

Bankruptcy liquidations: don't let your assets go up in smoke

BY MICHAEL L. NEWSOM

Among the tasks involved in a liquidating trustee's scope of responsibility are evaluating thoroughly all assets and potential assets and determining if the recovery and sale of these assets is worth the effort that might be expended in the process. One asset category that is subject to scrutiny is the plethora of warrants associated with credits for the reduction of air emissions.

These assets, or potential assets, can be bought and sold, and might be worth millions of dollars depending upon the location of the subject facility owned by the estate. The most common currency in the arena of credits is the New Source Review Emissions Reduction Credits (ERCs) with one time values of that can exceed \$10,000 per ton of emission. There are also regional programs such as the Reclaim program in the Los Angeles and the DER program in New Jersey where emissions are sold by the discrete pound with prices ranging from a few dollars per pound to thousands of dollars per pound per day.

Quick action will be necessary when dealing with emissions credits if this lucrative source of capital is to be tapped.

What is the genesis of ERCs and other credits? The need for such an item arose as a result of requirements in the Clean Air Act of 1970 and subsequent amendments ('the Act') designed to prevent the deterioration of air quality. The Act dictated that where there is an expansion of existing air polluting equipment or the construction of new air polluting equipment in areas that do not meet the National Ambient Air Quality Standards, (NAAQS), increases in pollution from new or modified sources must be offset by reductions in pollution from existing pollution sources. These geographic areas are called 'non-attainment' areas, and are declared and recorded as such by the United States Environmental Protection Agency (USEPA). On 7 April 1982 the USEPA published a document in the Federal Register called the 'Emissions Trading Policy'. This policy gave structure to future market-based environmental programs designed to provide incentives for sources to reduce emissions beyond applicable requirements. Since that time several programs have been developed at state and regional levels that more closely meet local needs and that are designed to bring these areas into NAAQS compliance. At this time, while many markets are still relatively new, the overall activity in emissions trading is quite robust, and daily trading rates are published on the internet by brokers.

Sources of credits in a liquidation are plentiful and include: credits that have already been confirmed or 'banked', credits that can result from opportunities that were missed as equipment was shut down in downsizing operations, and credits that can be banked after it is determined that the facility will not restart. Determining if there is realisable opportunity with regard to ERCs, however, can be problematic. As with many activities after bankruptcy, knowledgeable personnel and adequate records may not be readily accessible. In addition, even among ongoing companies, profit from ERCs is often foregone because their pursuit requires a blend

of profit motive, environmental expertise, detailed process knowledge, a specialist in the emissions market, and a willing environmental agency. Therefore you will probably need to get assistance in environmental consulting, industry specific knowledge, and credits' marketing; and you will need to nurture a relationship with the appropriate agency personnel.

In liquidation the profit motive noted above should not be lacking, but environmental expertise in acquiring credits and the other ingredients might. This is a specialised field, and emissions credits applications are not just the fill in the blanks type. A convincing technical paper is likely to be required that will describe the operation. Included in the paper the emissions potential – past and present – will have to be presented, the emissions abatement status and future abatement requirements will need to be defined, and the assurance of limited or no future emissions will have to be made. As the process of actually acquiring the credits is undertaken a parallel effort should be made to understand the market for credits and the amount of credits expected to be available for sale.

Despite the complexity of the process and difficulty in bringing all the resources together, your decision to proceed should be made as quickly as possible. The allowance for air credits can be impacted by a window of opportunity, depending on the governing agency. Some agencies give a two year window to bank credits. Others have a declining window resulting in a reduction in the credits available by about 4 percent each month beginning with the month the equipment was shut down.

Quick action will be necessary when dealing with emissions credits if this lucrative source of capital is to be tapped. Therefore, a timely coordination of efforts is needed to prevent your assets from 'going up in smoke'. ■

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