

# How to Negotiate and Win Environmental Insurance Claims Without Litigation

Laurence J. Eisenstein  
John L. Malanchuk, Ph.D.



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# New Approaches to Environmental Coverage Claims

- General theory is to match old insurance policies covering liabilities due to “property damage” with remedial obligations for environmental clean up
- So long as the contamination stems from operations during the policy period, the claim can be filed decades later
- Some regulatory driver is needed, but there need not be any legal action
- Claims have been widely pursued in other industries

# Negotiating Coverage Claims

- Traditionally environmental coverage cases were litigated, at large expense and over many years
- With years of experience in the courts, litigation no longer is the preferred option
  - While many issues remain unresolved, patterns of court decisions have emerged on a State-by-State basis
  - Enough cases have been settled or tried so as to provide benchmarks for how a new case should be valued
  - Both sides benefit from savings of time and expense without litigation
- While many environmental claims are still litigated, few should be

# Negotiating a Win-Win Solution

## Policyholder Goals

- Money
- Rapid settlement
- Relationship maintained
- Eliminate solvency and litigation risks

## Insurer Goals

- Closure
- Broad release
- Delay

Solution: Demand more money for broader release

# Negotiating to Build Relationships, Not Destroy Them

- Negotiation can be positive if it
  - Shows businesslike position
  - Provides a “win” for both parties
- Negotiating historic claims, in our experience, has no impact on current coverage

# How Not to Negotiate

- Write lots of letters back and forth
- Withhold critical information
  - Remember you are a plaintiff—act like one
- Make demands from thin air
- Present your bottom line as your initial offer
  - Remember this is a negotiation
  - Remember the insurers want a broad release – so value it
- File litigation early

# Negotiating Coverage Claims



- Negotiations can succeed when the parties become actively engaged in a dialogue on the valuation of the claim

# Insurance Archeology

- Generally foundries, like other companies, cannot locate some or all of their historic liability insurance
- However, in most instances this coverage, or evidence of the terms of the coverage, can be located through a combination of:
  - Internal records (e.g. accounting ledgers)
  - Broker records
  - Third-party records – certificates of insurance, etc.
  - (Infrequently) insurer records



# Insurance Archeology

- The most valuable coverage to find is from the 1970's and earlier
- Pollution exclusions first appear in the early 1970's
- Absolute pollution exclusions generally are seen starting 1985-1986

# Constructing the Claim – How Big is the Liability?

- Back-of-the-envelope never works
- Insurer will retain an expert – you should too
- More detail means insurers will take you seriously, set a reserve

# Constructing the Claim – Evaluating the Merits

- Not all claims are treated equally
- Environmental claims are worth more in Florida than Wisconsin
- But no claim is valueless
- Insurers expect a realistic evaluation of the merits
  - Not 100%, not 0%

# Presenting Environmental Liabilities to Insurers

- Insurers will undertake a “reverse underwriting” to determine the value of paying money for a pollution release
- But insurers realize that they must use only existing data, so as not to exacerbate any issues
- Generally uncertainty facilitates discussions with insurers
  - Insurers dislike past costs prior to giving notice
  - Uncertainty provides bargaining room

# Presenting Environmental Liabilities to Insurers

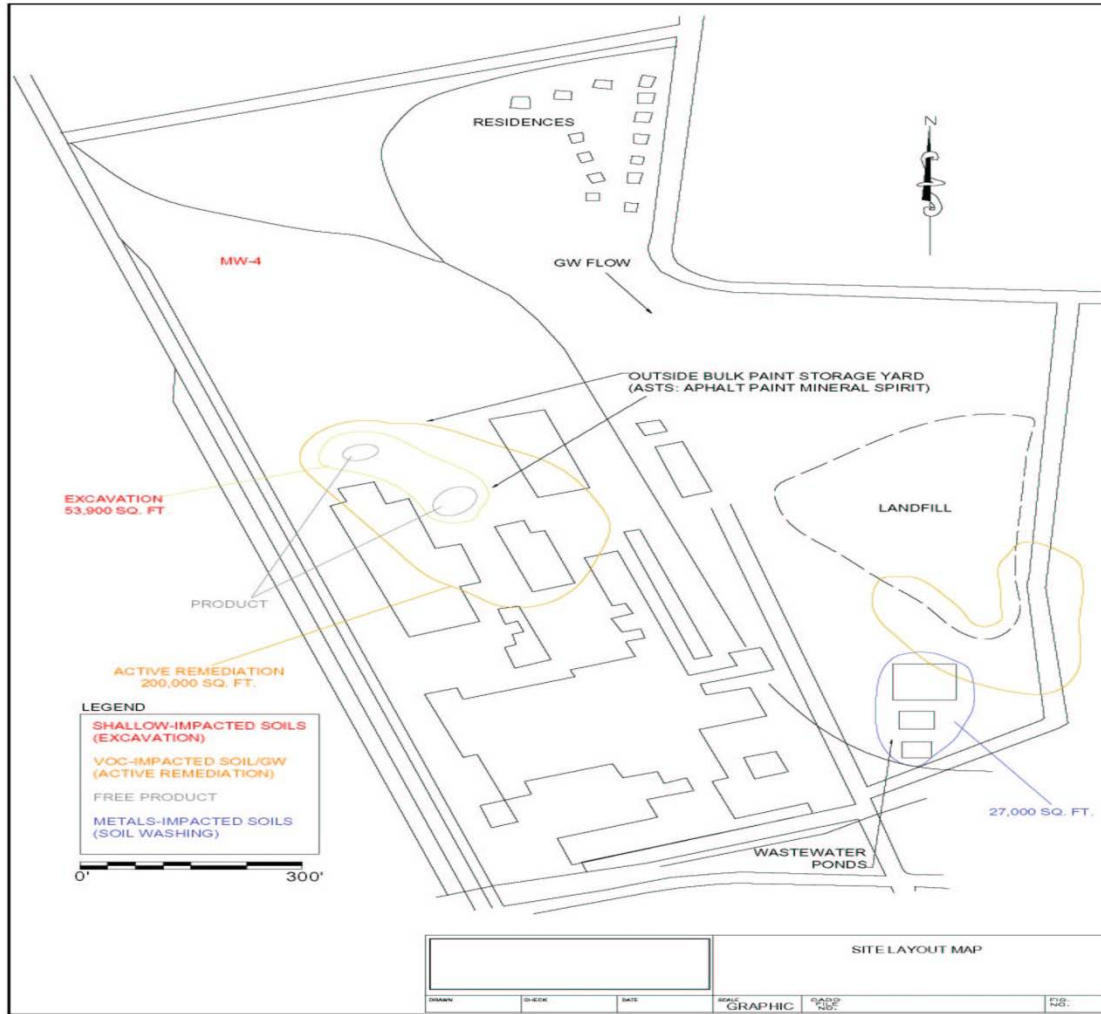
## *Normal Environmental Thinking*

- If I don't know about it, it's not a problem
- Argue the least cost alternative until regulators say no
- NFRAP means you're done
- Sending waste offsite means you're done

## *Insurance Recovery Thinking*

- If I don't price the risk now, I never will get to price it
- Argue what the regulators may require you to do
- Assume that contamination will have to be cleaned up eventually
- Sending waste offsite creates third-party disposal site liabilities

# Site Layout Map



# The Details

- Past costs
- Future costs
  - Site characterization
  - Remediation quantities and remedy
  - Ground water
  - Other offsite natural resources damage
- 3<sup>rd</sup> party property value diminution
- Negotiate a settlement with the insurer as a business transaction

# Questions?

Laurence J. Eisenstein  
John L. Malanchuk, Ph.D.  
Eisenstein Malanchuk LLP  
1048 Potomac Street, NW  
Washington, DC 20007  
(202) 965-4700  
[leisenstein@em-law.com](mailto:leisenstein@em-law.com)  
[jmalanchuk@em-law.com](mailto:jmalanchuk@em-law.com)  
[www.em-law.com](http://www.em-law.com)