

NANCY RICH

From Prosecuting Historic Mess to State-of-Art Aquaponics

by Mike Bailey

Kerr-McGee.

For Chicago attorney Nancy Rich of **Katten Muchin Rosenman LLP**, that name sealed her interest in environmental law and brought home the vagaries of the judicial system.

Rich, now a member of Katten's 600-plus worldwide team of attorneys, joined Illinois Attorney General Neil Hartigan's newly formed environmental unit fresh out of law school in the mid-1980s.

"It was so new, we'd argue our own appeals back then," she says. "Now, of course, the appeals division handles that. But we'd draft our own complaints, file them, try the cases, argue the appeals and learn as we went. It was wonderful experience. Also, we didn't have to worry about billable hours."

In 1985 and less than one year out of law school, Rich was assigned to assist in the prosecution of multinational conglomerate Kerr-McGee in a landmark environmental case in suburban West Chicago.

Low-level nuclear waste from the Kerr-McGee facility in West Chicago had been historically dumped onto property in and around the small city before the dangers of the waste were known. As a result, the waste was not contained or shielded in protective casing of any kind. In fact, some of the material was

disposed of along a creek in an area that later became a public park.

"At the time of the disposal, no one realized how hazardous this nuclear material really was," Rich said. "This case really put environmental issues in the public eye and made people think about how to deal with the modern concerns caused by old disposal practices."

In 1967, Kerr-McGee bought the American Potash and Chemical Company, which owned the Rare Earths Facility in West Chicago. The plant produced thorium, radium and uranium by acid leaching.

For 42 years, from 1931 to 1973, that plant extracted both radioactive and non-radioactive elements and produced gaslight mantles, among other things.

However, thorium mill tailings, which are the waste materials from the facility's operations, were used as fill and disposed of in four sites, one of which was the grounds of what later became Reed-Kepler Park in West Chicago. An 11-acre former sand and gravel quarry on land in the modern-day park was used as a landfill for the mill tailings for many years and became heavily polluted.

Excessive levels of contamination were found at Reed-Kepler Park in 1976, three years after production at the plant had ceased.

In 1984-85, the Illinois Attorney General's Office investigated the circumstances of the massive pollution and filed suit against Kerr-McGee. Rich was one of many lawyers who worked on the case.

"I took the deposition of a nationally recognized arborist," she says. "He contended that the radioactive material could be placed in an on-site landfill, where contamination would be drawn by trees out of the soil and would pose no real harm to residents in the area," a contention which was ultimately rejected by the U.S. Environmental Protection Agency.

Kerr-McGee, realizing what was at stake, hired its own fleet of lawyers and put on a sophisticated defense in the bench trial in DuPage County in front of Judge Fredrick Henzie.

Their defense, Rich remembers, hinged on several factors; the nuclear material was of low grade and posed no threat, the trees would absorb the material and naturally cleanse the area, and other novel defenses in this nascent field.

Death Strikes Twice Over

Because of the complexity of the issues and the number of witnesses, the trial could not be



heard in one continuous block of time, but was continued over several months with the trial held a few days a week in the afternoons when Judge Henzie had no pending matters.

Finally, in the fall of 1986, the case went to Henzie for a decision. Weeks passed. Months passed. Finally, in 1989, nearly three years after the case ended, Henzie suffered a fatal heart attack.

"The state's case died with him because there was no jury and he was the sole trier of fact," Rich quietly says.

In 1990, the EPA added the park to Superfund's National Priorities List. In 1993, the EPA began an investigation to learn the scope of the contamination. Using the results of the investigation, it issued a time-critical action memorandum, which implemented an expedited plan to excavate and dispose of the radioactive wastes off-site, according to published material.

Shortly after issuing the memorandum, the EPA issued a unilateral administrative order to Kerr-McGee and the city of West Chicago to carry out the longer-term cleanup effort. The work began in 1997, with Kerr-McGee agreeing to excavate contaminated material at the site. More than 114,600 cubic yards of contaminated soil were excavated and transported to a disposal facility.

By that time, of course, all of the young assistants, including Rich, had moved on.

"When the EPA came in to the case, Kerr McGee said it would be more dangerous to excavate the material and haul it away across the country," she remembers. "This case illustrates there are no perfect answers in dealing with historic waste. It's a cost-benefit analysis."

Rich's passion for the equitable application of environmental law has not lessened as she moved to the defense of major companies that have been accused of running afoul of complex rules and regulations. She defends people against the vagaries of the law and the uneven application of its premise.

Jeff Dewey, of iStar Financial, has worked with Rich for about eight years, almost always in environmental matters concerning properties that may have contamination or in structuring protective conditions into loans. She also advises them on issues that arise during the term of the loan, be they spills or new legislative directives.

"Nancy has the ability to understand the many different jurisdictional requirements handed down by the different states we operate in and is able to offer specific advice tailored to the situation," he says.

"She has helped facilitate meetings with state regulators and with her understanding of our needs and those of the state, she is able to put forth proposals that help us reach a more

equitable solution with the state. She is also able to understand that sometimes there is no canned solution to a problem, so you have to be creative and flexible," Dewey says.

Flexibility and knowledge of the uniqueness of environmental law is Rich's specialty.

"I represented a recycling business. They (the owners) were really trying to do the right thing, but they got into trouble when they rented property that was really not suited to their purposes. The landlord did not provide them with all the information and the number of challenges my client faced in locating a business at that site," she says. Those challenges included the fact that the property often flooded, leaving serious issues with runoff and the management of storm water.

"My client had won environmental awards for the way it conducted its business at its other facilities. But the state said its inspection at this property revealed what it alleged were 'oily samples' and we became involved in litigation."

Rich found the site had once been used for industrial purposes and that the source of the type of contamination at issue was more directly traceable to that operation.

"Most of my clients are people who live in our community. They have families here, and their kids play in parks and go to schools here," she says. "It is rare to find someone whose intent is to harm the environment and thus cause problems for us and future generations," she says.

Rich handles transactional matters, regulatory counseling and civil litigation. Environmental lawyers in Katten's other offices handle criminal work and a number of other environmental law specialties.

'The Only One I Would Call'

"Katten represents a wide variety of clients in various businesses. When I am called in, I try to look at these problems from a business point of view," she says.

Rich weighs the costs incurred versus litigating key points to obtain leverage, negotiating a settlement at the right time or some other solution.

"I am focused on the strategy. How do we end this in such a way as to benefit the client the most?" she asks.

"I ask at the very beginning of a case, 'What is the most effective strategy from a business point of view?' To the extent that we need to litigate to achieve our goals, I develop a strategy for our defense, hire consultants and do the due diligence. Sometimes we have to explore historical uses of the property prior to our client's involvement."

Maryann Waryjas, senior vice president, chief legal officer and corporate secretary for Great Lakes Dredge and Dock Corp., says

Rich is the best environmental attorney with whom she has ever worked.

Waryjas was a partner at Katten for years and worked closely with Rich at the firm. Rich is now outside environmental counsel for the company, which is the largest provider of dredging services in the United States and a major provider of commercial and industrial demolition and remediation services.

"She is just outstanding," Waryjas says. "She is the first person I would call about anything concerning environmental law. In fact, she is the only person I would call."

Rich has developed her own philosophy and unique approach to environmental law. She says she only uses invasive soil sampling, for example, when it is necessary to establish some kind of a baseline.

"If our client is buying an industrial property with likely historical contamination and an indemnity from the seller, for example, we want an environmental baseline," she says. "But some of the time, sampling is not necessary. We don't want to create a science project. We have to ask ourselves, 'Does it have a business purpose? Is it focused on issues that we can address within the context of the business transaction?'"

When she represents buyers who are purchasing property, she works with the environmental consultants to sample in areas that were most likely to have been impacted by former industrial operations. Taking the time to acquire knowledge of those past operations is key, she says. She says you can sample using a pro-forma grid that takes samples within each area of a plant. But, she says, "you can easily miss something because you are not working from the operational facts."

In her spare time, Rich enjoys travel and has made multiple trips to Ireland with her mother to trace their family lineage. Her college roommate lives in England, which has been the location of other family vacations. But her first passion remains environmental law and related issues.

She is the vice chair of the Green and Sustainable Transactional Committee of the American Bar Association. The goal of the group is to help attorneys represent clients in matters with sustainability issues.

"It is the intersection of real estate and environmental law," she says.

Sustainability and energy use are two of her passions, which is why she responded to a request to represent pro bono the people behind The Plant -- a self-sustaining building on Chicago's southwest side dedicated to sustainable businesses.

In July 2010, an affiliated entity acquired the former Peer Foods meat processing plant at 1400 W. 46th St. in Chicago's Back of the Yards neighborhood.

The 93,500 square-foot building has been repurposed into a net-zero energy vertical farm and food business operation. A complex and highly interrelated system, one-third of The Plant will hold aquaponic growing systems and the other two-thirds will incubate sustainable food businesses.

Rich advised the group behind The Plant on sustainability grants, applicable state and federal environmental and utility laws, and tax credits. The Plant seeks businesses that are sustainable, such as aqua culture and other green and environmentally friendly pursuits.

Rich also serves as general counsel and as an ex-officio board member of Climate Cycle, which teaches students about sustainability through solar energy and related educational projects and activities. ■