



Managing Environmental Liability

R. Allan Payne, Attorney at Law, RGP

DONEY | CROWLEY | BLOOMQUIST | PAYNE | UDA P.C.



Managing (Reducing) Environmental Liability

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“Managing Environmental Liability”

Not “Managing Environmental Risk”



Two Basic Sources of Environmental Liability

- **Governmental/Regulatory**
 - **Most Applicable to Brownfields**
- **Third Party/Tort Liability**



What is the Perception of Environmental Liability?



"Now let me get this straight. ...
We hired you to babysit the kids, and
instead you cooked and ate them both?"

Which is the Real Picture?

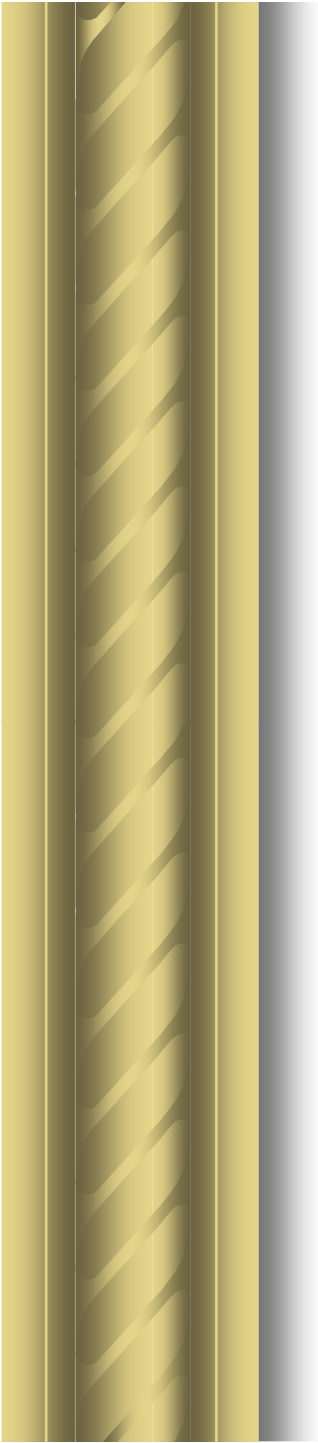


Depends on how you manage that liability?



Two Basic Situations when it Comes to Managing Environmental Liability

- **Outside looking to get in**
- **Inside looking to get out**



Two Basic Situations When it Comes to Managing Environmental Liability

- **Outside looking to get in**
 - “Hiring the Witch”
 - No liability now
 - Potential involvement in a site
 - Question is: how to get involved with the least amount of liability
- **Inside looking to get out.**

Two Basic Situations when it Comes to Managing Environmental Liability

- **Outside looking to get in**
 - “Hiring the Witch”
 - No liability now
 - Potential involvement in a site
 - Question is: how to get involved with the least amount of liability
- **Inside looking to get out.**
 - “Feeding the Witch”
 - There is existing liability
 - Ongoing involvement
 - Question is: how to reduce or eliminate that liability



Management Team



Management Team

- **You (decision maker)**



Management Team

- **You (decision maker)**
 - **Need information**



Management Team

- **You (decision maker)**
 - **Need information**
- **Environmental or Technical Consultant**

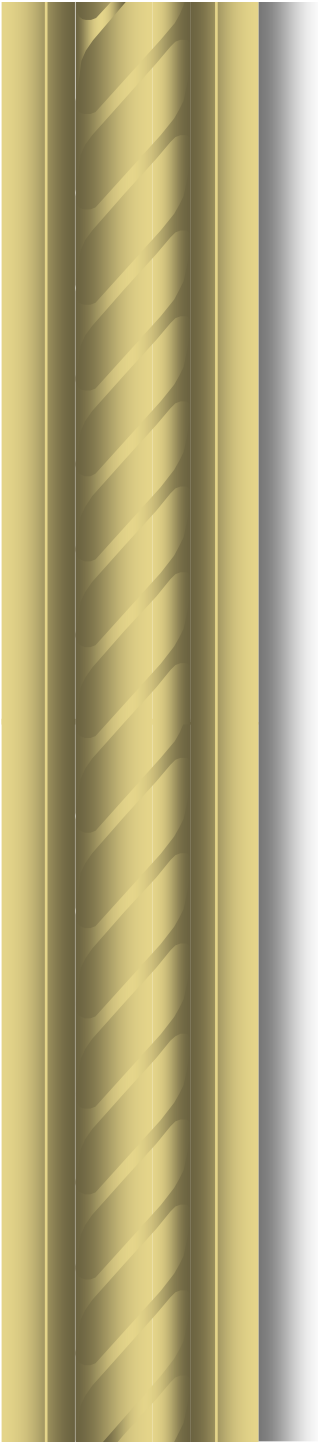


Management Team

- **You (decision maker)**
 - Need information
- **Environmental or Technical Consultant**
 - Specialist in area of Environmental Liability faced, e.g. Geologist, Hydrologist, air, hazardous waste, etc.

Management Team

- **You (decision maker)**
 - Need information
- **Environmental Consultant**
 - Specialist in area of Environmental Liability faced, e.g. Geologist, Hydrologist, air, hazardous waste, etc.
- **Attorney**



Be frank and explicit with your lawyer . . . It is his business to confuse the issue afterward.

— J.R. Solly

Management Team

- **You (decision maker)**
 - Need information
- **Environmental Consultant**
 - Specialist in area of subject environmental liability, e.g. Geologist, Hydrologist, air, hazardous waste, etc.
- **Attorney**
 - Specialist in area of liability faced

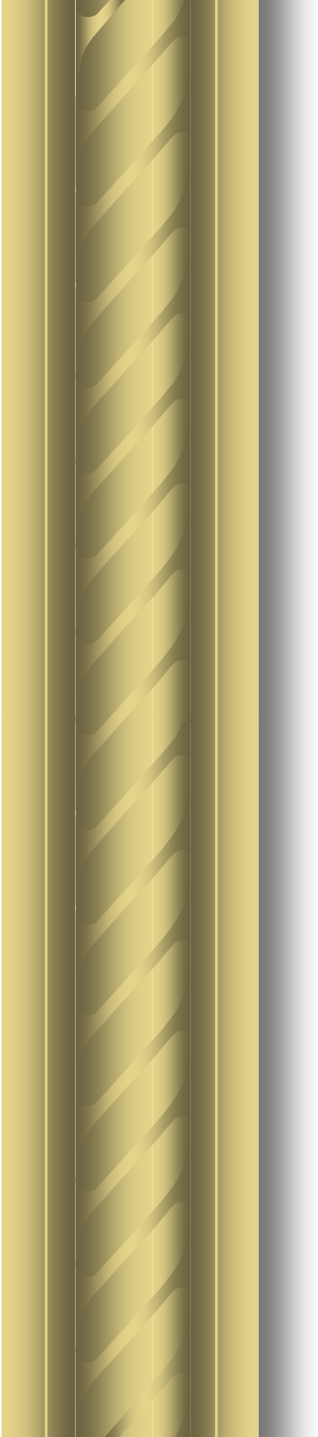
Management Team

- **You (decision maker)**
 - Need information
- **Environmental Consultant**
 - Specialist in area of subject environmental liability, e.g. Geologist, Hydrologist, air, hazardous waste, etc.
- **Attorney**
 - Specialist in area of subject liability
- **Regulator of the subject environmental liability**



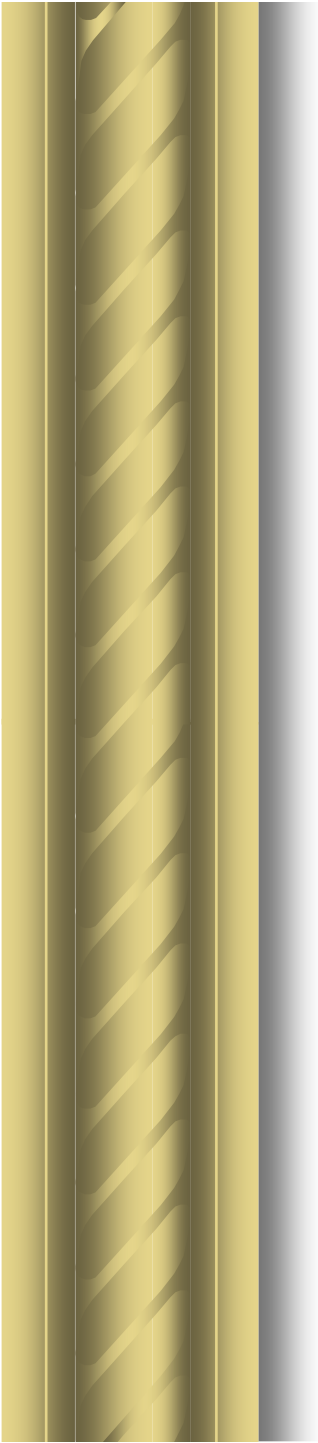
How to Manage (Reduce) Liability when Outside Looking In (Hiring the Witch)

- **Information**



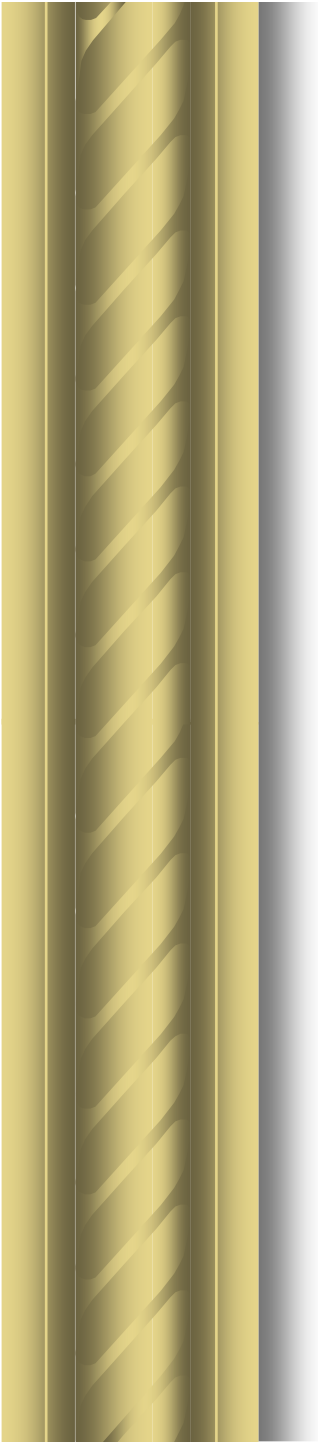
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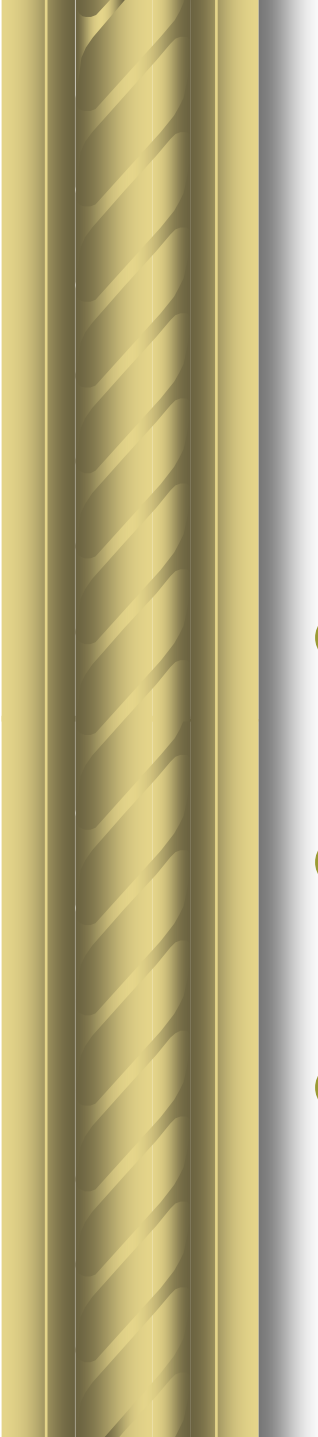
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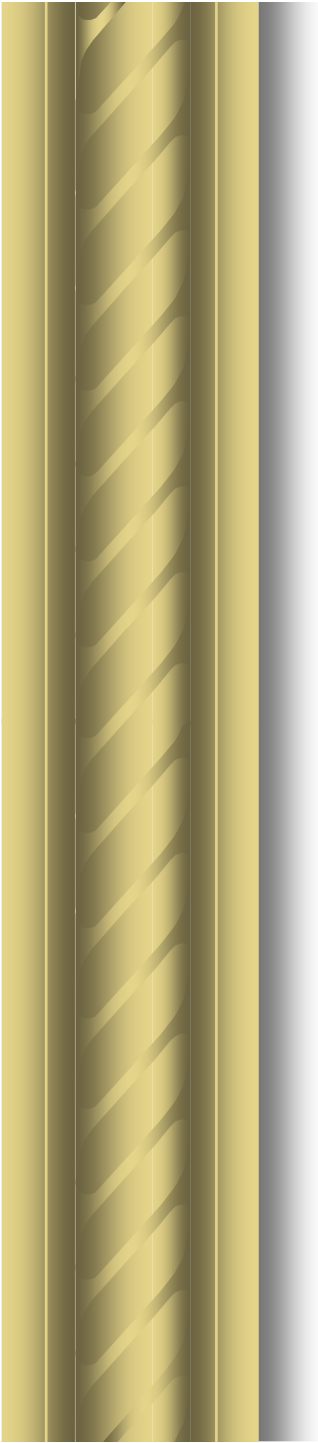
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- **Information, from your Technical Consultant (what is the problem?)**
- **Information**
- **Information**



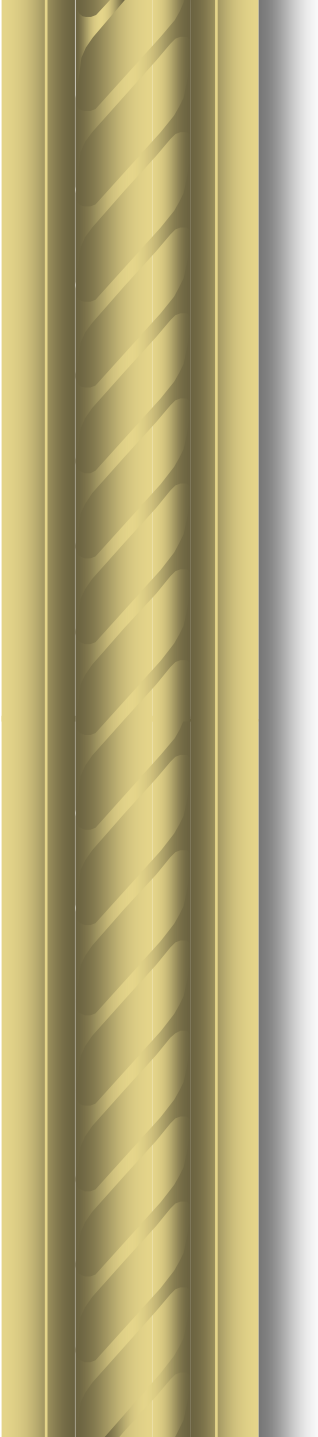
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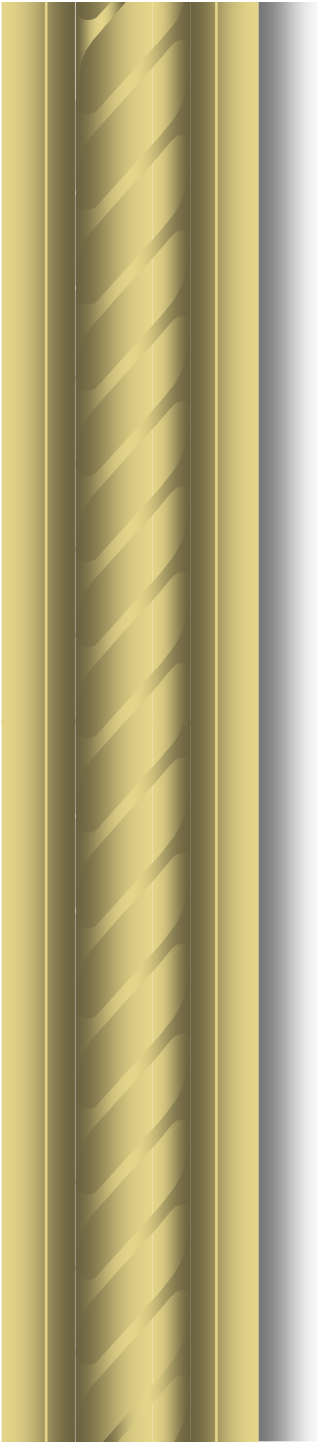
How to Manage (Reduce) Liability when Outside Looking In (Hiring the Witch)

- **Information, from your Technical Consultant (what is the problem?)**
- **Information, from your Attorney (what is the liability?)**
- **Information, from the Regulators (what are the requirements?)**



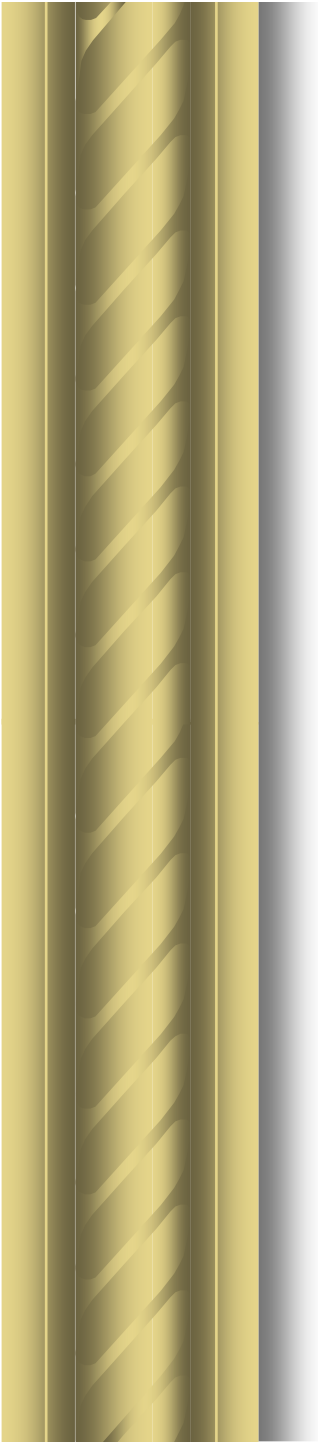
How to Manage (Reduce) Liability when Outside Looking In (Hiring the Witch)

- **Information**
- **Form a new corporation or other limited liability business entity (LLP, LLC, etc.) to get involved**
 - *i.e.* babysit straw children



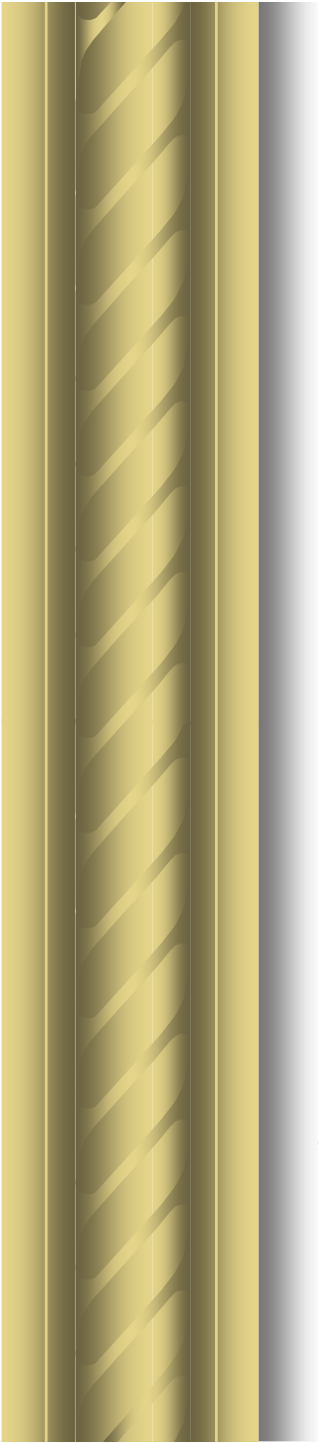
How to Manage (Reduce) Liability when Outside Looking In (Hiring the Witch)

- **Information**
- **Form a new corporation**
- **Insurance/Indemnity Agreements**
 - **Expensive**
 - **Uncertain**
 - **Enforceable In Montana?**
 - **Question always remains – when did subject liability occur?**



How to Manage (Reduce) Liability when Outside Looking In (Hiring the Witch)

- **Information**
- **Form a new corporation**
- **Insurance/Indemnity Agreements**
- **Prospective Purchaser Agreement**

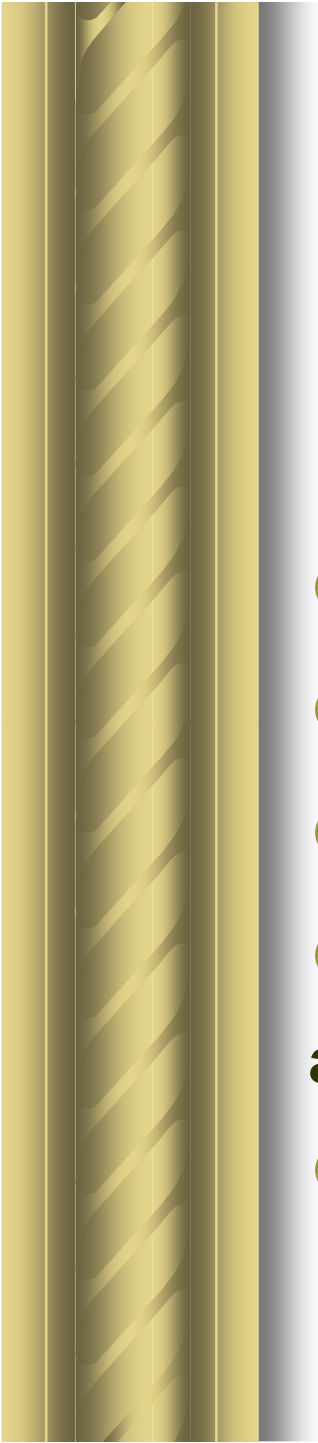


How to Manage (Reduce) Liability when Outside Looking In (Hiring the Witch)

- **Information**
- **Form a new corporation**
- **Insurance/Indemnity Agreements**
- **Prospective Purchaser Agreement**

and if you are a City or other Government entity:

[Drum Roll Please]



How to Manage (Reduce) Liability when Outside Looking In (Hiring the Witch)

- **Information**
 - **Form a new corporation**
 - **Insurance/Indemnity Agreements**
 - **Prospective Purchaser Agreement**
- and if you are a City or other Government entity:
- **Make Law (protect public health and the environment)**

How to Manage (Reduce) Liability when Outside Looking In (Hiring the Witch)

- **Information**
 - **Form a new corporation**
 - **Insurance/Indemnity Agreements**
 - **Prospective Purchaser Agreement**
- and if you are a City or other Government entity:
- **Make Law**
 - **Ban activity that leads to liability**
 - *e.g.* ban drinking wells if that's the harm



How to Manage (Reduce) Liability
when Inside Looking Out
(Feeding the Witch)



How to Manage (Reduce) Liability when Inside Looking Out (Feeding the Witch)

- **Information**



How to Manage (Reduce) Liability when Inside Looking Out (Feeding the Witch)

- **Information**
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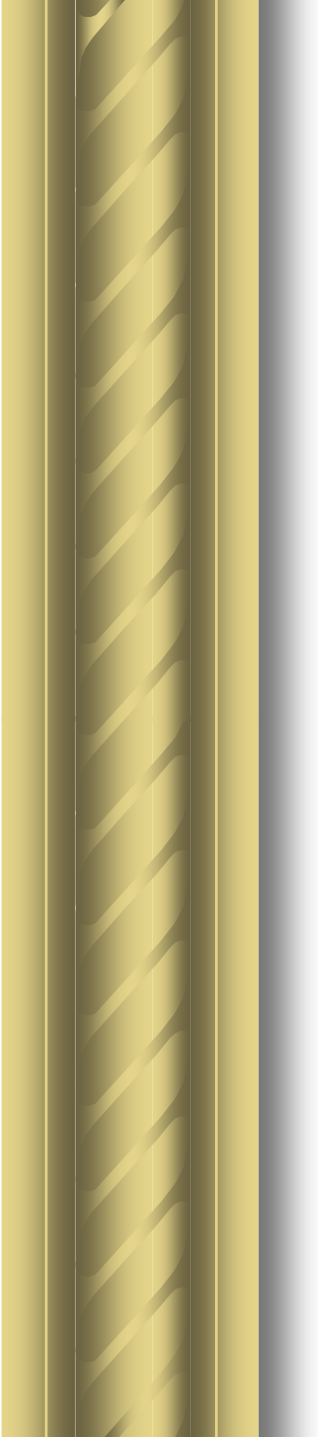
How to Manage (Reduce) Liability when Inside Looking Out (Feeding the Witch)

- **Information, from your Attorney
(what liability do you face?)**
- **Information**
- **Information**



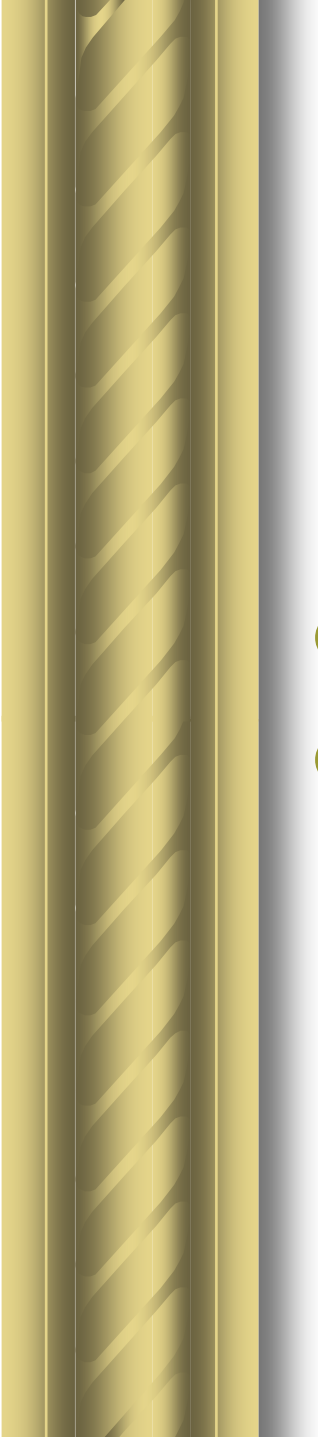
How to Manage (Reduce) Liability when Inside Looking Out (Feeding the Witch)

- **Information from your Attorney
(what liability do you face?)**
- **Information from your Consultant
(what is the problem and where
did it come from?)**
- **Information**



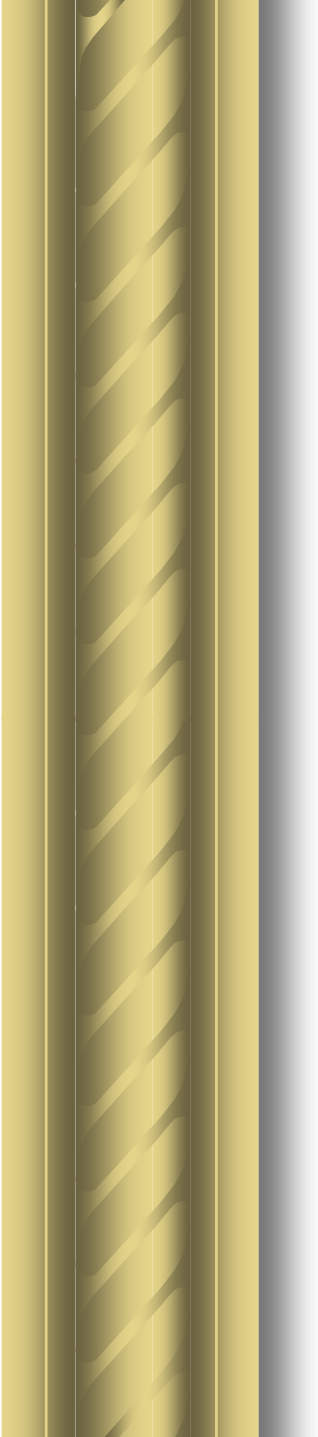
How to Manage (Reduce) Liability when Inside Looking Out (Feeding the Witch)

- **Information from your Attorney (what liability do you face?)**
- **Information from your Consultant (what is the problem and where did it come from?)**
- **Information from the Regulators (what is it going to take to fix the problem?)**



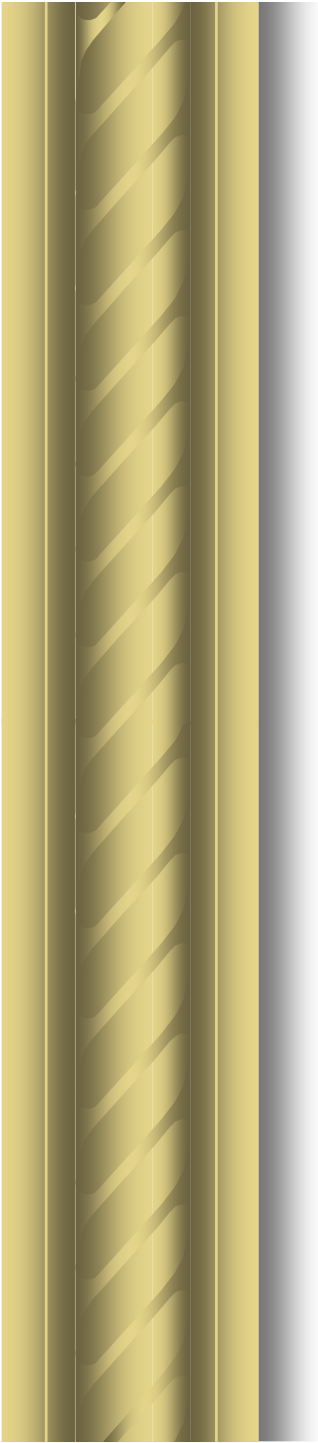
How to Manage (Reduce) Liability when Inside Looking Out (Feeding the Witch)

- **Information**
- **Ask: Is it worth it to try to reduce this liability?**
 - **Disband a “poor” corporation**



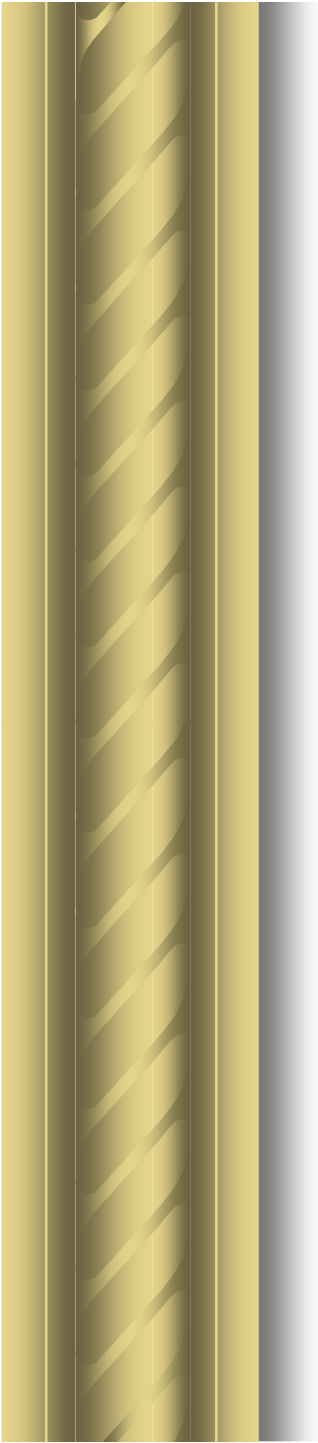
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- **Information**
- **Is it worth it?**
- **“The Pie Approach” to managing liability**



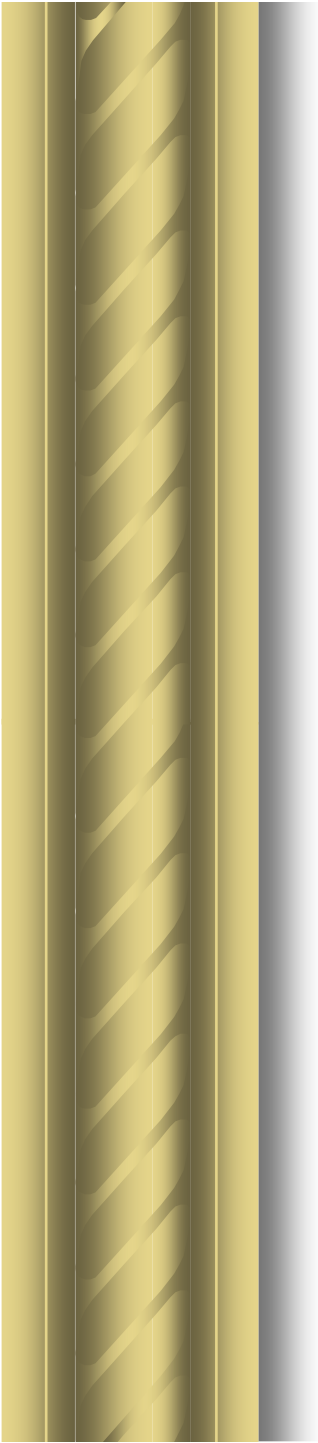
How to Manage (Reduce) Liability when Outside Looking In (Hiring the Witch)

- **Information**
- **Is it worth it?**
- **“The Pie Approach” to managing liability**
 - **How big is the Pie? – work with regulators to get what will be required to address liability (VCRA, AOC, etc.)**



How to Manage (Reduce) Liability when Outside Looking In (Hiring the Witch)

- **Information**
- **Is it worth it?**
- **“The Pie Approach” to managing liability**
 - **How big is the Pie?**
 - **How big is my piece? – pursuit of other liable parties through negotiations, lawsuits, CALA (good for “orphan shares”), etc.**



How to Manage (Reduce) Liability when Outside Looking In (Hiring the Witch)

- **Information**
 - **Is it worth it?**
 - **“The Pie Approach” to managing liability**
 - **How big is the Pie?**
 - **How big is my piece?**
 - **Will someone help me eat my piece?**
- Insurance, Indemnity Agreements**

How to Manage (Reduce) Liability when Outside Looking In (Hiring the Witch)

- **Information**
- **Is it worth it?**
- **“The Pie Approach” to managing liability**
 - How big is the pie?
 - How big is my piece?
 - Will someone help me eat my piece?
 - Is there another Pie out there? – 3rd party Tort liability, Sunburst v. Texaco



Two Basic Sources of Environmental Liability

- **Governmental/Regulatory**
- **Third Party/Tort Liability**



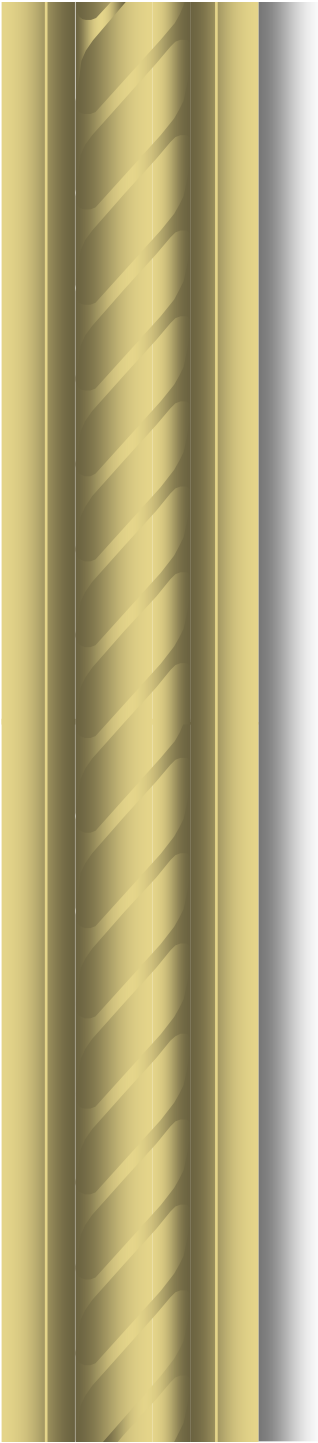
Third Party Environmental Liability

- **Personal Injury**
 - “A Civil Action”
 - Libby Asbestos
- **Property Damage**
 - Nuisance
 - Trespass



Property Damage

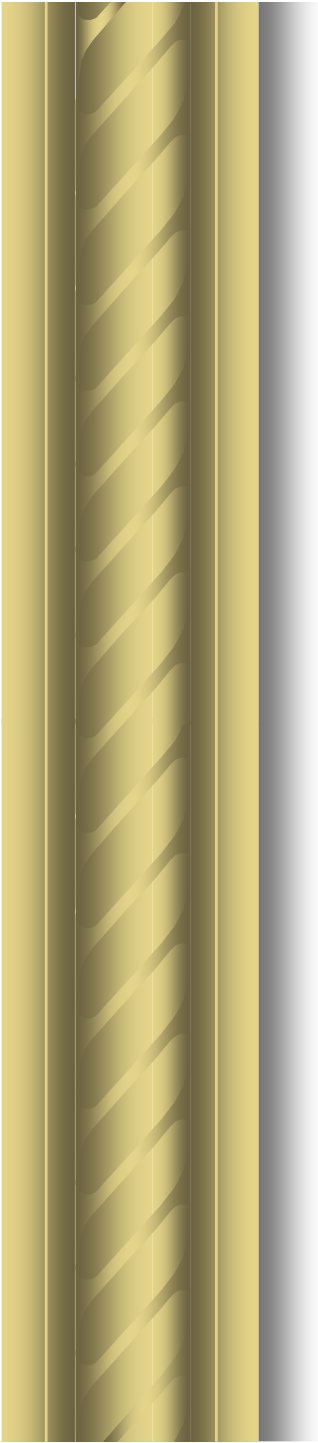
- **Most prevalent**
- **Former measure of environmental liability (in Montana)**
 - **Cost to clean up property to government-set standards**
 - **Could not exceed value of property**



Sunburst v. Texaco, 2007 MT 183,
338 Mont. 259, 165 P.3d 1079

● **Facts**

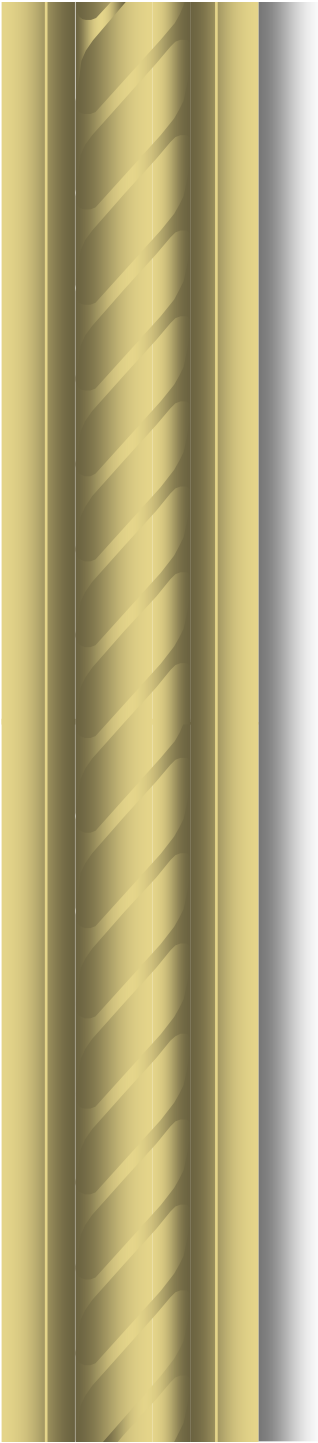
- **Old Texaco Refinery caused groundwater contamination in and around town of Sunburst**
- **Texaco was in compliance with MDEQ clean-up requirements (basically doing what DEQ told them to do)**
- **Sued by Sunburst residents for cost of complete removal of contaminants from groundwater (\$15 million on top of MDEQ required cleanup)**



Sunburst v. Texaco, 2007 MT 183,
338 Mont. 259, 165 P.3d 1079

● **Holding of MT Supreme Court**

- If property at issue had value to owner more than just its commercial value, owner could recover cost to return property to original condition
 - “Sentimental” valued properties include at least personal residences and maybe vacation homes, cemeteries, family farms, etc.
- Plaintiffs awarded \$15 million (but not required to remove contamination)



Sunburst v. Texaco, 2007 MT 183,
338 Mont. 259, 165 P.3d 1079

- **Lessons from Sunburst for Managing Environmental Liabilities**
 - Information is key to understanding and managing environmental liabilities
 - Government standards for cleanups may not be the whole picture
 - Environmental liability changes, which can make management of that liability difficult