy.

Basurto: It is of great importance to be able to develop mechanisms and instruments that make it possible to resolve environmental disputes, through a proper strategy, in a prompt, objective and transparent manner, and as it is important for

saving time and costs, and for preventing weariness in those parties taking part. It is important to emphasise that there are several organisations getting involved and paying attention to prevention and resolution, however they are the exception. There are projects that go 'hand-in-hand' with organisations trying to prevent and preserve flora and fauna species, and guide the developer. Also, there are other organisations making efforts, for money, so that specific projects are not developed. Sometimes it depends on the location or type of project.

McNevin: A thoughtful and informed response strategy allows companies to avoid being placed in a defensive mode when a dispute arises. In the first instance, instituting internal compliance mechanisms and good community relations can help head off environmental disputes by documenting compliance efforts and keeping an open communication to resolve potential issues early. Companies can also work with environmental counsel to assess compliance obligations and resolve uncertainties before issues are raised by an outside party. Tackling these issues head-on may allow a company to exert more control regarding the scope and timing of capital expenditures and can establish a record to show compliance efforts. Early dispute resolution strategies, whether that be engaging in settlement negotiations or pursuing

litigation, gives companies a greater opportunity to shape the course of the dispute and ultimately achieve a desirable result.

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*Lynn L. Bergeson,
Bergeson & Campbell PC*

CD: Once an environmental dispute has arisen, what are the initial steps that companies should take toward a quick resolution with minimal damage?

Basurto: Once an environmental dispute arises, it is important to objectively identify the areas for improvement, be they omissions, errors, third-party actions for or against the project or opposing groups, among others, and be able to identify legal aspects that may support a specific affirmation. A strategy needs to be developed on the basis of the aspects that represent the reason for the environmental dispute: development in protected natural areas, lack of permits, soil pollution, invasion

of other people's or ejido-type lands, charges filed. Of course, communication and dialogue are essential to minimising potential damage that may constitute a dispute.

McNevin: If the dispute is with a regulator, it is often effective to meet with the agency early, to discuss the nature of the agency's allegations and create a plan that minimises the risk of accrued penalties. Speedy engagement can lead to a negotiated resolution that is less burdensome and more predictable than litigation. If the dispute is with a community or citizen group, certain types of citizen suits lend themselves well to settlement, and companies can often resolve these disputes at a relatively minimal cost. Early assessment involves consideration of the cost of undertaking compliance measures implicated by the dispute versus the cost of litigating to contest the alleged violation. Companies with proactive internal compliance mechanisms may find those helpful in seeking to swiftly resolve citizen suit litigation, as such mechanisms can be evidence of a company's efforts to meet environmental obligations, and may also be a starting point to satisfy community group or NGO demands if a settlement is desirable.

Aldaz: The control organisms are in charge of supervising compliance with the environmental

regulations of the different sectors, placing a particular emphasis on the precautionary principle and the voluntary and material compensation of

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*Anabela Aldaz,
Guyer & Regules*

the environmental damage. Therefore the voluntary compensation of the damage is the first and most important step to take in order to mitigate the damage caused and the applicable sanctions. Furthermore, if an environmental dispute has arisen, an administrative procedure might take place at the request of a party.

Bergeson: The first step is to retain counsel. It is important to engage in due diligence and fact finding with the benefit of the attorney-client and work product privileges to protect communications from public disclosure. Counsel should immediately assume control of communications, fact-finding and related matters. Insurance coverage may be a

possibility, so notification to the company's carrier is essential. Finally, a public relations team should be assembled to ensure communications are accurate, timely and appropriate. In these days of social media, it is not acceptable to not engage in communications, assuming the matter is public.

CD: What are your expectations for environmental disputes over the coming months? How should companies prepare and respond by reviewing their environmental obligations?

Aldaz: Today, in Uruguay, there is a tendency to give special relevance to environmental issues. The national government has a committed agenda to these issues and is constantly working on the technical training of the comptroller bodies and their technical teams. Additionally, the government is expanding the number of inspection bodies for better compliance with the standards established by the regulations. On the other hand, companies are increasingly becoming aware not only of the relevance of the environmental issues, but also of the economic impact of the eventual application of sanctions. Finally, in February 2017, a bill on environmental crimes was submitted to parliament. The bill established the penalty of prison for directors or persons who participated in a decisive way to the committing of an environmental crime. These new regulations, if approved, will constitute a

significant change with regard of the responsibility of legal entities.

Bergeson: Any environmental dispute, whether pertinent to releases of contaminants into the environment or issues pertinent to the claimed toxicity of a product component in a product a company sells and is now the focus of regulatory review, needs to be addressed head on, quickly and competently. Companies are best served by managing their operations according to the highest standards of product stewardship and legal compliance, being mindful of their obligations to third-party neighbours, downstream customers and employees, and always comporting operations in a way that assumes a high degree of public scrutiny.

McNevin: The Trump administration's desire to roll back federal enforcement of environmental laws and delay environmental rulemakings may cause an uptick in citizen enforcement of federal environmental laws. State and local governments may be more active to fill the perceived gap created by reduced federal enforcement. And increased attention to environmental justice concerns, particularly in states like California, may lead to heightened scrutiny of environmental issues associated with projects sited in low-income communities. Because disputes, particularly litigation disputes, with environmental NGOs or community groups can be more unpredictable than disputes

with regulators, companies should be well-prepared to document compliance with existing laws and should have procedures in place to quickly respond to environmental incidents.

Basurto: Due to the risks posed to the environment, we do not believe that environmental disputes will end. In order for the potential impacts to be reduced, it will always be important for project developers, whether in the public or private sectors,

to seek not only to fulfil environmental provisions and obligations, but to go a bit further and apply better technologies, avoid causing damage, and try to effectively and truly compensate for the negative impact they may have on the environment. They must bear in mind, at all times, how important it is to be in constant communication and to foster a closer relationship with the community where the project is to be developed, paying attention to their concerns and respecting human rights. 