

Other People's Money

By Stephen E. Fauer
September 5, 2012



The cost of environmental services is a serious issue, especially in these harsh economic times. After 35 years in this industry I have yet to meet a client who says, “I polluted this piece of property and I feel terrible about having done so, therefore I want to clean it up. Do whatever is required to remediate this situation and I don’t care what it costs!” Regardless of how environmentally conscientious someone may be, our clients are always concerned about cost! Rich or poor; industrial, commercial, or residential...our clients want ESA to do a good job for the least cost possible. Knowing this we do whatever we can to help each client obtain Other People’s Money (OPM).

OPM is money, as the name implies, derived from sources other than one’s own accounts or assets. Typically OPM can come from one of three generic sources: insurance policies, tax appeals, and state grants and loans. Truth be told, there is fourth source of OPM: litigation. But I am not going to address litigation because that is fully within the purview of your legal counsel and beyond the scope of this e-newsletter.

Insurance

Virtually all general liability policies written prior to ~1986 paid for environmental remediation. In 1986 to stanch massive outlays for large environmental claims, the insurance industry instituted the “absolute pollution exclusion” (APE). Following the creation of this clause, new environmental claims came to a screeching halt. Subsequently any company that wanted to insure against environmental losses had to buy a specially written environmental claims policy. Even today some insurance companies write environmental pollution policies that cover claims for investigation and remediation of pollution incidents.

Old Insurance Policies

I liken old insurance policies (those written in or prior to 1986) to a long-forgotten gold mine. The gold may be tough to find, but it’s a beautiful thing when you can access it. And if you know a few secrets, extracting money from old insurance policies is easier than you might think. A surprisingly large number of ESA’s clients have successfully accessed this source of OPM.

To trigger an old claim you need proof that you (or a former property owner) were insured. It is always preferable that you have the actual insurance policy(ies) in hand. You can and should file claims against multiple policies whenever possible. If the actual policies are unavailable the next best thing are cancelled checks that contain insurance policy numbers. Lacking that, contact

your insurance broker for information. And if none of these options are viable, you can always retain an insurance archeologist. These professionals are skilled at finding old insurance policies.

What should you do when you are ready to file a claim? You should NOT file an environmental claim (especially against an old policy) on your own! ESA strongly recommends that you retain an attorney with environmental insurance experience to file your claim(s). Insurance companies truly dislike paying claims from very old insurance policies. Accordingly they will do anything in their power to reject your claim and thwart your efforts at insurance recovery, thus making it worth every penny to retain an expert attorney to file your claim.

Here are few other facts that you need to know.

- You can make a claim against any former policy that was written on an occurrence basis if it can be proven that the pollution event occurred when that former policy was in force. Therefore it is very important that your consultant be aware of your insurance recovery strategy in the earliest stages of a project so they can look for environmental evidence when conducting their field work. (Note: your consultant should be apprising you of this, not the other way around!) When ESA is called in after the fact it becomes more difficult (but not necessarily impossible) to identify evidence crucial to triggering coverage.
- The ownership of the old policy may be irrelevant. That is, there are ways to make claims against old policies owned by former property owners.
- You can file a claim against more than one old insurance policy.
- Even though contemporary policies have an APE, they still cover certain 3rd-party environmental claims. For example if you have an underground storage tank that impacted your neighbor's property, it is possible that your contemporary insurance policy may cover entire cleanup on the neighbor's property. In addition the state owns the groundwater that lies beneath your property making groundwater pollution another 3rd-party claim. Soil impacts are deemed a first-party claim and as such are not covered by contemporary general liability policies.

Tax Appeals

Most people know about the tax appeal process but most people are unaware that an appeal can be made due to environmental impacts. This can be done for either commercial or residential properties. Here is what you need to know.

- Impacted soil and ground water may diminish the value of one's property thereby lowering the property's assessed value.
- New Jersey court decisions have clearly established that such factors must be taken into account when analyzing a property's assessed value.
- Is your property near a highly contaminated site? If so, a tax appeal can be filed based upon "stigma". The mere perception of impacts can stigmatize a property. Stigma is a

“mark of shame or discredit, a stain”. When evaluating stigma one looks at more than measurable contaminant levels. Perception, disruption, and fear all contribute to stigma.

- A stigma may exist when an adjacent property is contaminated, or if your site has previously undergone a cleanup.
- Properties with wetlands may be eligible for a successful tax appeal.
- Property tax appeals for a given tax year must be made by April 1 in that year.

Most tax attorneys’ will analyze a property for no charge. In most instances cases are taken on contingency, meaning that after the appeal is granted they will send you a check. If a tax appeal is successful, it is like getting money for nothing. In addition you needn’t own the property; the entity paying the taxes has standing for getting an appeal. Even if you filed a successful tax appeal recently, you are not precluded from making another appeal if environmental conditions warrant a further reduction.

Grants and Loans

New Jersey has some very interesting and worthy grant and loan programs. ESA spoke with the Underground Storage Tank Fund to get the latest information on this program and here is what we learned. Sadly, this once great fund is depleted and of little immediate value to the citizens of New Jersey who may be very deserving of financial assistance.

1. The program is funded with \$13-15 million annually. Most of this money is going to larger remediations on commercial properties.
2. This amount is insufficient to fund the program, leaving homeowners in a lurch.
3. Applications from all parties are still being accepted. Currently 2,000 applications are backlogged. NJDEP predicts that applications submitted now will not be addressed until sometime in 2016.
4. Regulated (privately held) sites have funding priority over homeowners. However under the current situation even applications for regulated sites are being backlogged.
5. People eligible for reimbursement (including homeowners) can execute their projects now with their own money then submit their receipts and invoices for potential reimbursement. While the following statement may be obvious, I will nonetheless state that reimbursement is always predicated upon having your grant request approved. Moreover fronting the money for remediation will not accelerate reimbursement from the fund. You will enter a queue along with all other applicants. Thus reimbursement will not happen for several (four?) years.

There is one other important consideration. If you know that you have a leaking tank or some other contamination issue, delaying a project can exacerbate the situation. This is especially true if you have a massive leak. For example, ESA is privy to a homeowner in north Jersey who suddenly lost 275 gallons of heating oil from an above ground tank in the basement. After five years she has taken no action. This large pool of oil now lies entrenched, beneath her house and the cost of remediation exceeds the value of her property. Had this problem been addressed immediately the outcome might have been very different.

In the meantime, ESA is always available for consultation if you have questions or comments on this e-newsletter or any other subjects that arouse your curiosity.