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Avoid These Evidence Issues In Environmental Litigation

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By Mr Jeffrey Pollock

Experience is a cruel teacher, and I write this article in the hope that others will be spared some of the evidence problems I have faced. Environmental trial practice is unique because of the incredible breadth of environmental laws, as well as the great variety of disputes. Environmental law is an amalgamation of federal and state common law, with a number of statutory structures (federal and state) adding to the mix.

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To add to the complexity, environmental law covers a number of areas, ranging from coastal zone management (CZMA), storm water discharge (CWA and SWD), hazardous waste remediation (Spill Act and CERCLA), air pollution (CAA), chemical process (TSCA), preventing manufacturing from contaminating (RCRA), landfill design and operation (SWDA), protection of endangered and threatened species (ESA)-and this list does not cover dozens of other areas such as nanotechnology, farm run-off, lead paint pollution, asbestos, nuisance, trespass, second-hand smoke, pesticide application, underground storage tanks (USTs), etc.

Environmental Hearings: Forum Dictates the Rules

Environmental challenges are heard in local municipal courts, state and federal administrative proceedings, agency hearings and, of course, federal court. Each forum may have different evidential rules. Jurisdiction is important to consider because many state laws are, in fact, the result of delegation by the United States Environmental Protection Agency (USEPA) to the New Jersey Department of Environmental Protection (NJDEP)-but both the rules of civil procedure and the rules of evidence vary depending upon which forum is hearing the dispute.

A prime example of this is in the area of expert witnesses. Environmental law hearings often require expert testimony to explain the reams of data underlying the dispute in question. Be careful, because the state rules of evidence as to who qualifies as an expert, and what satisfies the criteria of an adequate methodology, are far more lenient than those in federal court. In practice, nearly any individual with adequate experience or education will be permitted to testify in state court even if there are questions about their data or methodology. Federal courts are far more restrictive as a result of the *Iqbal*, 556 U.S. 662 (2009), and *Twombly*, 550 U.S. 544 (2007), decisions. A simple recommendation is to choose an expert and require an expert report that satisfies the more stringent federal standard-that way, if the matter gets removed to federal court, you are assured of having that expert testify regarding his or her opinions.

Administrative Hearings: Preserve the Record

Administrative proceedings have far more flexible standards than either state or federal court proceedings. Because they are relatively informal and the hearing officer has great latitude in admitting evidence, many lawyers fail to object fully to the admission of evidence that would not be admitted in state court or the even more strict federal courts. This is a mistake-always protect the record. In the event of an adverse ruling from the administrative tribunal, your client may wish to appeal and the court to which you appeal will carefully study the hearing transcript. If you failed to state clearly the basis for your objection, you may be stuck with inadmissible evidence harmful to your position.

Common Evidence Issues in Environmental Disputes

Environmental litigation often requires evidence regarding one or more of the following: 1) historic records to prove a change in real property over time; 2) huge volumes of environmental data prepared by multiple people, which is nearly incomprehensible; 3) corporate environmental and compliance records; and, among others, 4) governmental reports and records. How do we get these things into evidence?

Historic Records. Merely because a document is old does not qualify the record to get into evidence. First, the federal and state law requirements are different as to time-state law requires, under NJRE 803(c)(16), that the document be 30 years old, whereas the federal rules consider the document "ancient" after merely 20 years. Again, which court you are in will determine the rules of procedure and the rules of evidence. More importantly, both the state and federal rules of evidence regarding ancient records require that the document be authenticated. NJRE 901/FRE 901. Authentication requires the proponent of the document to establish that the document is authentic and is what that document purports to be. How to authenticate? The first place to look is NJRE 902/FRE 902, which indicate those documents that are self-authenticating. Be warned-Rule 902 is where I have seen most evidence problems arise with regard to government records, historic records, foreign documents and business records. For a public document to be self-authenticating, it has to bear the signature of an officer of the state or relevant governmental entity. Other records require a seal. (Note, getting a sealed public document can take weeks or months, so plan well ahead of trial.) Some public records require that they be certified-meaning that there has to be an attached certification that the record was the document actually prepared or required. These small points may seem picayune, but they are often the difference between being able to have a document self-authenticated or having the court determine that they are incompetent evidence and will not be admitted.

Large Volumes of Data and Records . Because expert reports are hearsay documents, they are often not admitted into evidence. Although your environmental expert has reviewed and digested huge amounts of data, how do you get that evidence before the court if you cannot simply submit your expert's report? A second and related problem is that environmental data is not only voluminous but (and I hate to admit this) incredibly boring. No one, especially the court, wants to read reams of quality analysis/quality control reports, gas chromatographs or New Jersey Pollution Discharge Elimination Reports (NJPDES). This may not be an evidential problem, but it certainly is a related advocacy issue-how to present this data and make it come alive before the court falls into a coma? NJRE 1006/FRE 1006 (Summaries) to the rescue. Under the Summaries rule, a proponent of large volumes of evidence is permitted to use summaries of that evidence for the convenience of the court. Two common errors in providing summaries are: 1) not making the originals available for inspection by your opponent; and 2) failing to inquire of the court whether the judge wants the originals available in the courtroom at the time of trial. From an advocacy perspective, the biggest issue is how to make this data come alive. The simplest solution? Remember that a picture is worth a thousand words-perhaps a few million words in the environmental litigation context. Create powerful but accurate graphics that demonstrate both your presentation and interpretation of the data. Use colors, overlays, and avoid simply presenting columns of numbers and data points (unless, of course, the data alone really is persuasive and simple). Make the data presentation interesting, but always make sure that it is beyond any doubt an accurate representation of the facts. Both you, as counsel, and your client will suffer greatly if the graphics are disingenuous and falsely represent the data.

Corporate Records. There are several rules of evidence at issue in the admission of corporate records. NJRE 803(c)(6) excepts from hearsay records of regularly conducted activity and, further, does not depend upon the availability of the declarant-but the rule does require that the statement be by a person with actual knowledge, or from information provided by such person. A common issue for environmental lawyers is getting a plant environmental engineer's test records or notes into evidence. The most common failure is that the lack of proof that the individual who is testifying (the plant manager) actually reviewed the data or obtained the data from the person

who actually collected the data. Other common corporate record documents are 1) getting into evidence records from a foreign parent corporate office, which may be in a language other than English, and may be in a format that is not admissible in U.S. courts; or 2) corporate records from a corporate officer or engineer who may be located in another state. The primary issue here is authentication, so it is critical to: 1) get the documents in advance of trial and determine if they are in the format where the court will admit them; and 2) study NJRE 901 and 902/FRE 901 and 902 to ensure that the evidence you intend to rely upon is properly authenticated. Getting that raised corporate seal may be a small thing-but it can be the difference between having evidence admitted or excluded. Governmental Reports and Records. Governmental records have particular importance to environmental lawyers for two fundamental reasons. First, most environmental laws are poorly written and therefore have to be construed by the use of guidance documents, policy statements, and other interpretations issued by the NJDEP and USEPA. Second, environmental law is a hodge-podge of regulatory, common-law and statutory law-and, to make matters worse, the federal and state environmental enforcement authorities may have concurrent jurisdiction. As the rough equivalent of legal grease, interpretive statements and governmental records are often very important to the environmental practitioner at a hearing or trial. How to get these things into evidence? The most common rule to rely upon is NJRE 803(c)(8), which addresses public records, reports and findings. These documents are excepted from hearsay if the document was written by a public official within the scope of that official's duties. Beware, however, of two problems that constantly arise in the application of this rule. The first is that the data or information upon which the public official relied must be trustworthy. If there is sincere doubt about the manner in which the public official derived his or her analysis, then anticipate a fight regarding admissibility of that document. A second problem is that NJRE 803(c)(8) addresses only the question whether that record falls within a hearsay exception-the record still has to be authenticated. A public record must have the signature of an official affixed (NJRE 902(a)/FRE 902).

Environmental trial practice in New Jersey is particularly enjoyable because of the camaraderie within the bar. In the limited space here, I cannot address all of the evidence problems I have faced, but I hope that by sharing the points above that others will be spared the evidence problems I have faced.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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