

# **MANAGING MULTI-PARTY ENVIRONMENTAL LIABILITIES A NEW APPROACH**

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## **ABSTRACT**

Resource Environmental LLC (RELLC) is a unique business model to manage petroleum release sites in which there are two or more potentially responsible parties. Formed in 2003 by five major integrated oil companies, RELLC incorporates principles of preventative law, total liability management and alternative dispute resolution in the management of petroleum fuel release sites in a way that promotes environmental stewardship, avoids commercial disputes (and by extension litigation), centralizes management, takes a holistic regional approach to site characterization, and leverages assets and expertise of its member companies. It has now been operational eight years and has a proven track record of performance with over eighteen complex projects located in five states. Over fifty percent are in their final stages of completion with two to three projects soon to be completed. Without exception, these projects are being managed successfully and meeting the desired goals and objectives of the member companies. It has added value to its member companies' remedial programs and has impressed regulators who have not been accustomed to seamless and effective multi-party site management. The stories of how these projects were executed and the lessons learned are well worth sharing.

## BACKGROUND

MTBE (methyl tertiary butyl ether) was first blended into gasoline in small quantities in the late 1970s as an octane enhancer after lead was removed from gasoline formulas. Later, to improve air quality, the Clean Air Act amendments of 1990 required additional oxygen to be blended into gasoline to improve combustion in vehicle engines. The industry utilized MTBE which is an ether made by combining isobutylene (from various refining and chemical processes) and methanol (a by-product of natural gas processing). Because MTBE was plentiful, readily available, relatively inexpensive, and could be blended at the refinery and transported by pipeline, it was the logical oxygenate choice of refiners and marketers in the early 1990s.

It is now well understood that MTBE can behave very differently in groundwater than its “host” benzene, toluene, ethylbenzene, and xylene (BTEX) compounds. When gasoline containing MTBE is released into the environment from surface spills, UST system failures, or pipeline or storage tank releases, the resulting plumes can and often do reach groundwater. Because of MTBE’s high solubility in water, it can, depending on hydrogeology and sub-surface conditions, leave the pure gasoline plume and travel with the groundwater for hundreds of feet or more and often off the real estate occupied by the source. When this occurs, there is an enhanced risk of impact to surface and groundwater receptors to include private and public water supply wells.

The extent to which exposure to MTBE is a health risk and affects property values has been a topic of debate for over fifteen years in academia and legislative branches of state and federal government. (1) Moreover, MTBE in gasoline has been the subject of substantial litigation in courthouses around the country commencing in 1995 in *Peters v. Brants Grocery* in federal court in Montgomery Alabama (2). The definitive answer to these questions, if there is one, is beyond the scope of this paper. It is sufficient for this discussion that the litigation MTBE has spawned since 1995 was the circumstance that originally drove the development of Resource Environmental LLC (RELLC) which is this paper’s topic.

RELLC was organized to provide its members (and other’s in the industry who may want to utilize it) with an alternative to litigating their way through joint liabilities from petroleum fuel releases. All tort litigation, whether it is with governmental entities, municipalities, water purveyors, local residents, or non-governmental environmental organizations, is reactive by definition. Large companies have come to appreciate that lawsuits, while sometimes an essential business remedy, are nevertheless quite costly in terms of time, financial and human resources, and good will. It is a “win-lose” exercise in which it is often difficult to discern who “wins” at the end of the day other than lawyers, expert witnesses and the litigation support industry.

In the wake of multiple lawsuits involving MTBE contamination, RELLC was formed in 2003 by some visionary business figures within five major oil companies and their in-house litigation counsel. The working model was to turn the conventional management of multi-party MTBE release sites on its head by a newly created entity that would provide rapid or accelerated response and/or remediation as a first step rather than at the end of protracted negotiation and/or litigation between or among parties. Accordingly, RELLC’s underpinnings are three major pillars derived from the collective lessons learned from MTBE litigation specifically and commercial litigation generally:

Preventative Law – engaging in behavior which, based on experience and legal precedent, anticipates and avoids conduct which might otherwise become the basis for damages in tort (especially punitive damages) or other legal entanglements.

Total Liability Management – addressing both regulatory compliance issues at a site as well as common law duties to all stakeholders so that when a site is closed, there are no loose ends that may result in “site relapse.”

Alternative Dispute Resolution or “ADR” – utilizing a pre-agreed liability allocation process backed up by contractual commitments to binding arbitration in order to avoid the courthouse, thereby abbreviating the process of resolving what are essentially business disputes.

While the LLC was created in response to MTBE issues, it became apparent after two years of operation that the business model was sound and could readily add value at sites impacted with any fuel product. Upon the Board’s recommendation two years after formation, the member companies expanded the scope of RELLC’s purpose to include remediation of all petroleum fuels whether they contain MTBE or not.

## FORMATION

The Limited Liability Company Agreement which created RELLC was filed on April 25, 2003 with the Secretary of State of the State of Delaware. The Company Agreement (loosely analogous to Articles of Incorporation for a corporation) is the organizational document that creates the LLC and provides basic governance of the Company. Parties to the Company Agreement (ConocoPhillips, ExxonMobil, Chevron, Marathon and Shell/Motiva) are referred to as “Member Companies”.

The Service Agreement is a separate document under and through which Member Companies contract with RELLC to provide its environmental management services. Parties to the Service Agreement are the LLC, Member Companies and any other industry member identified as a potentially responsible party (PRP) that might want to utilize its services “a la carte” (3). The Services Agreement also contains the framework for the allocation by the Board of Directors of financial responsibility between and among the parties who are involved at a given site. Allocation by the Board is a customized form of Alternate Dispute Resolution (ADR) since the only alternatives are agreement (historically not easily achieved) or litigation. Since the entire Board makes allocation determinations (based upon a comprehensive and reasoned recommendations of the President), fairness and objective decision-making are built into the process. Moreover, as a deliberative body, the Board members are more sophisticated in environmental science and engineering than most judges, arbitrators or mediators are likely to be.

Any dissatisfaction with the Board’s approval of a given remedy, project budget, or allocation is resolved through binding arbitration as the exclusive contractual remedy. This serves to keep the parties out of court in favor of non-litigated dispute resolution, thus avoiding the creation of a public evidentiary record.

The LLC, under Delaware corporate law, is “manager managed” meaning the Board members (and not the companies they represent) are the legal managers of the LLC. However,

the day to day management and oversight of the LLC's business is vested in a President with support from a General Counsel and General Manager of projects. These three officers are the only salaried employees of the LLC. All other corporate functions are out-sourced including information technology, accounting and environmental engineering and consulting. In this manner, RELLC's overhead is kept to a minimum. To the extent that outsourced services are project related, the costs are paid by the parties involved at the site in their respective allocated shares. Corporate costs that are not directly related to projects are funded by a management fee, currently set at eight per cent, charged against direct project costs. The management fee equates to general and administrative expenses that companies would incur if they were to manage the project independently.

In addition to the governance provided by the Company Agreement and the Services Agreement, the Board of Directors has, over time, adopted a formal business plan and promulgated a host of written policies, procedures and processes. Such policies and procedures run the gamut from housekeeping issues (records management and travel) to more substantive subjects (waste management, allocation, rapid response, communications and ADR). In this way, member companies and other industry members that might refer sites to RELLC know in advance the specific method and manner by which RELLC will manage the site. These policies, procedures and processes have been developed and approved by the Board members as representatives of their respective member companies. When a site goes into RELLC, there is little ambiguity about how it will be managed and the work processes that will be followed.

## FUNCTION AND COMPANY STRUCTURE

RELLC's member companies each have well developed environmental remediation programs and highly skilled environmental professionals who ably manage the vast majority of health, safety and environmental issues to include compliance, prevention, assessment and remediation. However, the challenge occurs when environmental responsibilities for environmental contamination and liabilities are joint and several due to the close proximity of different companies' assets to the contaminated area. Petroleum fuel pipelines often occupy the same corridor, transportation terminals are often adjacent or in close proximity, and retail marketing facilities are typically across the street from each other or at the same intersection. When an underground plume of petroleum fuel contamination is discovered, it is often commingled and frequently difficult to quickly discern with any certainty who is responsible for what and in what proportions. In such situations, disputes over the issue of proportionate responsibility have been common and not easily resolved, especially with incomplete or conflicting historical and technical data.

RELLC's function is simple and straightforward. By pre-agreement to an allocation process, the management approach and the consolidation of site management into one body, the life cycle of the remediation site referred to RELLC can be substantially shortened and the objective of good environmental stewardship can be realized earlier and unburdened by disputes which would otherwise prolong the process. Moreover, by providing a mechanism of internal financial allocation which takes place after historical and current technical information has been assembled and supplemented if necessary, remedial work can commence almost immediately thus eliminating disputes or the need for litigation between responsible parties and the delays and legal costs attendant to it. This acceleration of remedial work also serves to mitigate personal injury and/or property damages, which either eliminates the need for third party litigation or reduces its scope.

Over the past eight years, RELLC has demonstrated at the eighteen sites it has managed that centralized management, aggressive remediation and dispute avoidance achieves better environmental stewardship, protects human health and the environment and conserves financial and human resources of member companies to better spent on proactive environmental stewardship initiatives.

## MANAGEMENT OF MULTI-PARTY RELEASES

With RELLC's history and structure in mind, RELLC's approach to a multiparty environmental release is best understood by contrasting it with the more conventional and historical approach ordinarily taken by the industry. The classic scenario involves a petroleum fuel release that is discovered at or near fuel handling facilities (marketing sites such as, terminals, pipelines, gas stations) where there are multiple PRPs that have operations in the vicinity of the site that may or may not have had a release. Typically, where a sensitive receptor is impacted, regulators are energized and focused on the site and issue investigation orders to all the PRPs (usually all companies with a flag within an arbitrarily drawn circle). Recipients of these orders independently negotiate with the agency and each begins an assessment within the boundaries of its own site. Companies may each develop different remedial approaches and employ different technologies, some of which may negatively influence each other and even work at cross purposes. The data from each site may be interpreted defensively and will often yield site conceptual models that cannot be reconciled. Even though these independent remedial efforts may be compliant with regulatory requirements, they may completely miss additional sources, other explanations for the contamination, and/or off site commingled plumes. Moreover, the disintegrated and uncoordinated remedies may not work or may not work efficiently, thereby adding to the lifecycle of the project and increasing the attendant costs.

What we know is that the industry has experienced this situation time and again. A single party acting independently may unwittingly be myopic to the fact that there are other potentially responsible parties in the area. It remains comfortable with managing its own site in the belief that it is doing everything it needs to. An independently acting party can become so comfortable in its position that it continues to believe that it has a reasonable understanding of the site conceptual model and the impacts that may have been caused by its operation. However, it is often not the case at all. Plumes may in fact be larger, actual concentrations may be higher, and there may be other parties or sources that remain undiscovered. Meanwhile, damages don't get mitigated, environmental impacts don't get abated, and the independent party's reputation and good will in such circumstances is at risk.

### Conventional Approach

Historically, given this somewhat typical site profile, the response of major oil company gasoline marketers to environmental liabilities has been guarded and measured, primarily because the facts are often unclear at the beginning and sometimes completely unknown. The tort system has conditioned large companies with deep pockets to initially deny liability at least until the point in time that it becomes clear they have liability. This question of liability, and who should bear it, may take months or even years to be answered and often the answer is unclear.

Voluntarily funding and conducting a clean-up when actual liability is uncertain is counter-intuitive to company counsel, environmental managers, senior executives, Boards of Directors and even shareholders. Indeed, it is counter intuitive for anyone to assume a liability

before it is reasonably determined that they have at least partially responsible. Accordingly, oil companies might deny liability initially, not because they are irresponsible or poor environmental stewards, but because it would be imprudent to admit liability for an environmental spill until it becomes evident it has some responsibility. In essence, companies in this situation behave just as any prudent person would in the same circumstances.

When companies are in the “denial mode,” justified though it may be, cooperation among these PRPs is inhibited, much for the same reason. With whom does one cooperate? What degree of cooperation is appropriate? With incomplete and conflicting “facts,” an innocent company might inadvertently align itself with a liable party or even a wrong doer. Conversely, a responsible party may in good faith sit on its hands while an environmental incident for which it has some responsibility unfolds into a major liability. The responsible party must guess at its peril what it should do. The tort system is very unforgiving of this approach since once committed and aligned, it is not easy to disassociate from the responsible parties in the eyes of the adversary or average fact-finder. Non-cooperating PRPs in the denial mode delays taking proactive measures that otherwise address the environmental issues and immediately assessing and remediating the environmental impacts. As a result, the level of cooperation to address the problem proactively is either superficial or non-existent.

Even if the PRPs agreed to cooperate, it takes significant effort and time to develop and finalize such a contractual relationship. Often such agreements set forth a process that requires decisions to be made by committee(s). Implementation of such an agreement is certainly time consuming and may be compromised by an individual party’s self interest. A comprehensive, effective and sustained solution is therefore very hard to cobble together at the last minute.

Perhaps one of the most problematic aspects with multi-party releases is coming to agreement on the allocation of costs or alternatively an agreement on the distribution of activities to be split among the participating parties. Allocation may in fact be the key barrier to coming to a collective solution for multi-party releases. Since each party sees the data through the lens of its own self-interest, it is nearly impossible to come to grips with what is fair and equitable. As a result, the resolution of the allocation question favors the best negotiator or, alternatively, the parties agree to an allocation which is often arbitrary at a time when the facts and outcomes are not well understood. And if an allocation is agreed to, the allocation is almost never adjusted over time, even as new facts and data material to allocation come to light. Through the process of deciding allocation, time passes by and the impact from the multi-party release continues and environmental conditions can deteriorate further.

While PRPs are struggling to get organized on the fly (or worse, hiding in the weeds) individual property owners who may live near or on top of a plume of petroleum fuels are anxious and fearful about their health and their property values. Fear can easily turn into anger which motivates plaintiffs and energizes regulators, especially when nothing is happening to clean up the release. Real environmental stewardship will not likely happen soon enough and legal damages may not get mitigated in time. Indeed, regulators may begin the enforcement process and third party stakeholders may seek counsel to explore their remedies.

RELLC has seen this sequence repeat itself and in many cases it has led to litigation in some form. Litigation, by definition, is reactive and occurs after the fact. It is costly, time consuming, unpredictable, and is a zero sum game with a nominal winner and loser, both of whom may leave the court house disappointed and resentful. In addition, third party claims, governmental enforcement actions and cross claims among PRPs effectively become the

dominant activity and co-opt the remedial process. As a result, the exigencies of environmental releases from multi-parties are not well served with this approach.

### The RELLC Approach

If the same scenario is referred to RELLC, this sequence is turned upside down and works from the desired result backward. Once a site is in RELLC by the submittal of an “Investigation Notice” by a member company, the President immediately initiates whatever is necessary to protect human health and the environment. If human health is at risk, that issue is addressed immediately and can include distribution of bottled water, installation of point of entry carbon filtration systems on public or private water wells, or addressing vapor intrusion into buildings. If human health is not immediately at risk, the President immediately begins a preliminary assessment of the site conditions, determines the regulatory status, and assesses any already existing remedial programs in place and reports to the Board. Based on this preliminary report, the Board decides whether to retain the site for further remedial management or whether to turn it back. The latter course can occur if it is determined that no RELLC member is involved in the site or that the contaminants of concern do not include petroleum fuels. If the site is retained, an accelerated remedial response continues.

RELLC also provides a “corporate shield” behind which the member companies involved can respond aggressively to petroleum fuel spills without stepping out on the limb of liability. Since RELLC is not itself a PRP, it can do whatever is necessary to address the site conditions without subjecting the members to liability pre-maturely. RELLC’s first objective is to protect human health and the environment. Determination of proportionate responsibility through pre-agreed RELLC processes is deferred so that the clean-up can have priority. If human health is immediately protected, plumes are assessed and arrested without delay, sources are cut off, and remedial programs are put in place, then the life cycle of the site is shortened, remediation dollars are better spent at a faster pace, damages are mitigated, and litigation is avoided or minimized. Moreover, regulatory compliance is accelerated reducing the need for agency action.

Some sites that have come into RELLC are not “new” in the sense that member companies may have independently been managing remedial activities on their own sites prior to referral. Nevertheless, in such situations, RELLC’s management of the site still adds value by looking at all the sites regionally and talking a holistic approach to the remedial program. A significant value that the RELLC approach provides is integrating remedies and treating the individual sites that comprise the area of contamination as one regional site. Regional remedies are designed which essentially ignore property lines. Individual remedial systems and technologies, which often work at cross-purposes, are replaced by a remedial design for the whole area of contamination. Furthermore, management of these multi-party sites is centralized into one management system thereby ensuring a true and sustained coordination of effort as well as consistent messaging with state and federal regulators. This approach allows for a more effective regional remedy that helps ensure site closure at an earlier point in time. It is also more effective at damage mitigation and regulatory compliance. It is preventative law in its highest technical form.

In summary, the following are the key differences in approaches to multi-party sites between the traditional industry approach and the RELLC’s approach.

### Contrast in Approaches: Multi –Party Sites

#### GENERAL INDUSTRY PRACTICE

#### RELLC

PRPs reluctant to take action until sources identified / reasonably delineated & responsibility more clear



Immediate focus on impacts and what to do if there is a threat or impact to human health and/or environment regardless of fault

Often parties take significant effort and time to agree, if at all



Pre-established contracts and work processes are in place

Each party acts on its own data only and does what it thinks is best for its site and is often driven by agency demands; any regional approach is difficult for single party acting alone



RELLC takes a regional approach with all the needed data driving integrated solutions. Strategies are set to meet parties' needs. RELLC leads but is collaborative with agencies

Allocation of shared costs are problematic, often arbitrary and if agreed are almost never adjusted



Allocation is based on independent data analysis with scheduled updating as new pertinent information develops

### Current RELLC Portfolio and Case Studies

RELLC has now been operational eight years and has a proven track record of performance with eighteen complex projects located in five states (California, Indiana, New Jersey, New York and Texas). Four of these projects involve petroleum fuel marketing terminals and the remainder are retail marketing sites. Over fifty per cent of these projects are in their final stages of remediation under RELLC supervision with three projects soon to be completed. Without exception, these projects are being managed successfully and meeting the goals and objectives of the member companies and the regulatory community. As these RELLC sites reach full maturity, their stories are well worth sharing as they are the best demonstrations of the value of the RELLC business model. For this paper, two projects have been selected.

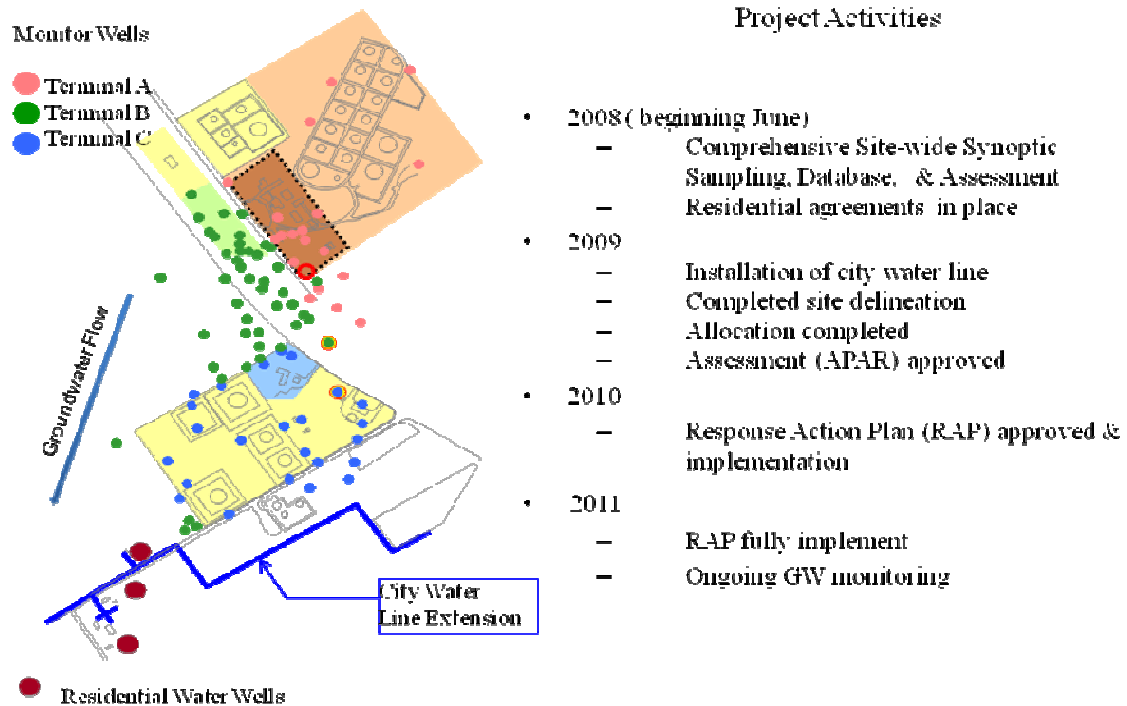
The first case involves a mature commingled plume site that involves three RELLC member companies' terminals with a risk of third party impacts and litigation and a secondary risk to each party's reputation and goodwill. After reviewing each party's data, it became apparent why they were at loggerheads – neither party could see the whole picture. This phenomenon has been present in many cases that RELLC has evaluated. This type of conflict is nearly impossible to resolve under the conventional approach but is much more easily resolved under the RELLC approach in which all regional data is looked at holistically.

The second site involves three service stations in a highly a congested metropolitan area involving two member companies and a recalcitrant third party. This site was referred to RELLC

in early stages of assessment of a commingled plume. At the onset of RELLC's involvement, free product on groundwater from a historical release from one RELLC member sites was commingling with another plume from at least one other up gradient site. The scope and impacts were unknown. Without a regional approach, resolution of what turned out to be a significant commingled free product plume would have been nearly impossible to properly remediate.

### Texas Terminal Project.

This project involved three neighboring terminal facilities outside a small town in central Texas. Each terminal had historic petroleum fuel releases that impacted soil on-site and groundwater under and down gradient of the three facilities. Each site had previous remedial programs in place but they were being managed independently from each other for over a decade. Prior to RELLC assuming overall project control, little progress had been made by the three terminal owners to fully address comingled groundwater plume issues beneath the facilities. Stumbling blocks between the terminals included access, data sharing, differing business objectives and timing, and different relationships with the Texas Commission on Environmental Quality (TCEQ). In order to properly address offsite impacts to the local residents on well water, a regional approach was needed to complete a comprehensive site assessment of the entire project area. TCEQ had not approved any of the individual terminals' Affected Property Assessment Reports (APARs) nor had it approved Remedial Action Plans (RAP) for either terminal. These were the site conditions when it was referred to RELLC in 2008 for management.



Initially, RELLC focused its attention to the nearby residents. RELLC approached the residents to establish a positive dialogue with them and to identify and address their concerns. From these discussions, it was a project priority to connect these residences to a local municipal water supply in order to relieve them of potential health concerns and provide them a more reliable source of water. Another project priority was consolidating a massive amount of data

collected previously by the parties and implementing a site-wide synoptic sampling to establish unified baseline conditions across the site.

In 2009, significant progress was made to resolve the water supply issues with the residents as well as complete the overall environmental assessment of the project area. After seeking agreement with the city and the residents, the water system was installed. Once completed, the residents were pleased to a reliable water supply and improved fire protection with fire hydrants on their property. City officials were gratified as this effort was consistent with their long range water system plan. Lastly, this installation was critical to TCEQ as it eliminated their concern about exposure pathways.

Also in 2009, additional assessment activities were implemented in an effort to complete the site conceptual model and satisfy agency requirements for the combined affected property assessment report (APAR). These activities included the installation of six new monitoring wells and the collection of slug test data to characterize aquifer conditions. With the additional data, the completed site conceptual model revealed the fundamental hydrology of the site including regional and local flow directions, flow fluctuations and preferential flow pathways and groundwater flow velocities. RELLC also completed forensic geochemical analyses to gain insight on source release timing, location and discrimination to support RP allocations. In November 2009, RELLC received approval from the agency of the APAR also requested that RELLC prepare a Response Action Plan to address the groundwater plume.

In 2010, utilizing representative wells from all three parties, RELLC proposed a Plume Management Zone (PMZ) response action. The PMZ was a cost effective control and remediation strategy that (1) allows COCs to remain in place; (2) monitors natural attenuation processes (3) significantly reduces the number of wells to be sampled from 90 to 44 and (4) reduces the sampling frequency from semi-annual to annual. This effectively reduced the monitoring program by approximately 75%, substantially reducing the long term sampling costs for all three Parties. Also as part of the long term response action, RELLC developed deed restrictions for all properties to restrict groundwater use.

In 2011, annual sampling continues. If site conditions remain stable, it is anticipated the site will be offered for closure following several years of monitoring.

In summary, the environmental issues with three terminals have been essentially resolved in a period of two and a half years. RELLC's creative and proactive approach to dealing with the residents was instrumental in avoiding potential claims associated with off-site impacts to neighboring residential wells. The site characterization is complete and an agency approved response action is currently being implemented. The ongoing response action, a monitored natural attenuation program using a reduced number of monitoring wells, is highly cost effective and should serve to move the site to closure with minimal life-cycle costs.

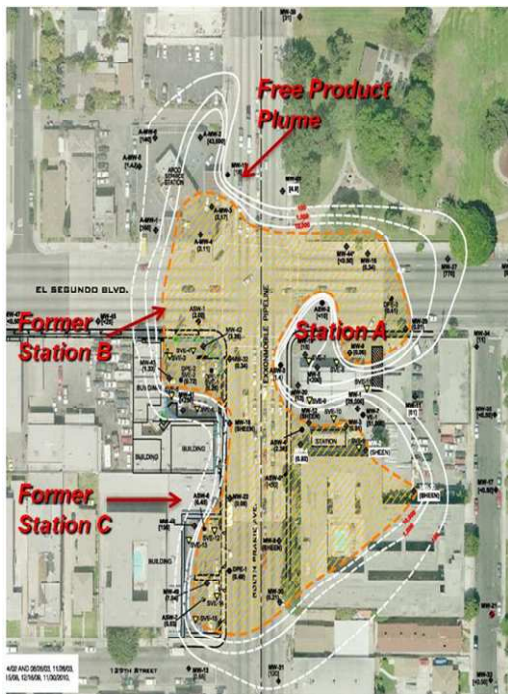
#### Los Angeles Area Marketing Site Project

This project involves one active and two former service stations in very populated area and high traffic intersection in suburban Los Angeles. Assessment and remedially planning and installation were complicated by a free product plume was two shopping plazas, a multi-story apartment building, and other businesses. RELLC's investigation discovered a plume of free product approximately fifty feet below grade ranging from one to ten feet thick covering an area of two and a half acres. Groundwater studies showed no threat to the drinking water aquifer

in the area and soil-vapor intrusion investigations to the buildings indicating no potential human health exposure concerns. It took four and a half years to thoroughly assess the project area, develop a solution and install a remediation system to deal with the free product plume and the source areas. It was an unusually complex project with many challenges to overcome.

RELLC's involvement in this project began mid 2005. The operator of Station A, a member company of REllC, was performing its own assessment of a release associated with its operations. Over several years, the operator of Station A realized that there must be other sources based on the extent and nature of the contamination found immediately up-gradient. Since one of the suspect former service station sites was another member company, REllC was asked to assumed remedial management of the project area. The combination of forensic analysis and the stable groundwater flow conditions made it apparent that there were likely at least 3 source areas (Station A and former Station B and C). This situation was complicated further since the former service station properties had been fully redeveloped into high density shopping and business office plazas and the former operators had no relationship to these sites.

### 2005 - 2011 Project Activities

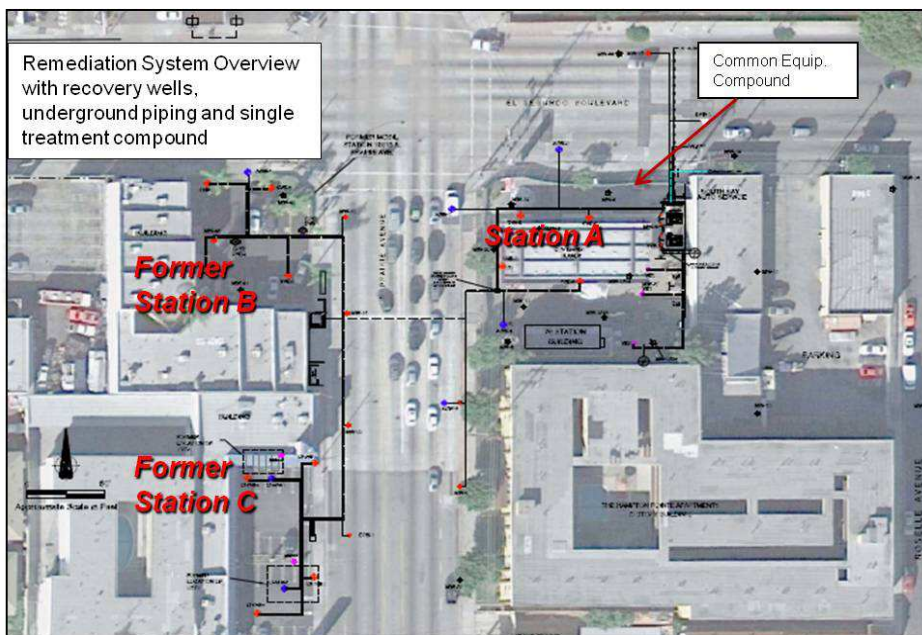


- 2005 (2<sup>nd</sup> Half) -2007
  - Comprehensive region wide assessment including soil-vapor with sub-slab investigation businesses and residual housing complex
  - Develop project strategy and objectives
  - Initial public outreach program in place
  - Bi-weekly LPH removal
- 2008-2009
  - Pilot studies, remedial design completed and approved
  - Main access agreements and permits
  - Continued biweekly LPH removal
  - Remedial wells and initial system constructed for Station A , former Station B (multi-story shopping plaza) and intersection areas
- 2010
  - Remedial system completion
  - Remedial system start-up removing ~200k lbs. of VOC at ~ 30#/hr.
- 2011
  - Remedial system is expanded to former Station C (mini market, restaurant and business plaza)

There were many challenges that had to be addressed: developing a comprehensive site conceptual model that adequately defined and assessed the contaminate impacts; developing a solution to recover free product from under structures and streets as well as remediating soil contamination down to the aquifer in the general vicinity of the former UST systems; developing a plan that was acceptable to stakeholders such as the regulatory agency, property owners, local officials and the responsible parties; and ultimately defining an acceptable project budget and the allocation of financial responsibility. Coming up with a remedial solution was particularly challenging considering access issues, finding a location for remedial equipment, permitting, constructability, addressing potential public concerns, as wells as business interruption impacts with all the local shops and businesses. There were many issues that could have derailed this

project ranging from access, permitting, local business impacts and public matters. Nevertheless, the system was successfully installed and became operational in 2010. Performance of the system has been outstanding with more than 200,000 lbs. of hydrocarbons removed in the first full year of operation and a significant reduction of free product thickness. With the removal of the free product and the clean-up of contaminated soils on site underway, no further work is anticipated concerning impacts from the dissolved petroleum fuels in the aquifer itself. The plume is stable and expected to shrink with remediation. Lastly, there have no identified impacts to any other potential receptors.

Including the former Station C as a third site of the remedial program was particularly important. If not remediated, this location would have been an ongoing source impacting the remedial progress of the other 2 down-gradient sites for many years going forward. This property was owned by an individual with no knowledge of the contamination from the former operations. The former owners had passed away and the current owner did not have financial resources to assess and remediate its property. RELLC was ultimately able to assume remedial management of the property with the down-gradient responsible parties willing to share in the remedial cost of this up-gradient site. RELLC anticipates that some of the cost associated with this property will be reimbursed through the state's UST Fund.



This project demonstrates some of the unique aspects and benefits of the RELLC business model in assessing and remediating a difficult commingle plume multi-party scenario. If one analyzes the accomplishments and how the numerous challenges were handled, the value of RELLC's approach is apparent. Just consider how this may have played out following general industry practice. Consider the following. Even with all its challenges and complexities, the project was fully accessed and had a full scale remedial system operational in four and a half years. The project was executed as forecasted and within budget. The remedial installation and operation has been incident free with all the safety related challenges associated with the very limited work areas and the high congestion of pedestrian and vehicle traffic. Progress to meeting environmental goals is essentially on target and performance of the system is excellent. The

working relationships with local businesses, property owners, city officials, residences and the environmental agency has been certainly ideal and has been a contributing factor to the success of the project.

## THE ALLOCATION PROCESS

Central to the RELLC business model is the process of allocating financial responsibility between or among contacting entities. This unique form of customized ADR was designed to ensure a credible and objective allocation of financial responsibility by qualified environmental managers (Board Members) in accordance with available technical data. All Board members vote on allocation decisions including members whose companies are not involved at the site. A simple majority rules with the President voting only in cases of a tie.

Allocation occurs in three stages – initial, interim, and final. The initial allocation is almost always *per capita* when the site is first referred to RELLC because comprehensive and integrated information and data is not then usually available, regardless of how old the site is. Accordingly, only the parties involved with the site fund the assessment and preliminary remedial work on an equal basis while the President and the consultants analyze existing data, generate new data, and integrate additional data from regulators and other public sources. When this is completed (classic “Phase II” information), the President prepares an Interim allocation recommendation for presentation to the Board. Upon request of one or more members that were assigned an initial allocation percentage, the Board then meets to consider the recommendation of the President, the basis for the recommendation and the underlying data that supports it. After a new allocation (or re-allocation) is determined by the Board, the President conducts a financial reconciliation or “true-up” so that contracting entities’ overpayments are refunded with interest (retroactive to the date the site was referred to RELLC) and underpayments are made with interest (retroactively). For example, at a two party site, the initial allocation would be 50% for company A and 50% for company B. If the interim allocation is changed to 65% for Company A and 35% for Company B, Company A would pay in the deficit with interest and company B would be refunded its overpayment with interest, all retroactive to the date the site came into RELLC. If new data triggers a second interim allocation resulting in 60% for Company A and 40% for Company B, the reconciliation is recalculated. In this way, the parties are made whole throughout the process, at least to the extent the allocation percentages are fair and reasonable.

Subsequent interim allocations may occur every 24 months or more frequently if all interested contracting entities agree. Circumstances that could trigger a subsequent interim allocation are newly discovered information or new or additional data that would have a material effect on the allocation decision.

A final allocation takes place when RELLC’s response activities permanently end, RELLC receives a closure notice from the governing agency, or when all interested contracting entities agree, whichever is earlier. The Board can make the final allocation either on its own initiative or upon a request by an interested contracting entity along with a determination that the requirements for a final allocation have been met. The final allocation is based upon all information known to the RELLC at the time of the allocation. In the event the Board is unable to agree on a final allocation within ninety days of when the requirements for a final allocation have been met, then the last allocation in effect upon expiration of such ninety days becomes the final allocation unless agreed to otherwise.

Since allocations are data based, they are unique to each project given the complexity, scope and cost involved. On-site and off-site costs are distinguished and are sometimes organized into “zones” if appropriate. The financial investment necessary to develop an allocation is reasonably proportionate to the amount in controversy. As a result, RELLC allocations have a well articulated rational basis thereby avoiding arbitrary divisions of financial responsibility that might pass for good guess work.

## THE RELLC TOOL BOX

RELLC’s unique business model and portfolio of exceptional projects has required it to load its tool box with some traditional ones as well as some it has devised on its own to meet its needs and serve the Member Companies effectively. Even some of the traditional tools liberally borrowed from the Members and widely used in business required adaptation. RELLC’s tools include unique corporate governance, company policies, work processes, standing procedures, outsourcing, office technology and how to conduct day to day business with three employees. These tools cover both technical, legal, and business issues.

*Corporate Management.* With a President located in Louisiana, General Counsel located in Texas, a General Manager in California coupled with Board members equally scattered around the country, use of technology (including occasionally commercial aircraft) has been essential and has allowed RELLC to link together its virtual “headquarters.” Liberal use of teleconferences and real-time internet meetings has proved effective and minimized business travel for corporate housekeeping. Two live Board meetings a year supplemented by conference calls when necessary have proved adequate. Most travel by staff is project related and charged to those projects as allocable costs.

*Document Management.* Increasingly, business communications are largely digital which makes document management simultaneously easier and more difficult. RELLC takes great care in document creation and assumes that any document it creates may land in the public domain. This “glass house” approach reduces angst when records, especially email, is subpoenaed or subject to discovery in litigation. Company records are maintained if they either have a useful business purpose or a legal requirement that they be kept. Otherwise, they are purged in the ordinary course of business. In order to reduce the e-document load on individual computers, and recognizing staff members are virtually connected, company files are maintained on a web based document management system.

*Safety.* While RELLC is a relatively small organization, its footprint is big with eighteen projects around the country involving at times hundreds of contractors and sub-contractors undertaking high risk activities. Their safety is paramount within the RELLC culture inherited directly from its member companies. Safety performance, including incidents, near misses, and simple hazard recognitions, are documented and discussed weekly with project managers in the field and monitored closely by the General Manager. Based on these discussions, work processes are occasionally altered and contractor staffing replaced if appropriate.

*Waste Management Plan.* Waste handling and disposal has evolved into a complex process that involves waste identification by regulatory definitions, sampling and testing, labeling, permitting, manifesting, and detailed record keeping. The by-product of assessment and remediation activities for multiparty commingled plume sites creates a new set of challenges

ranging from identifying where has the waste been generated, the use of temporary storage if needed, the transport and the ultimate disposal of the waste to an acceptable Treatment, Storage, and Disposal (TSD) facility. RELLC's Waste Management Plan is used as a guide to develop a site specific waste management plan for each RELLC project. Each waste stream when generated is carefully documented and tracked using "a cradle to grave" concept including documentation of all handling activities. RELLC is usually the "generator" of the waste. Where practicable, wastes are segregated by property location. Once characterized as "nonhazardous," "hazardous," "special waste" etc., a TSD facility appropriate for the waste type is used. When considering the selection of a TSD facility, approved facilities common among the parties involved in the project are given preference.

*Technical Advisory Committee (TAC).* The Company Agreement that created RELLC authorizes the Board of Directors to establish "advisory committees" to assist it in any aspect of its work. Early in 2004 as RELLC was beginning project work, the Board created a standing technical advisory committee. The TAC is comprised of the Member Companies best in-house remediation experts in various technical areas. In order to leverage remediation experience and enhance RELLC's decision quality, the TAC sits as a peer review panel, and is called upon to critically review RELLC's consultant's technical proposals. The ultimate goal of the TAC interaction is the application of the most cost-effective and technically sound remediation approach. Accordingly, the TAC may be asked at various stages in the project to consider and discuss project definition, overall site assessment, technologies, and/or remedy selection. The TAC ensures that what RELLC is doing is not affected by consultant bias and serves a "gut check" against inappropriate remedial work

*Rapid Response Plan.* Rapid response is a product of the very structure and organization of RELLC and inherent in how it works. Everything RELLC does is "rapid," at least in a relative sense. RELLC's response is "rapid" not because its staff is more skilled than member company managers, or because its contractors are better than member company consultants, but because of the way RELLC is fundamentally organized and structured in the first place. In spite of the built-in processes and efficiencies unique to RELLC, the Board recognized that extraordinary circumstances may arise in which human health or the environment may be in immediate peril. Such impacts would likely include impacts to drinking water and vapor intrusion into structures. Mitigation actions might include distribution of bottled water, installation of carbon filtration systems on water wells, or ventilating vapors. Any of these activities might also include temporary living arrangements for affected persons. Accordingly, the Board adopted a formal Rapid Response Plan (adapted from traditional emergency response planning) that would meet this need and ensure that a site of such magnitude and complexity would be managed properly and swiftly. The goal of this Plan is to protect human health and the environment in serious spills and releases without waiting for a clear determination of which parties are responsible for the release. In addition to mitigation activities, an accelerated and preliminary assessment phase would proceed on a parallel track. Under this phase, the threat is delineated, perceived risk exposures are verified, the mitigation program is refined, and the involvement of at least two member companies is confirmed.

*Communication Plan.* As part of a rapid response or remedial effort (two key purposes for which RELLC was organized) appropriate communications of relevant facts to both internal and external constituencies is necessary. The RELLC Communications Plan provides a framework by which these external communications can take place honestly and effectively. Communications as used in the Plan is more than mere canned statements for public consumption. It includes all levels of communications of facts and circumstances, as they develop, to internal stakeholders such as member companies and affiliated industry organizations

as well as external groups such as regulators, local governments, affected neighborhood groups and the news media. The Plan is not about controlling or “spinning” the message but about providing factual information to those who need it in a timely and coordinated way.

Since each site is unique, the Plan contemplates a site-specific communication plan developed within the framework of the overall Plan. The goal of such site plan is to build and maintain trust with the overall community through open and honest communications of relevant facts as they become clear. This requires a thorough analysis of each site from technical, legal and social perspectives.

The communications team that executes the Plan parallels the response team in the Rapid Response Plan and is loosely derived from the conventional Incident commander System structure. The Plan provides for careful documentation of the Team’s activities regarding communications to each constituency. It also includes an extensive Appendix containing guidance documents, suggested forms, sample letters and checklists.

### ALTERNATIVE DISPUTE RESOLUTION SERVICES

While RELLC’s core business is to provide its member companies with rapid response and remediation capability along with an allocation process and binding arbitration remedies, the Board of Directors observed that there are a host of ancillary commercial disputes that arise between members related to but outside of conventional remediation issues. Such disagreements may involve contractual issues, purchase and sale issues, or indemnity disputes. While such conflicts can be and sometimes are resolved through traditional litigation, they are usually settled before trial. Settling these matters before the necessity of litigation through proactive and early intervention could reach the same result much earlier in the process and save all parties time and money and help preserve business relationships.

Management of commercial disputes was not and is not one of the core services originally contemplated in RELLC’s organizational documents. However, RELLC has developed and adopted a *voluntary* process by which any commercial dispute can be addressed, managed and resolved. Parties wishing to avail themselves of this ADR process simply execute a separate ADR agreement, which contractually binds them to follow the process as their exclusive remedy. Moreover, because the process is voluntary, non-members of RELLC that are involved in a dispute with a member company may also take advantage of it.

The RELLC voluntary ADR process is a tiered approach designed to begin with basic business communication and then gradually escalates in complexity. The parties are encouraged and free to settle the dispute at any phase in the process but the design is to settle the dispute within a year even if it progresses through the entire process briefly described as follows:

Phase I: The parties provide RELLC with all relevant information and prepare case statements.

Phase II: RELLC’s staff and the parties meet to define the issues, identify common ground and impediments to settlement. Settlement opportunities are to be explored and encouraged.

Phase III: After review of all the materials submitted by the parties, RELLC provides a non-binding “advisory opinion.” RELLC may seek outside legal and/or technical opinions might be secured from appropriate experts.

Phase IV: Formal mediation. RELLC staff facilitates the selection of an agreed mediator and assists with logistical support only.

Phase V: Binding arbitration. Arbitration is conducted under the AAA rules. Arbitration can be either conventional arbitration or “baseball” arbitration in which each side prepares a proposed solution and the arbitrator simply picks the one he or she believes is the most fair.

As in any business dispute, especially between or among large, sophisticated companies, it is critical to involve business representatives of the companies who have the authority to settle the matter. Pragmatic business representatives can resolve most business disputes if they can focus on the right issues in a controlled environment with all the facts on the table and without the interference of the lawyers who, in doing their jobs, often co-opt the dialogue. The design of this process is to maximize settlement opportunities through leveraged communication and to be concluded within one calendar year.

This process has been utilized by two member companies with a complex business dispute that was about to go into litigation because of a soon-to-expire statute of limitations. By having their senior business representatives present along with their respective counsel come to appreciate each side’s position, this matter settled at the end of Phase II thereby preventing a lawsuit and countless hours of time and company distraction.

#### Future Business Model

As the gasoline manufacturing and marketing industry evolves and member companies continue the divestment of the retail gasoline marketing business, RELLC must also adapt in order to stay relevant to its members needs. The Board of Directors have recognized that the RELLC business model “experiment” has been extraordinarily successful in the management of joint liabilities and that it has the potential to be useful to the members well beyond its original and somewhat limited purpose and scope. Accordingly, in 2010, RELLC undertook an internal and external business review that included extensive interviews with member and non-member companies. These interviews were designed to more fully understand these companies’ business drivers, approaches and needs, especially in the general area of joint environmental liabilities. From this survey, along with interviews with company attorneys, project managers and business managers involved in the liability and risk management business, new strategies and a broader focus for the Company are under consideration. For example, consideration is being given to expanding services beyond petroleum fuel releases to a broader array of contaminants. RELLC may also add value to other areas of the members’ businesses to include upstream issues. In the meantime, the interviews have determined that there is still work to be done inside RELLC’s current business model because of the “long tail” of contractual obligations inherent in divesting marketing sites.

RELLC has proven its value to its members and is uniquely positioned to resolve specific kinds of complex problems in a cost effective manner. RELLC is becoming more efficient, deeper in its capacities, more experienced and connected across the industry and able to handle an even wider variety of problems and projects. Armed with greater knowledge of industry’s needs

and practices and reinforced by these well-defined improvements, RELLC is even better equipped to serve its members and potential new members by resolving difficult, complex issues.

## REFERENCES CITED

(1) Faulk, Richard O. and Gray, John S., "Reunion in Salelm: Updating the MTBE Controversy," *Environmental Law Reporter*, 36 ELR 10667 (2006).

(2) *Peters* purported to be a national class action seeking property damages allegedly associated with leaking UST systems around the entire United States and included counts relating to MTBE contamination. A class was never certified. Other MTBE cases of note in this time frame included *City of Santa Monica v. Shell Oil Co., et al.*, Cause No. 01 CC0433, Superior Court of the State of California, County of Orange; *South Tahoe Public Utility v. Atlantic Richfield Company ("ARCO")*, Cause No. 999128, Superior Court of the State of California, County of San Francisco; and, *In Re: MTBE Product Liability Litigation, MDL NO. 1358*, Master File No. 00 CIV 1989 (SAS), United States District Court for the Southern District of New York. Since these and other such cases were resolved, other cases filed by water purveyors with wells contaminated by MTBE have been filed alleging strict liability by gasoline marketers, most of which have been removed to federal court and consolidated by the Judicial Panel on Multi-District Litigation into one case. See *In re Methyl Tertiary-Butyl Ether Products Liability Litigation*, MDL 1358 (S.D.N.Y.).

(3) PRPs that are not RELLC members may become contracting entities by execution of a Third Party Service Agreement under which the non-members are afforded the same decision making rights as Board Members regarding the site in question