

# How Environmental Insurance Can Make or Break a Brownfield Project

BY HEATHER MARTIN, DIRECTOR OF MARKETING AND SALES, EAI ENVIRONMENTAL MANAGEMENT SERVICES

Every urban center, former industrial town, and waterfront community in New Jersey will eventually have to face a serious dilemma: How to redevelop their brownfield properties while still guaranteeing the safety of their communities and the economic feasibility of their plans, inclusive of cleanup costs. From Camden to Trenton, from Asbury Park to Jersey City, every one of these communities, and many more, will have to determine how to accomplish these goals.

Mayors and their council want to guarantee that communities will be safe once the proposed redevelopment is in place—whether housing, retail, mixed use, or open space for parks or golf courses. Furthermore, in order to see these projects to fruition, mayors and other interested parties need to be confident that the required cleanup of these sites will be economically feasible and not cost prohibitive, while accounting for the unforeseen risk associated with environmentally impacted sites.

Pollution liability insurance and cost cap insurance can provide some assistance to what is almost always an uncertain venture with some inherent risk—brownfields redevelopment. Risk-averse parties will want to consider one of these insurance strategies in order to increase the level of certainty when redeveloping these sites.

Prior to the acquisition, transfer or other real estate transactions, a Phase I site assessment should be conducted to identify potential environmental concerns. If a Phase I site assessment identifies potential concerns, then a Phase II site investigation should be conducted, to obtain the type of contamination as well as the scope. Further testing and studies should also be conducted to determine regulatory compliance requirements, outline a remedial action plan, and compile cost

estimates for a proposed project. Following the above-outlined process with an experienced environmental engineering firm with knowledge of current technologies and remedial options is key to ensuring quality data, reporting, and planning. The previously mentioned insurance products will also be critical mechanisms to limit the extent of the risk when building on or redeveloping these sites.

For instance, pre-1985 comprehensive general liability policies, which do not contain a so-called “absolute” pollution exclusion, may provide significant coverage for hidden environmental problems that surface today. A cost recovery action lawsuit could be commenced against entities that are potentially responsible for some or all of the contamination. In a cost recovery action, you would seek to have the other potentially responsible parties pay for some or all of the remediation. A typical case could involve the Industrial Site Recovery Act (ISRA) that is triggered when the sale, closure or transfer of a business or property occurs. A company may only then discover that the groundwater beneath the facility is contaminated by solvents. That company’s older liability insurance policies, however, may be a valuable asset in paying for the cleanup. This is why all companies and governmental entities should review their document retention policies to ensure that insurance policies are never destroyed or discarded.

Pollution Legal Liability (PLL) insurance also provides an avenue to address environmental liability, providing coverage that supplements older policies in addition to protection for owners and operators of a facility or site. PLL insurance covers unknown, pre-existing and newly-created conditions. Therefore, if it is common knowledge that the heating oil tank in the basement of your building has been leaking for a while, this insurance would not cover that condition, with the following exception—third party liability, such as leaching of known contamination onto adjacent properties.

Another level of coverage that the PLL product can provide is renewed coverage for previous known conditions that have been cleaned up. In this scenario the policy would cover losses associated with changes in environmental standards. When a property transfer occurs, there is always the possibility that prior unknown contamination will be discovered. One potentially outstanding feature of a PLL product involving property transfer is the ability to assign ownership of the policy to the new owner, subject to the insurance companies’ approval. Essentially the PLL policy becomes an asset to insure that the deal goes through.



Heather Martin is the Director of Marketing and Sales for EAI Environmental Management Services and has a background in brownfield developments in the Northeast region. EAI Environmental Management Services has over 15 years of experience in the environmental field and is headquartered in Jersey City.

*Martin, continued from page 44*

Clean-up cost cap (CCC) insurance picks up a portion of risk that pre-1985 comprehensive general liability and newly acquired PLL policies do not, namely cost overruns for cleanup of brownfields or certain environmental remediation projects. CCC is typically only for cleanups that cost \$1 million or more and covers only known conditions. CCC will kick in when the cost of cleaning up known contamination exceeds the sum of initial cost estimates plus the buffer.

If a cleanup is estimated to cost \$1 million, and the buffer (an insurance term implying the percentage of risk/deductible that the policy holder will pay) is approximately 25%, then the party responsible for paying for the cleanup would pay up to \$1.25 million, thereafter the insurance policy would take over. The buffer percentage is typically around 25%, but will increase or decrease based on the legitimacy of the data and the cost estimate. Planning is crucial, but as many of us are aware, even experience cannot tell you what complications will arise on a site, particularly a brownfield, that may make cleaning up known contamination even more expensive than initial estimates. Moreover, CCC can provide the benefit of transferring the potential risk while ensuring that remediation of complex sites will not impede or halt the construction process.

PLL, CCC, and cost recovery actions against responsible parties are all options that developers should consider. While each of these options has limitations, they all have merit that can certainly assist one in paying for a brownfield redevelopment project. In addition, insurance providers are adapting to the changes in the environmental redevelopment world quickly to meet the needs of the industry.

So what is the verdict? Brownfield and landfill redevelopment is tough, but so is New Jersey, and for well over a decade our state has been in the forefront of making these projects happen and setting the pace for the rest of the nation. When the proper remedial technologies and action work plans are designed and implemented by experienced consultants and contractors, in conjunction with insurance policies to limit risk and liability, value is created out of formerly blighted properties while still ensuring the safety of the community. When working on your next project, I encourage you to consider your insurance options—they just might make or break your brownfield project! ■