

The Brownfield Quandary—Solutions from the Environmental Insurance Marketplace

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Many corporations and property owners lack appropriate incentive for cleaning up and moving their environmentally challenged properties back to productive use. For property owners ready to act, being able to navigate the terrain, handle liability issues, and deal with surprise contamination issues can be enough to prevent action.

The reality is there are a range of underpublicized and often unknown environmental insurance and risk transfer solutions available to facilitate restoring these properties to productive use.

THE BASICS

There are a number of different risk transfer solutions to allow Brownfields property development and re-use of contaminated properties. Elements of each program are selected by site conditions, parties' risk-tolerance levels, transaction structure, and regulatory implications. Some basic elements of a risk transfer solution include:

- Capping costs
- Insuring on-site activities of contractors/subcontractors
- Insuring transportation of off-site waste and material
- Insuring disposal and/or destruction of waste
- Indemnifying current owner through insurance and contract indemnification language
- Guaranteeing against subsequent reopener of the site by regulatory agencies
- Providing Real Estate transfer coverage so the property can be conveyed to subsequent purchasers
- Obtaining indemnifications and/or certificates of destruction from the waste incineration and/or treatment and disposal facility
- Obtaining No Further Action approval from NJDEP

A MORE COMPLEX SOLUTION

Remediation Stop Loss

A Remediation Stop Loss (RSL) program covers known contamination at a site. It is designed to cover overruns in anticipated cost of project work, generally outlined in a document defining the scope of work (SOW). This program is typically structured with a self-insured retention (SIR) representing expected clean-up costs (plus a buffer).

Real Estate Environmental Liability

The Real Estate Environmental Liability program (REEL), a more traditional environmental impairment liability policy, covers unknown contamination at a site and third-party bodily injury and property damages arising out of pollution events commencing during the policy period. REEL picks up the environmental liabilities that RSL policies would typically not cover, i.e., unknown contamination at the site. A REEL program can add significant value to property transactions since much of the financial uncertainty associated with these transactions emanates from environmental conditions unknown at the time of the transaction closing.

THE TRADITIONAL SOLUTIONS

Environmental Protection Program

This finite type of environmental program is instrumental in the redevelopment of Superfund sites and Brownfields properties. The Environmental Protection Program (EPP) is one possible solution where sellers are able to release themselves of the environmental liability, and buyers are able to cap their environmental risk. The structure works as follows:

- Named Insured and insurance carrier agree upon an estimated cost of cleanup
- Net Present Value of this estimated cost is deposited into a Commutation Account held and managed by the insurance carrier in the name of the Named Insured
- Insurance program is then put in place to draw down on this money throughout the term of the cleanup
- Some programs provide for 100% cost overrun protection as part of the program. If required by the seller or bank, higher limits are available in the marketplace
- Some programs provide first dollar (zero self-insured retention) overrun protection with this program.

Environmental Wrap-Up

An environmental wrap-up program (WRAP), which provides coverage for the remediator as the project's general contractor and all subcontractors engaged, offers liability protection to all named parties involved on the project for any claims that arise as a result of environmental constituents being released into the air, soil, or water resultant from contractors' actions in the scope of their work onsite. This includes: Coverage for all insureds on project; Remediation costs can include restoration costs; Off-site Transportation and Exposures at non-owned locations; Completed Operations Coverage; Demolitions coverage is possible; Policy terms can match project duration.

Environmental Liability Transfer

Another structure designed to contractually transfer environmental liabilities associated with contaminated and actionable site(s) to a third party via contract is the Environmental Liability Transfer (ELT) program. Typically, a contract is signed between a site owner and a third-party firm, whereby the third party agrees to assume all environmental liabilities associated with a site up to a certain amount. The third party usually also leads the cleanup according to the Remediation Action Plan. A cost cap policy in excess of the contractual obligation is then placed, naming Seller and Buyer as insureds.

Pollution Legal Liability

Pollution Legal Liability is the most common type of risk transfer solution purchased after a remediation. PLL pays on a site owner's behalf all sums they are legally obligated to pay as a result of emission, discharge, release, or escape of any contaminants, irritants, or pollutants into/on land, the atmosphere, or any water course or body of water, provided this results in "environmental damage."

WHAT YOU NEED TO DO

The reality is that management and insurance solutions are available to help to make a project viable. The insurance marketplace offers ways to transfer or limit the environmental exposures related to a project and remove the obstacles to redeveloping contaminated sites helping to revitalize local economies. Even in these troubled times, the insurance marketplace is healthy, with new players and products on the scene.

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