
Liability and Cost Recovery at Brownfields

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Legal Toolbox – Liabilities and Property Transfers

- Liability depends on the type of pollution
 - Hazardous substances under CERCLA/Superfund (solvents, metals)
 - Petroleum (underground tanks vs. other sources)
 - Hazardous waste (RCRA)
- Liability can be to various entities
 - IDEM and EPA
 - Third parties (neighbors)
 - Workers
 - Subsequent property owners

Legal Toolbox – Liabilities and Property Transfers

- Basic Rule:

If you're going to own it, you're going to be liable unless you can prove otherwise

Strategy for dealing with brownfields liability:

- Evaluate your liability (due diligence)
- Develop a plan for reducing your liability

Legal Liabilities – Initial Considerations

- **Due Diligence for Property Prior to Purchase**
 - ❑ Gain a full understanding of possible environmental issues (ASTs/USTs (how many, size, age, ownership history), industrial chemicals or oils, other source(s) of contamination)
 - ❑ Gather information from prior owners/operators
 - ❑ Gather information about prior owners/operators, neighboring owners/operators, historical usage of area
 - ❑ Account for any concerns in Acquisition/Purchase Agreement – if possible
 - ❑ Reliance letters
 - ❑ Ask about insurance documents

Legal Liabilities – Managing Liability

- Exemptions
 - Government entities
 - Prospective Purchasers
 - Neighbors
- Regulatory Closure: why not just clean it up?
 - HEA 1162 makes this easier
- Should I involve the regulator?

Legal Liabilities – Government Liability Exemptions

- Varies based on type of contamination
 - Hazardous substances under CERCLA*
 - Petroleum from USTs*
 - Petroleum from other sources*
 - Hazardous wastes under RCRA
 - “Corrective Action” sites
- State and Federal exclusions may not match

*Covered under Indiana’s unified liability approach

Legal Liabilities – Other Liability Exemptions

- CERCLA “bona fide prospective purchaser”
 - Requires Environmental Site Assessment
 - Requires compliance with information requests, access requests, land use restrictions, etc.
 - Exercises “appropriate care”
 - Does not apply to petroleum or hazardous waste sites
- Neighbor impacted by contamination
 - “Contaminated aquifers policy”
 - Applies to all regulatory schemes

Legal Liabilities – Dealing with the Regulatory Agencies

- Should I talk to IDEM?
 - Comfort and Site Status Letters
- Should I just clean it up?
 - Variety of cleanup programs, some involuntary
 - Helps minimize third party liabilities (workers)
 - HEA 1162
- The Wildcard
 - Prospective Purchaser Agreements

Legal Liabilities – Summary

- Presume liability upon acquisition unless an exemption can be identified
- Liability exemptions depend on the type of contamination and the nature of the entity acquiring the property
- IDEM can but need not be involved
- Work prior to transfer or property is vital to minimizing liability

Available Funding / Cost Recovery

- Who might pay for initial investigation(s), Site stability, and/or cleanup?
 - Prior owner/operator
 - Other Potentially Responsible Parties (PRPs)
 - Neighboring industry
 - Redevelopment partners
 - Government funds (Brownfield's dollars, Federal, State, local grants, other sources)
 - Insurance
 - Anyone else – be creative

Insurance Issues

■ Insurance

□ Types

- CGL Policies – other?
- Pollution-specific Liability Policies
- Cost-cap Policies

□ Document retention

- Collect information
- Keep everything

□ All Policies may be Important

- Current and historical

Insurance Issues, Cont'd.

■ CGL Policies

- Older may be better – but, don't give up hope on the new ones!
- CGL policy provides coverage for liabilities not addressed in (pollution) exclusions or endorsements
- Indiana's favorable environment
- Evolving pollution exclusions
 - Limited pollution exclusion (1973-1985)
 - Sudden and accidental language
 - Absolute pollution exclusion (1986-present)
 - Indiana-specific pollution exclusions

Insurance Issues, Cont'd.

- ❑ Under a typical CGL policy, Insurer generally has duty to:
 - Indemnify Insured
 - ❑ Pay “all sums” or “those sums” the Insured becomes legally obligated to pay as damages resulting from bodily injury or property damage to which this insurance (policy) applies.
 - ❑ Damage covered must be caused by an “occurrence”.
 - ❑ “Damages” may include environmental remediation and response costs.
 - ❑ Duty is triggered by “suit”, but also might be accepted in a pre-suit settlement.
 - Defend Insured against any “suit” seeking damages resulting from bodily injury, personal injury, or property damage that might be covered by this insurance (policy)
 - ❑ Duty is very broad.
 - ❑ Defense costs will include attorneys’ fees, and might include some investigation and site characterization work.

Insurance Issues, Cont'd.

- ❑ Typically, Insured has duty to:
 - Notify Insurer (called the Tender)
 - ❑ Everything starts from the date of the Tender. Therefore, it is crucial to do this ASAP
 - ❑ Pre-Tender “defense” costs are not recoverable
 - From Insurers’ perspective, this might include: defense, investigation, and any indemnity (cleanup) costs that were incurred prior to notifying the Insurer of the “claim”.
 - Cooperate with Insurer

Insurance Issues, Cont'd

- Stacking Policies
 - Individual limits can be very powerful when stacked
 - Most CGL Policies are “occurrence” based
 - Environmental releases are often very gradual
- Common time limitations
 - Personal (bodily) injury claims – 2 years
 - Injury to Property - 6 or 10 years
- New ELA Statute of Limitations

Thank you

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