

IADC Committee Newsletter

TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

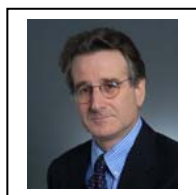
July 2009

IN THIS ISSUE

William A. Ruskin and Jennifer M. Moore discuss new developments in the use of Value Assurance Plans (VAPs), both in the toxic tort context, as a means of solving environmental disputes without litigation, and as a means of gaining community acceptance for new industrial projects that may raise environmental concerns in a way that minimizes community hostility and conflict.

Value Assurance Programs

ABOUT THE AUTHORS



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Member participation is the focus and objective of the Toxic and Hazardous Substances Committee, whether through a monthly newsletter, committee Web page, e-mail inquiries and contacts regarding tactics, experts and the business of the committee, semi-annual committee meetings to discuss issues and business, Journal articles and other scholarship, our outreach program to welcome new members and members waiting to get involved, networking and CLE presentations significant to the experienced trial lawyer defending toxic tort and related cases.

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People living near manufacturing plants and other projects that create environmental concerns increasingly seek judicial solutions to environmental issues. Environmental issues, more than other legal corporate concerns, tend to have a ripple effect, often causing multiple repercussions with far-reaching consequences to the company's business. An accidental release of contaminants into the air, soil or groundwater may result in adverse public relations, boycott of products, worker safety disputes, adverse agency action, and, of course, the potential for costly and destructive mass tort litigation. Somewhat different but related concerns may be raised by proposed industrial projects that carry the risk of actual or perceived environmental issues in the future. These projects, which may be as diverse as landfills, airports, wind farms, and nuclear power plants, can face strenuous public opposition, difficulty in obtaining property, licenses, or permits, adverse publicity, and costly legal action. The companies promoting these projects can utilize Value Assurance Plans to address community concerns during the course of facility siting discussions.

How a company responds to such events has an important effect on how the community, which includes residents and property owners, elected officials, potential jurors, local, state and federal regulators and prosecutors, will react. It is therefore essential that a company plan in advance to minimize the resulting fallout.

Value Assurance Programs (VAPs)

A Value Assurance Program, sometimes called a "VAP," should be considered by companies as one significant component of a response plan. A VAP is a promise to protect property owners affected by an environmental issue if they sell their property and realize less than its full value due to an environmental concern in the community. A VAP establishes a formula for determining the property's fair market value in the absence of the environmental concern, and protects that value over time by compensating the owner for the difference between the fair market value and a lower sale price, to the extent the sale price is attributable to the environmental issue. A

VAP may also be designed to protect other transactions in which market value is important, such as rental or the extension of a mortgage.

A VAP is rarely a stand-alone solution to an environmental issue, but is generally part of a process of dialogue with the community to learn residents' actual interests and concerns. One lesson learned from successful VAPs is that one of the most important things a company can do in an environmental crisis is to educate the community. If the company can become a source for accurate, reliable information that residents can use to make realistic assessments of their actual or perceived health hazards, the company will go a long way toward establishing itself as credible and trustworthy.¹ The stage will then be set for what has come to be known as "principled negotiation," i.e., negotiation that focuses on the parties' interests rather than on arbitrarily staked-out positions, and that focuses on finding opportunities for mutual gain.² This process can be used to seek out creative options which address the interests of both sides. Hostility is reduced, which in turn reduces the incentive for community residents to join mass tort suits.

Benefits of VAPs

In a mass tort case, plaintiffs' lawyers invade the community to sweep up as many residents as possible into a plaintiff "class." Such actions often result in a windfall to claimants who may not have provable claims. In these cases it is the plaintiff's lawyer who determines what each settling plaintiff receives. The defendant rarely

¹ To establish trust, the company may benefit by partnering with an independent expert or agency in its education process.

² Principled negotiation is a concept developed by the Harvard University Negotiation Project, and is perhaps most notably summarized in ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed. 1991). For more information on how principled negotiation can work in the environmental area, see William A. Ruskin, *The Use of "Principled Negotiation" in Resolving Environmental Disputes*, 17 Am. J. Trial Advocacy 225 (1993).

how learns how much money went to an individual plaintiff. More to the point, the defendant never learns how much money the claimant might have accepted in a more traditional, individually-negotiated settlement of his claim, or whether the claimant would have preferred a different approach to advancing his or her interests. For example, a community with a large number of elderly residents at risk because of inadequate ambulance facilities might prefer the company to subsidize a mobile coronary-care unit so that patients would not have to travel long distances to an emergency care center, over a different proposal, even if the other proposal more directly addressed the health risks of contaminants in the groundwater. The principled negotiation approach helps the parties to identify value that they might otherwise have left on the table.

A Value Assurance Program can also help a company avoid a threatened class action suit. In establishing a VAP, the company creates its own class of affected property owners. Once the company has identified this group and produced a plan in negotiation with them, an attorney is likely to find it difficult to establish additional residential zones in which to seek plaintiffs for a class action suit. A VAP also discourages class actions by demonstrating that a class action is not necessarily “superior to other available methods for fair and efficient adjudication of the controversy,” a requirement of class certification under Fed. R. Civ. P. Rule 23(b)(3). Once a VAP has been implemented, a company can argue that a class action is no longer the necessary because claims are being fairly and efficiently resolved individually, without the need for judicial intervention. A VAP may also help a company defeat the “numerosity” requirement of Fed. R. Civ. P. 23(a), i.e., that the class must be so numerous that joinder of all members is impracticable. If many claims have already been settled individually, arguably there is no need to resort to a class action for the remaining claims. Finally, the process of negotiating with the community and exchanging information may give the company’s attorneys significant information about community residents and their interests that is valuable even if an agreement breaks down and the parties end up in litigation. If litigation had

begun right away, the company would most likely not have had access to this information.

Although the principled negotiation approach may result in up-front costs to the company, early participation in such negotiations can result in substantial savings. These potential savings become evident when one considers the bad publicity associated with litigation, the millions of dollars paid in defense costs, the distraction of executive attention, the risk of punitive damages, and the hefty contingency fee that most plaintiffs’ attorneys work into their settlement proposals. The threat of litigation may not be the chief concern of senior management. In an environmental crisis, the integrity of the company’s name may be at stake. Its value is not so easily calculated. A VAP assists the company in preserving its name by demonstrating its good faith and commitment to the community. The company’s enhanced reputation may later be a factor in a decision by a local, state or federal regulator or prosecutor as to how to penalize the company for a violation, whether to bring criminal charges, or whether to place the company under the supervision of a Monitor pursuant to a Corporate Integrity Agreement.

For the community, a VAP can help stabilize property values and prevent a mass exodus after an environmental problem has been disclosed. Those residents who choose to leave can do so without feeling “trapped” by a devalued home, and residents who stay have protection for the market value of their home, which is most likely their most valuable asset. Residents may end up with an arrangement that results in significant protection, even advancement, of their interests, without the downside of lengthy litigation and costly legal fees.

VAPs in the Toxic Tort Context

VAPs appear to have first gained currency in New York in the mass tort context, when a sweeping plan was introduced by Eastman Kodak in 1988 in response to a public outcry concerning potential adverse economic impacts to the Rochester community arising from concern over groundwater contamination at the Eastman Kodak

manufacturing plant. Kodak moved immediately to open communications with the community, and took steps to educate the community about the risks of the contamination. The company devised a plan to compensate homeowners affected by the contamination by paying the difference between the property value's sale price and its fair market value prior to the discovery of possible contamination. Kodak also offered to reimburse closing costs and moving expenses of residents who left the community. At the same time, it encouraged property owners to stay in the community by offering funds to improve property and refinance mortgages. In doing so, it demonstrated its commitment to preserving the stability of the community and the protection of property values, found creative compensation without the interference of the plaintiffs' bar, and reduced the likelihood of litigation.³

Under different circumstances, Du Pont implemented a VAP after engaging in principled negotiation with the community surrounding its Pompton Lakes Works Facility, after the discovery of elevated levels of lead and mercury that had been carried to neighbors' yards due to the contamination of a brook that flowed through the community. Early on, Dupont engaged in the testing of fish in the brook and vegetables in homeowner's gardens, enlisting the help of local health officers and environmental coordinators. This information gathering allowed the company to announce, together with local officials and outside experts, that the garden vegetables and fish did not create a pathway of exposure that might cause a health problem. In the course of the crisis, Du Pont representatives went door-to-door to deal with community members individually. Du Pont also offered value assurance benefits to both people who left the neighborhood and those who stayed. Homeowners whose property needed remediation were given the opportunity to remain

in their homes or move into a fully furnished home provided by Du Pont. Eligible property owners could receive guarantees of both property value and the appreciation rate of their property over the eligibility period. Property owners not eligible for property value protection received compensation for the noise of remediation and a home improvement grant. Du Pont's VAP was developed through the company's Community Outreach Program, which had been effect before the discovery of the contamination, and a Citizen's Advisory Committee, through which the company communicated with residents and monitored their concerns. Even before the completion of remediation, new homeowners began to buy homes within affected portions of the community. These purchases demonstrate that the integrity of the community and property values were maintained.⁴

The successful use of VAPs in the past shows that there may be solutions that accommodate both parties' interests in an environmental dispute in a way that is fairer and far more efficient than litigation. Despite positive experiences however, VAP's have not been utilized by companies or governmental agencies as widely one might expect. This suggests that corporations are missing opportunities to increase value for themselves and the community in environmental cases.

A Recent Example: Canada's Port Hope Area Initiative and Its Value Assurance Program

One of the largest and most ambitious VAPs currently in effect is the Property Value Protection Program negotiated between the Canadian federal government and residents of the Municipalities of Port Hope and Clarington, Ontario, as part of the larger Port Hope Area Initiative. Port Hope was the site of refining operations of Eldorado Nuclear, a former federal Crown Corporation that refined and converted radium and uranium for industrial and medical use, including use in the

³ For general information about the events that occurred in Rochester, see *Rochester Testing for Tainted Ground Water Near Tanks at Kodak*, N.Y. TIMES, Apr. 10, 1988, §1, at pt. 1, 35, col. 1, and Robert Hanley, *Eastman Kodak Admits Violations of Anti-Pollution Laws*, N.Y. TIMES, Apr. 6, 1990, ad D4, col. 1.

⁴ For more information on Du Pont's Pompton Lakes, N.J. VAP, see William A. Ruskin, *The Use of "Principled Negotiation" in Resolving Environmental Disputes*, *supra* n. 2.

Manhattan Project, until the 1950s. Thereafter, the facility refined and converted uranium fuel for Canada's nuclear power industry until it was sold in 1988. These operations left behind low-level radioactive waste in a number of former dumpsites as well as contaminated soil throughout the community. In 2001, after attempts had failed to find a site outside the community for a long-term waste management facility, the Canadian government signed an agreement with Port Hope and Clarington that included hosting fees of \$30 million and a VAP. The Initiative calls for the construction of a long-term, above-ground low-level radioactive waste management facility in each of the two municipalities. The projects include extensive remediation, which in Port Hope will involve hundreds of properties and will include the front and back yards of many residences.⁵ Facility construction and remediation will begin after the necessary approvals and licenses are received. It is anticipated that the cleanup and construction phase may take as much as ten years to complete.

The Port Hope Area Initiative has communicated openly with community stakeholders to determine their concerns about the proposal and to provide information requested by residents, using community meetings, kitchen table discussions, web sites, and storefront offices to facilitate community consultation. The Initiative provided funding for the municipalities to obtain expert advice about the project, which in turn enabled community members to participate meaningfully in decisions about what scientific and technical information should be collected, and about the manner in which "clean" should be defined for the completion of the project.

Extensive community involvement has increased the credibility and legitimacy of the Initiative. Seven years of public attitude surveys conducted by independent consultants in the affected

municipalities have shown a steady increase in community awareness, understanding and confidence in the Initiative.⁶

The Port Hope Area Initiative's VAP, called the Property Value Protection Program (PVP), covers approximately 5,100 residential and commercial properties in a 90-square-kilometer affected area. It runs from 2000, when the Legal Agreement between the parties was signed, until two years after the remediation has been completed. The PVP provides compensation to property owners for the difference between the selling price of their property and its "unaffected" fair market value as determined by independent certified appraisals of comparable properties in areas unaffected by the Initiative. It also provides compensation for loss of rental income, mortgage renewal difficulties, and costs related to delayed sale or rental as a result of the Initiative. Eligible property owners must expose their property on the open market for at least the average number of days it takes to sell a similar property in an unaffected location. To participate, property owners proceed, once they have an Agreement of Purchase and Sale in hand, by filing a claim with the PVP Office, which reviews the claim and makes a decision, which could result in full or partial compensation or denial. If the claim is denied, property owners may turn to a two-stage, no-fee appeal process. Among the side benefits of the PVP Program is that some property owners may be eligible for a pre-sale appraisal, giving them accurate information about the market value of their property prior to accepting an offer. Additional, through the support of local real estate brokers who refer their clients to the Project information office, the PVP provides disclosure about the Initiative among prospective buyers, helping to create overall market stability.

Use of VAPs in Establishing Industrial Projects With Environmental Risks

VAPs are particularly well-suited to avoid litigation in the remediation context, because if remediation is handled properly, property owners can expect to experience a reduction in both

⁵ For more information on the Port Hope Initiative, see P. Arthurs, J.L. Herod, S.E. Stickley, *Communicating Risk to a Concerned public in Historic Low-Level Waste (LLRW) Projects*, presented at the Waste Management 2007 Conference, Tucson, AZ. On file with the authors.

⁶ *Id.*

actual and perceived risk after remediation is complete. Recent examples, however, suggest that companies may also find principled negotiation and value assurance principles useful in gaining community acceptance for industrial projects that will have permanent environmental effects that may never be remediated, and/or that carry the potential for substantial future environmental risks. Such projects could include landfills, airports, wind farms, and nuclear power plants. In such cases, VAPs must be crafted somewhat differently than in the toxic tort context, but they may still play a significant role in avoiding litigation, obtaining property, licenses, permits, and zoning concessions, minimizing tension with the community, and enhancing the company's reputation. Based on the experience of companies in the toxic tort context, and in the Port Hope Initiative, it is likely that dialogue with community stakeholders, the dissemination of full and accurate information, and principled negotiation that considers the interests of both the company and the community – continue to be integral aspects of a successful VAP.

In Cumberland County Virginia, for example, a Value Assurance Program played a role in a plan to construct a landfill to be operated by a private non-hazardous solid waste management company. The VAP is part of a comprehensive Host Agreement between the community and corporation entered into in mid-2006, which also included broader benefits such as the payment of host fees to the community, payment of fees per ton of waste received by the landfill, and free acceptance of a specified amount of waste from the community.⁷ The VAP component of the program applies to residents of approximately 15 homes within a half-mile of the landfill, and is offered as a one-time benefit for a period to begin after the construction of the landfill has been completed. To qualify for reimbursement, property owners must place the property on the market for a period of eight months at a value at or higher than its "unaffected" market value. Unlike the PVP use in the Port Hope Initiative, participants in the Cumberland VAP must agree

not to oppose the permitting, development, construction or operation of the landfill, provided it is in material compliance with state and federal laws and regulations.

In the period leading up to the signing of the Host Agreement, the County's Planning Commission provided information and monitored community concerns about the Agreement and the anticipated effects of the proposed landfill through a Citizen's Landfill Advisory Committee. Significantly, the community expressed concern over the safety record of the company in its operation of other landfills, particularly at an existing nearby landfill, and other potential safety issues. Because construction has not yet begun on the landfill and the VAP has not begun to apply, it is too early to evaluate the success of Cumberland County's VAP. However, it appears that the VAP, and the extensive citizen involvement, were instrumental in community acceptance of the project.

A VAP was also used by Canastota Wind Farm LLC, a subsidiary of Enel North America, in the construction of the Fenner Wind Farm in upstate New York. This project appears to have affected a small number of residents living in the immediate vicinity of the wind farm, which was completed in 2001. Among the features of this VAP is a provision requiring that the property remain on the market for 18 continuous months, and also, that compensation will be paid only if the seller's agent reasonably certifies that the lack of a sale or acceptable offer is attributable "solely to the close proximity of this property to the wind farm, and not due to any reason whatsoever including but not limited to market conditions or specific deficiencies related to the property that was otherwise assumed to be satisfactory."⁸ No community benefits are described other than property value protection, although one could imagine such benefits, for example, free electricity for neighbors bordering the wind farm, or grants for soundproofing to reduce ambient noise. The authors did not find sufficient

⁷ Host Agreement, Exhibit A, Property Value Assurance Agreement. (On file with authors)

⁸ Canastota Wind Power LLC Property Value Assurance Plan, available at <http://www.windaction.org/documents/4898>. (On file with the authors).

information to determine whether the company used principled negotiation with the community to develop its VAP, whether it provided information to property owners, or the results of the VAP for affected property owners, and the results of the VAP for the company and the community.

Many unanswered questions exist regarding the use of VAPs to gain acceptance for proposed industrial projects. Can value assurance principles create fair results where only a few property owners are affected by an environmental concern? Should VAPs include not only benefits in return for acceptance of a project, but also forward-looking provisions to address risks that may arise in the future? What benefits accrue to a company from entering into a VAP in this situation? Due to the flexibility of the VAP formation process, there may be benefits to using VAP principles in any number of contexts involving industrial siting or environmental

remediation. We have seen in Canada's Port Hope Area Initiative that VAPs can be successful in dealing with prospective, as well as present, risk factors.

Conclusion

The success of Value Assurance Programs suggests that they should be more widely adopted. They offer benefits to both the company and the community in classic toxic tort situations and in pro-actively addressing prospective siting issues. Significantly, VAPs also appear to hold promise in dealing with the siting of industrial projects that either carry environmental risks or threaten to diminish the property values of affected homeowners.



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