

Managing Contaminated Property

How do you cost effectively manage environmental liabilities associated with your real estate portfolio? First, do no harm: you



JOHN G. NEVIUS

need to make sure you are not creating new environmental problems or making existing problems worse, while ensuring continued protection of human health and the environment. With this principle in mind, you can, essentially, hold, lease, sell or donate property which may be tainted by actual

or potential environmental (read Superfund or CERCLA) liability.

Where a viable real estate market exists, underperforming property assets ideally should be cleaned up to unrestricted use standards and sold for maximum gain. Another alternative is to sell potentially tainted industrial property to a separate entity with sufficient resources to provide satisfactory indemnity against future regulatory action. These alternatives sound good, but are not always available.

Many corporations choose to lease old industrial sites in order to defray carrying costs. Leasing industrial property can buy time in the hope that environmental conditions, science, regulations or the real estate market may change. Leasing may work well in the short to medium term, but the threats of third-party liability and new or renewed regulatory intervention arising from contamination remain unaddressed. Various types of pollution liability insurance policies are available to address these concerns, but this coverage can be prohibitively expensive and may involve other downsides, such as the need to conduct additional environmental investigation simply to answer basic underwriting questions or the risk that covered claims

will not be paid.

Other options include using potentially tainted industrial property (a/k/a "Brownfields") to mitigate losses in other areas such as with respect to wetlands or natural resource damages, i.e., designate the land as a park or nature preserve or flood it to create a marsh. Donation of land to municipalities, not-for-profit corporations or other entities can have valuable publicity and tax implications depending upon the level of contamination. These approaches also can be combined with conservation easements, institutional controls (read deed restrictions) or engineering controls (read fences and long-term monitoring).

In the absence of the ability to divest the corporation of a problematic site, it is never too early to plan for the future by considering future land use, aggressively proceeding with remediation, encouraging redevelopment as integral to any clean-up activity and reaching out to all stakeholders, particularly the affected community. Moreover, never forget that historic liability insurance may be available to off-set environmental liability or fund clean-up even following significant corporate changes. Whatever option or options are selected, environmental risks and costs can be managed effectively. For example, why conduct sampling quarterly when annually will do? Similarly, when was the last time you evaluated the job your outside environmental consultant is doing for you – and who is managing them?

When you decide to look into whether your potentially tainted real estate assets are being managed effectively – even if not all of them presently are considered assets – newer environmental insurance products may become more attractive as a means to address existing problems or the risk of future ones. You can pay someone to come in and agree to take on all your environmental liability. Or, you can hire in-house technical consultants to manage and effectuate clean up. Between, or perhaps in conjunction with, these two extremes there are at least four issues for you and your insurance broker to consider when purchasing environmental liability insurance products.

First, go with a known quantity that has been in the

business long enough and has the requisite technical expertise and financial staying power. The emerging environmental insurance market is dominated by a few key players and, as with most things, this is not an area in which to be penny-wise and pound-foolish. Recent insolvencies have left many policyholders holding the bag.

Second, environmental insurance generally is sold only as “claims made and reported.” This generally means that: 1) the government must bring some compulsion to bear upon you to remediate or cleanup; and 2) you have to report this to your insurance company within the policy period. The beginning of the policy period often is contemporaneous with what is known as the retro-active date. In addition to the two criteria above, the future event giving rise to environmental liability, such as a release of hazardous substances, generally must take place after the retro-active date.

Unknown or poorly defined contamination which existed before the retro-active date can get you in trouble. This involves issues three and four. If you stay with the same insurance company, your original retro-active date may be carried over each time you renew coverage. If you change carriers, you may be out of luck because prior coverage may be unobtainable if you report after an unrenewed policy period is over. Accordingly, no coverage may exist for the period between the old retro-active date and the new one.

Fourth, what did you know and when did you know it? Most environmental coverage applies only to a set of well defined known conditions or to specific types of environmental releases taking place in the future, or both. If you submit a claim, the extent to which the condition you seek coverage for may have related to some undisclosed or unknown historic release may be an issue. In other words, some courts have required the policyholder to submit evidence of exactly when the tank leaked in order to obtain coverage even though no evidence of leakage existed when the tank was insured. Effective investigation, disclosure and cooperative underwriting help to reduce the possibility that your claim may be denied – but cannot eliminate it.

Whether you hold onto, sell or donate your contaminated real estate, periodically reevaluating your management approach cannot hurt. Applying basic management skills can go a long way toward minimizing liability and optimizing value. When considering a transaction, traditional indemnity agreements can be complex and

open-ended. As an alternative, in the absence of cleanup to prehistoric standards, implementing legal and engineering controls may provide the level of comfort necessary for buyers and lenders to go forward with the deal. An added measure of certainty also may be obtained using more recent environmental insurance products. With all of these things to consider, you may be thinking why don't we just cap the whole parcel with asphalt? While this may not be the most sophisticated environmental risk management strategy, parking lots can generate a lot of revenue!

John G. Nevius is a shareholder in the New York office of Anderson Kill & Olick, P.C. and a member of Anderson Kill's Petroleum and Chemical Industry Insurance Group. Mr. Nevius successfully has resolved and litigated numerous insurance coverage actions on behalf of policyholders and provides advice and technical expertise on a wide range of environmental matters. Mr. Nevius also is a registered Professional Engineer and former USEPA Senior Project Manager. John can be reached at jnevius@andersonkill.com or (212) 278-1508.