7. What transfer mechanisms can be used for successful liability transfer?

One of the most secure methods for liability transfer is statutory transfer, although this is only available in certain jurisdictions. Statutory transfer is where national legislation allows for liability transfer such that a third party can in effect take the role of the polluter. This means, for example, if there was a statutory clean up requirement the regulator would seek to resolve it with the third party rather than the original polluter. For statutory transfer to succeed the vendor needs to fulfill the requirements of national legislation, which could for example include providing the purchaser with sufficient information about the state and condition of the land, or adjusting the land price to take into account the clean up cost. These statutory transfer requirements are typically included in the sale and purchase contract for the site.

Where statutory transfer is not available (the majority of jurisdictions) heavier reliance needs to be placed on the sale and purchase contract. This specifically defines the obligation and its transfer. However, to manage the risks associated with liability bounce back, contracts normally need to be backed by indemnities/warranties or in some cases insurance policies.

Contractual transfer from the vendor may occur to the purchaser, to a remediation contractor willing to take on some of the liability to win the contract work, or to a specialist liability management body. Further contractual transfer may occur from the new owner, to the next owner of all or part of the site, to site occupiers, and again to remediation contractors or specialist liability body. The web of contractual obligations can become complex.

Specialist liability management bodies offer a variety of approaches for a bespoke package of liability protection which may include remediation of known pollution conditions and an insurance backed long-term indemnity. To avoid contention between transaction parties, this is usually set up as a special purpose vehicle with the purpose of providing protection from liability bounce back.

8. Where do I get more information?

NICOLE has a specialist Brownfield working group which looks specifically at environmental liability transfer, particularly in ground contamination situations. They are a group of experts with practical experience in liability transfer, and have commissioned bespoke research in this area specifically focussed on the needs of industrial land owners. You can consult these specialists (contact information is provided below) or you can consult the detailed information in the NICOLE Brownfield Working Group’s May 2011 report “Environmental Liability Transfer in Europe: Divestment of Contaminated Land for Brownfield Regeneration”. The report can be downloaded from www.nicole.org.

9. What is this information going to provide?

The NICOLE Brownfield Working Group has developed a Report and a Road map which shows the issues for liability transfer within Europe. It contains more detailed information for 15 different European jurisdictions. Following the Road map for environmental liability transfer the traveller will explore:

- The definitions of ‘contaminated land’, ‘brownfield’ and related terms, what status they have and how they are used in different European countries;
- Legislative, policy and market drivers for brownfield regeneration in Europe, and how they are used in different European countries/territories;
- Environmental liability transfer mechanisms in Europe, including statutory and contractual provisions, and insurances;
- The Roadmap for environmental liability transfer containing Tools and Checklists for environmental liability transfer applicable across all European jurisdictions.

The NICOLE Liability Transfer Roadmap

CONTACT Information
For more information please visit www.nicole.org or contact the NICOLE network secretariat marjan.euser@deltares.nl
Environmental Liability Transfer for Contaminated Land: Key Questions and Answers

Background

Closure of industrial sites is an inevitable part of the cycle of land use. Organisations closing facilities are sensitive to the possibility that, even with safeguards in place, it could be possible for a post-divestiture contamination problem to end up back with them. Unlike the sale of many assets there can be a continuing liability associated with the sale of land, or property, which could be subject to Professional Indemnity insurance. Such liability can ‘bounce back’ to the original polluter. Liability transfer can only happen if the original owner has not been found un-reclaimed, or whether the ‘factory gates are opened’ and the site is regenerated into a new productive use, supporting local needs such as employment or housing provision.

Objective

The NICOLE Brownfield Working Group has been working to prepare guidance on liability transfer for Brownfield land in Europe. In 2008 the Working Group set itself the objective ‘to develop a Framework Document for Brownfield divestment in Europe, designed to inform industrial land holders of options to secure as clean an exit from liability as possible, and meet their liability management goals’.

This paper provides the reader with key questions and answers related to environmental liability transfer. It is based upon the work done by the NICOLE Brownfield Working Group in their May 2011 report “Environmental Liability Transfer in Europe: Divestment of Contaminated Land for Brownfield Regeneration” The answers have been written from a general EU perspective and details may differ for individual Member States. Further detailed information for 15 European jurisdictions can be found in the Report.

NICOLE is a network for industrially contaminated land and this document reflects the perspective of the holder of former industrial Brownfield land seeking to divest liability. The land holder is one of many stakeholders involved in the remediation process, including stakeholders seeking insight and understanding into the perspectives of the diving land holder will also find this document, and the May 2011 report, of use.

1. What is Environmental Liability for Contaminated Land?

Environmental liability can be defined as an obligation due to damage or the potential for damage to either humans or an environmental receptor. The cost of a liability can typically be monetary but can take other forms, for example reputation. It can also be an obligation, duty or responsibility to ‘do something’, rather than a direct financial loss. An environmental liability can either arise from statutory requirements, out of contractual agreements, or from civil actions (torts).

For contaminated land, the most obvious and apparent liabilities are immediate and actual costs, for example for remediation. Remediation costs (i.e. actual liabilities) are dependent on a wide range of factors such as the accuracy of the site characterization information, the approach that the remediation contractor takes, the terms of the contract and the approach of the regulator. While some risk remains in remedial execution such liabilities are normally controllable through foresight and good management practices.

In addition to actual liabilities there are also potential future costs that may or may not materialize as a liability. For a large majority of sites, remediation will have been executed in such a way that future costs (i.e. potential liabilities) will not materialize and be left to the next owner. However, if the site is not adequately site investigated, risk assessment or remediation; changes in scientific knowledge, changes in land use, or changes in legislation (for example the Water Framework Directive or if and when it is finalised) the Soil Framework Directive). These costs can be very difficult to predict and hence manage.

2. What types of Environmental Liability are NICOLE members likely to encounter?

Potential environmental liabilities that NICOLE Members may encounter in their day to day site EHS management or land management could include:

- Land clean-up liabilities, required now or in the future, even beyond the boundaries of the site;
- Waste management licensing requirements;
- Permitted activities such as Pollution Prevention Control authorisations;
- Water pollution and waste incidents or infringements;
- Water pollution and waste incidents or infringements;
- Actions to safeguard Corporate Reputational integrity and enhanced regulatory interest associated with contamination; and
- Damages payable to third parties in respect of pollution incidents.

Liabilities may materialise in many forms, such as balance sheet provisions for contamination, and reputation related issues which intertwine with other stakeholders seeking insight and understanding into the perspectives of the diving land holder will also find this document, and the May 2011 report, of use.

3. What is the Polluter Pays Principle?

The polluter pays principle makes the party responsible for producing pollution responsible for paying for the damage done to the environment. This means that historic owners of land or property may be liable for the pollution caused at the time of ownership. Polluter pays is a principle on which most contaminated land legislation in Europe is based. This principle makes it difficult to transfer liability, as even if the site is sold with liability information, the polluter would still deemed to be liable in the future.

The Polluter Pays Principle applies to contaminated land in all of the countries reviewed. The practical consequences are subject to local legislative differences. More detail of prevailing contaminated land laws in each country assessed can be found in the May 2011 report.

4. What is Environmental Liability Transfer?

Environmental liability transfer is passing the obligation for monitoring Environmental liability (but not necessarily the polluter responsibility) to a third party. The third party could for example be a new site owner, an occupier, an insurer, a contractor, or a specialist liability management body.

The security of the transfer depends upon many factors, not least the local and national regulatory regimes, and the strength of covenant of the party receiving the liability. Often it is not possible to pass on all liability with 100% security. However, having harmonized structured process, it may be possible to pass on sufficient liability that the land vendor’s liability management goals are met and the land transaction can proceed with confidence. Such a process could include contractual, financial, legal, technical and insurance elements. Corporate goals can influence the choices made for transfer of liability.

5. What is Environmental Liability bounce back?

Liability bounce back is a term commonly used when a contractual or statutory transfer of liability fails. This occurs for a wide variety of reasons but most often when the contractual arrangements put in place fail - most commonly when the new entity ceases to exist or cannot meet the obligations it has contracted to do so. There are other situations where the chain of land ownership becomes protracted over time, and the intermediary organisations cannot be found or cease to exist.

In these instances, the liability may go back to the original polluter. Bounce back can also occur where the contractual agreement was insufficient to cover all the liabilities – typically when the liability was not well defined at the transfer stage.

6. How does it link to Corporate Management?

Corporate managers are responsible for the quantification of risks, assets and liabilities that affect the balance sheet. Environmental liabilities may have significant impact on balance sheet and therefore require accurate quantification, and management. In an environment where the scale of organisations liabilities is becoming less palatable, there is increased pressure to present clean balance sheets, and therefore transfer of environmental liability can be an attractive proposition for corporate managers.

Other factors linking to corporate management may be:

- Focus on managing core business instead of diversion of management effort
- Shareholder perception due to changing provisions for environmental liabilities in time

Categories of Environmental Liability that may be Transferred for Contaminated Soil and Groundwater

- On Site Contamination
- Historic Off Site Contamination
- Future Off Site Contamination
- Historic Future Site Contamination
- Future changes in legislation
- Environmental Liability Transfer and Management Mechanisms
- Corporate restructurin
- Detailed assessment of site purchaser
- Contract (e.g. warranties and indemnities)
- Remediation to higher standards than those set by the regulator
- Monitoring of greater frequency and duration than required by the regulator
- Legal restrictions on future land uses
- Environmental insurance
- Other Financial mechanisms (Bonds, Escrow accounts etc)
- Transfer to a specialist liability management organisation