Anderson Kill & Olick, P.C.
REAL ESTATE & CONSTRUCTION ADVISOR
www.andersonkill.com Spring 2010

Protecting Your Bottom Line When Facing Potential Superfund Liability: Critical First Steps

By John G. Nevius and Peter A. Halprin*


John G. Nevius

You and your company are facing Superfund liability. What can you do to manage your costs? Depending on the history of the site, you may be able to draw on general liability insurance, other people's insurance or contributions from other potentially responsible parties. Integrating these sources of funding with practical cost-savings and oversight of environmental consultants can ease the Superfund burden. You need experienced professionals to advise on oversight and to evaluate and tap potential resources. A fully coordinated approach would involve these professionals in not only overseeing investigation and cleanup, but doing so in a way that satisfies the community and regulators without paying a fortune.

Superfund Liability Has Long Tentacles

Risk of Superfund liability may be on the rise after a long period of relative inactivity. In early March 2010, the U.S. Environmental Protection Agency (EPA) announced that the Gowanus Canal in Brooklyn had been designated a Superfund site. Heavily polluted with industrial waste and sewage since the first World War, the canal, according to the EPA estimate, would take over 10 years to be cleaned up at a projected cost in excess of $300 million. Nine other sites in seven states — Alaska, Florida, Illinois, Michigan, North Carolina, Oregon and Texas — were also recently designated as Superfund sites.

Superfund liability has long tentacles. The Superfund Enforcement program achieves its site-cleanup objective by finding the companies or people responsible (or "potentially" responsible) for contamination at a site and negotiating with them to either clean up the site or contribute clean-up funds for remediation activity undertaken by another party. Joint and several Superfund liability may be triggered if:

1. Hazardous Substances are present at a facility
2. there is a Release or possible Release of these Hazardous Substances
3. Response Costs are incurred or anticipated
4. the defendant is a liable party — that is, one that owns, operates or causes waste to be sent to, or disposed of, at the site.

Moreover, the definition of a liable party recently broadened. In February 2010, the United States District Court for the Northern District of Illinois held that the lessor of equipment used at a contaminated site was liable as a facility "Owner" under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA, commonly known as Superfund), 42 U.S.C. § 9601 *et seq.* *United States v. Saporito*, 2010 WL 489703 (N.D. Ill. Feb. 9, 2010).

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This expansion of the definition of an Owner and thus the responsibility of additional parties in a Superfund action can both help and hurt policyholders facing Superfund liability. On the one hand, if a lessor can be deemed an

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Owner, this will broaden the scope of potentially responsible parties in such an action. On the other hand, it may help those parties deemed responsible by diluting every party's share as well as providing additional bases for recovery, including an opportunity for contribution.

Steps to Take to Offset Potential Liability

Provide Timely Notice. For those facing potential liability, there are ways to offset costs. To facilitate and maximize recovery, preliminary steps are crucial. First, provide immediate and effective notice to all known previous liability or environmental impairment insurance carriers. Many companies have complex corporate histories, but that does not mean that historic insurance assets are worthless. To the contrary, many states allow the coverage to follow the liability and, thereby, prevent a windfall to the insurance company that accepted the risk in the first place. Millions of dollars have been recovered on behalf of defunct entities — even where insurance policies are missing and must be reconstructed.

Many policies and jurisdictions, however, require notice within a certain period of time, and failure to comply could prove fatal to a claim depending on applicable state law. When providing initial notice of a claim or potential claim, all that is necessary is a copy of the document received by the policyholder alleging liability — for example, a potential responsible party (PRP) letter identifying the policyholder in the context of Superfund liability (note that states and some municipalities have equivalent environmental laws very similar to Superfund). In some cases, an insurance company will require compliance with special notification provisions — these may be outlined in the policy — so be sure to check with your broker or even your insurance carrier or an experienced coverage professional to avoid diminishing your rights.

Seek Out All Existing and Historical Policies. A related and equally important step is to find all insurance policies. Given the imperative to provide timely notice on all policies that may be triggered, it is important to find all relevant policies as quickly as possible, so that notice can be provided on behalf of you or predecessor companies or other affiliated entities. If liability extends far into the past or if your company has undergone changes of ownership, it might be necessary to hire an insurance archaeologist or other expert who can track down lost or missing policies. Searches for indirect evidence of coverage such as accounting or government contract records have led to the discovery of millions of dollars in coverage assets. Moreover, just because an insurance company is insolvent does not mean that recovery is unavailable. Many states have created mechanisms, such as state guaranty funds, which pay out claims made to insolvent insurance companies. Some states even allow entities harmed by environmental property damage a direct right of action to pursue another's coverage. *See* New York Navigation Law § 190 (McKinney's 2010).

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Document and Preserve All Communications. Preserve all documents — not just those generated in the course of litigation but even simple communications with the EPA and your insurance company. In some cases archived documents may shed light on other parties that were aware of, or may have contributed to, your liability. If so, such documents could provide a basis for a contribution action. It is therefore critically important that company document retention policies are reviewed and that essential personnel, even retirees and broker representatives, be alerted as to the information that could and should be located and retained.

Following these steps, a qualified professional can perform a coverage analysis. A simple but key component of such analysis is to display available coverage on a chart. This chart will demonstrate, for a given year, what insurance was available, who provided it, how much coverage existed, and who the broker was, as well as any deviations from standard-form language. Key exclusions or other coverage limitations can also be noted (e.g., aggregate or per occurrence limits, follow-form language, broad "umbrella" versus straight excess coverage, etc.).

Conclusion

Following the steps outlined above should give your company a sound basis for reducing its liability while simultaneously satisfying the environmental concerns of regulators and, more importantly, the needs of the communities and habitats surrounding the Superfund site. It has been said that an ounce of prevention is worth a pound of cure. Usually, you cannot recover historic pollutants, but you can recover historic insurance coverage.

John G. Nevius, Esq., P.E., is a shareholder and Registered Professional Engineer in the New York office of Anderson Kill & Olick, P.C. He has successfully resolved and litigated a variety of legal and technical matters, most of which involve insurance coverage. He provides advice and scientific expertise to clients on a wide range of engineering issues and has represented numerous Fortune 500 companies. He is a nationally recognized expert on environmental coverage and financial assurance, particularly in the energy, electronics and mining sectors.
(212) 278-1508 jnevius@andersonkill.com

*__Peter A. Halprin__ is a law clerk in the New York office.

Tenant's New Lease: What to Look For and Look Out For

By Thomas A. Neufeld, Esq.

With the downturn in the economy, there are many opportunities for a commercial tenant to obtain a new or renewal lease containing favorable provisions. A tenant must consider several important matters before entering into a new lease or a renewal of an existing lease.

1. Location. The reduction in prevailing rents allows tenants to lease premises in desirable locations that were previously unaffordable. The glut of vacant space on the sublease market is at even lower rates, and some of the space may be already built out to easily accommodate a new occupant. A tenant's "back office support activities" may be moved to a more economical location.

2. Usable Space. The leased premises are described, and the rent is calculated, according to the gross square footage, which includes areas not occupiable by a tenant. The tenant must ascertain, for itself, the actual usable, occupiable space, which may differ considerably from what is initially quoted.

3. Financial Obligations. Besides the basic rent, tenants often pay for all or part of the building's operating expenses and real estate taxes. The definition and scope of those expenses and taxes may vary widely from lease to lease. A tenant may seek a free rent period and a contribution from the landlord toward the cost of the build-out work. The tenant's responsibility to pay for electricity, overtime heat and air conditioning, cleaning and other services must be considered.

4. Length of Term. Tenants are seeking longer-term leases in order to lock up today's reduced rental rates. A tenant who does not wish to commit to a long-term lease may prefer a shorter term with an option to extend, possibly at a rent discounted below the fair market value.

5. Maintenance and Repairs. Care must be taken in determining the scope of the tenant's obligation for

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the maintenance and repair of the premises. A tenant should avoid responsibility for making improvements required by law unless the requirement arises from the tenant's particular use of the premises.

6. Alterations. Under what conditions may a tenant make alterations or improvements? Will the tenant be required to restore the premises to its initial condition at the end of the lease term?

7. Assignment and Sublease. The landlord's consent to a proposed sublease or assignment of the lease should not be unreasonably withheld. The landlord's option to recapture the space or to share in the sublet profits must be considered. A tenant may request the right to sublease a limited portion of its space or establish a "desk-sharing" arrangement.

8. Security Deposit. A tenant may seek a reduction, over time, in the amount of the security deposit. If a guaranty is required, the guarantor may try to limit its duration or the obligations thereunder, and the guaranty should apply only up to the date when the tenant vacates the premises.

9. Credit-Worthiness of Landlord. A tenant must investigate the financial health of the landlord because it will affect the building services and the ultimate viability of the lease. A tenant should obtain a non-disturbance agreement from the landlord's mortgage lender so that the lease will not be terminated if there is a foreclosure.

Even in a tenant-friendly market, a tenant must carefully scrutinize a proposed lease in order to protect its rights and limit is obligations.

Thomas A. Neufeld is an attorney in the New York office of Anderson Kill & Olick, P.C. With over 25 years of real estate law experience, Mr. Neufeld has a broad range of commercial, residential and financing experience. Mr. Neufeld's transactional work includes leases and subleases involving commercial space, stores, offices, garages, warehouses, residences and equipment leases.
(212) 278-1840 tneufeld@andersonkill.com

Anderson Kill Real Estate & Construction Advisor

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Thomas A. Neufeld, Editor
(212) 278-1840 or tneufeld@andersonkill.com

James P. Cullen, Chair
(212) 278-1565 or jcullen@andersonkill.com

The firm has offices in New York, NY, Greenwich, CT, Newark, NJ, Philadelphia, PA, Ventura, CA, and Washington, D.C.