



THE BETTERLEY REPORT

ENVIRONMENTAL INSURANCE MARKET SURVEY 2009
A HARDENING BUT STILL BROAD ARRAY OF VALUABLE COVERAGES
WITH SEVERAL NEW MARKET ENTRANTS

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Editor's Note: We are pleased to present our third evaluation of Environmental Insurance (EI). We review ten of the leading carriers, including two new entrants, collectively reflecting over 98 percent of premium written in this market.

Because none of the carriers has fixed policy wording or terms, we have expanded our discussion of the coverages and their wording and reduced the number of table entries. Moreover, given the strong interface between EI and regulatory requirements and exposures, Betterley Risk Consultants has teamed with attorney and broker Michael Hill to prepare this report.

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New Endorsement. As an example of the non-standard and changing aspects of EI terms, beginning last year, an increasing number of carriers began offering manuscripted "Downgrade" endorsements. These allow Insureds to cancel the policy (and receive back a pre-negotiated portion of the premium) in the event that the Insurer is downgraded below a certain level (typically A.M. Best A-). Particularly because EI policies are, in most cases, not backed by State Guaranty Funds, and because EI policies are often three to ten years in duration, this can be an important endorsement if only to assure prospective Insureds.

Table Discussing Endorsements. Given the number and flexibility of the Downgrade and other endorsements, we have created a table, Endorsements Commonly Provided, that

summarizes and discusses individual endorsements and key terms within them.

Product Names, and Insurer Contacts, Products, Capacity, and More. For preferred starting points, we describe the products (for example, "Pollution Liability" and "Cleanup Cost Cap") in a generic sense, and then identify the insurers that offer them. We also provide each Insurer's contact information, Weblinks, dollar capacity, duration limits, and other information. That information is contained in the Contact and Product Information and Capacity and Duration tables.

Glossary. Given the unique terminology of EI, we have provided a Glossary of Terms. Our starting point was a larger glossary available on EPA's Website (a link to which is also provided). However, we have modified EPA's Glossary because it omitted some terms (e.g., Additional Named Insured) that are uniquely important to EI policies; and because we thought other terms would benefit from greater detail.

Caveats. While every identified EI carrier was contacted to obtain this information, we have tested their responses against our own experience and knowledge. Where those conflict, we have reviewed the inconsistencies with the insurers. However, the evaluation and conclusions are our own.

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In using this survey, the reader should understand that because EI policies are almost always written by surplus line insurers, individual policies must be crafted to provide specific terms required for a particular context. Unlike most kinds of other policies, EI policies are not subject to regulatory review or approval of any kind, and each is an individual and expressly “entire” legal contract. Thus,

- *In one case that went to litigation, a Pollution Liability insured was denied all coverage on a \$9 million cleanup because it was an “Additional Insured” rather than an “Additional Named Insured.”*
- *In another, a contractor with a Contractor’s Pollution Liability (CPL) policy did not understand that, absent modification, its CPL policy excluded releases that occurred from the Insured’s own property; and*
- *In another, a Cleanup Cost Cap (CCC) policy covered only cleanups that were required by the federal government, whereas the Insured needed (and could have negotiated for) coverage for state-required cleanups as well.*

Given the complexities and the lack of regulatory review and back-up, assistance from a surplus lines broker and, in many cases, counsel, should be sought before EI policies are bought.

Climate Change. In addition to this article on the Environmental Insurance market, we also include a separate commentary on Climate Change—Risk and Opportunity for Environmental Insurers, authored by Sandy Hauserman of Stones River Consulting. Given the potential impact of climate change on the EI market, we thought his insight would be valuable. Sandy was previously head of the worldwide environmental liability practice at reinsurance broker Guy Carpenter and was a member of Marsh & McLennan’s global climate change group.

BACKGROUND AND INTRODUCTION

The Pollution Exclusion in GL, D&O, and other Non-EI policies. Pollution coverage has been excluded from traditional liability policies since the mid-1980s. This occurred, most notably, with the introduction of the “Pollution Exclusion” and then the “Absolute Pollution Exclusion” into the ISO form of the CGL policy.

Though unknown to many Insureds, the pollution exclusion has been inserted into many standard policies beyond the GL areas – e.g., D&O. A court decision discussing this harsh reality for one board of directors is National Union v. U.S. Liquids, Inc., 88 Fed. Appx. 725 (2004), holding that the exclusion unambiguously bars both coverage and defense of pollution-related claims. Thus, the board in that case was not covered when shareholders brought suit when the company’s stock fell sharply as a result of environmental liabilities.

The Emergence of EI. Special policies and endorsements for EI were developed in response to the pollution exclusion in other policies. This process began in earnest in the mid-1990s and the field grew substantially over its first decade, to where it is today (which is roughly \$2 billion in premium per year).

Cost Cap. During the mid-1990s, coverage that protected against the maximum cost of a cleanup (Cost Cap insurance) was offered for the first time, sometimes combined in a “finite” insurance policy form with other EI coverages (for example, for toxic tort liability, or liability for off-site disposal risks). In the late 1990s as well as the current decade, the market has expanded greatly as developers and other entities used these policies to clean and redevelop “brownfield” sites (sites that are unused or underused because they contain pollution of one sort or another).

Note: The term “finite” has been commonly used to describe what has more formally described as an Environmental Protection Program (EPP). Because “finite” is the commonly-understood term, this article and survey uses it rather than EPP.

UST Coverages and Regulatory Mandates for Financial Assurance. Under federal and state law, owners of underground storage tanks (USTs) are required to provide specified amounts of insurance or other financial assurance to address releases and other problems. The EPA has recently become more active in this area, in one case fining the owner of a chain of 23 gas stations \$3.16 million for failing to meet financial assurance requirements (among other violations).

In re: Euclid of Virginia, Inc., EAB Dkt. No. RCRA-03-2002-0303 (March 11, 2008). Because UST financial assurance is regulatorily mandated, the terms of EI policies that are used to provide financial assurance must be carefully reviewed to ensure that all legal requirements are met. As just one example, whereas in most cases payment of a deductible by the Insured is a precondition of an Insurer's obligation to pay claims, in the UST world such a requirement would make a policy non-compliant. Rather, to protect the public in the event of an insolvent or otherwise slow-to-respond UST owner, the Insurer is liable for the payment of amounts within the deductible. 40 C.F.R. § 280.97. Because UST policies (as surplus lines policies) are not subject to regulatory review, it is critical that anyone buying a policy to meet UST requirements take particular care to ensure compliance with regulatory mandates.

Contractor's Pollution Liability. This insurance is intended to protect contractors (e.g., pavers, HVAC, roofers, UST installers) whose business activities may result in environmental claims. Policies are typically issued on an annual basis. Importantly, coverage is normally excluded for the insured contractor's own property.

EI and Public Benefits (such as through Insured Fixed-Price Cleanups). EI provides enormous benefits to private entities and to the public in a number of ways. The most obvious are by ensuring that funds are available to address releases, such as by meeting regulatory requirements applicable to USTs, or simply through private efforts reflecting careful risk management.

Less obviously, EI has enabled Remediation Contractors to perform large cleanups on a guaranteed fixed-price basis. These cleanups involve liable or potentially liable parties who transfer to the Contractor the responsibility to perform the cleanup along with other risks and administrative headaches associated with the cleanup. Contractors are, for many reasons, incentivized to enter these contracts, and most hedge their risks through the use of EI.

Insured Fixed-Price Cleanups (IFCs) have been performed on a broad scale for about a decade. A recent 41-site look-back study by the Department of Defense (DoD) shows that, by transferring the risks to the person most able to manage it directly (the Contractor), and for other reasons, IFCs typically reduce the cost of cleanups rather than raise them, even after accounting for the cost of the insurance and other risk premiums. Cost savings realized by the DoD averaged over 20 percent, whereas non-IFC cleanups typically result in overruns of 40 percent or more. IFCs also help regulators know from the outset that, even if

one or more of the entities liable for a site (for example, at a multiparty Superfund site) were to become insolvent during the multiyear process of remediating the site, there will be sufficient funds to perform the cleanup. Finally, the underwriting required to purchase EI furthers the public policy goals of increased accuracy and transparency in corporate accounting. (In some cases, the finality that EI fosters can also help companies achieve tax benefits: details on this topic are beyond the scope of this survey).

A key component of IFCs is the Cost Cap policy, described above. Unfortunately, and largely because of a relative high loss ratio for Cost Cap policies issued outside the context of an IFC (where, many would argue, Cost Caps can present a moral hazard), the Cost Cap market has hardened significantly over the last five years, with required premiums, deductibles, and co-pays all rising. It is hoped that this trend will reverse, at least as Cost Caps are applied to IFC cleanups performed by experienced and well-capitalized Contractors.

Michael Hill (co-author of this article) consults for the Department of Defense and has been the attorney and/or broker for private entities (industrial companies; brownfield developers) that have applied IFCs to the cleanup of hundreds of sites. Further information and articles about IFCs and their public and private benefits (as well as EI's benefits in other contexts) are available on his firm's Website, www.hillkehne.com.

STATE OF THE MARKET

Annual premium volume information about the EI market is hard to come by, but in asking several of the product managers, we have concluded that the annual gross written premium remains in the \$2 billion range. Particularly given the relatively high loss ratio with respect to Cost Cap policies, premiums in that area have increased somewhat and retention requirements have increased (for example, Cost Cap policies now typically do not "attach" until cleanup costs are 15 to 20 percent above expected costs, whereas previously attachment points were typically as low as 0 to 10 percent above, and co-insurance is also typically required, usually in the range of 10 to 20 percent).

Information about claims activity and/or loss ratios is not publicly available, but EI product lines (with the possible exception of Cost Cap) appear healthy. Carriers are active in developing and promoting EI products as well as associated risk management services, such as mold awareness training and environmental response training, indicating that they see this as a viable product line.

MARKET INFORMATION

Carriers are reluctant to list prohibited Insureds, either by industry or by size, but there are numerous classes of Insureds that interest them. For a listing, please see our table *Frequent Purchasers of Environmental Insurance*.

Most carriers are willing to write multiyear policies. Typically, the maximum period for a policy is 10 years (this is down from 30, available only a few years ago). On a site-specific basis, particularly if bought in a “finite” form offered by AIG (now AIU Holdings, Inc.), it may be possible to buy a 15 year policy (as was done to secure a cleanup of the Fort Ord Site in California in late 2007).

CAPACITY AND RETENTIONS

Limits. Depending on the specific type of coverage, significant liability limits capacity remains, and reasonable (account appropriate) retentions or deductibles are available. Most carriers offer protections of \$25 to \$50 million. For detailed information, see our *Capacity and Duration* table.

Retentions. Deductibles or retentions can be quite competitive. Co-insurance is typically required for the Cost Cap policies, typically in the range of 10 to 20 percent.

Commissions. Carriers are still reluctant to state commissions, but they are typically similar to those paid on traditional commercial lines products (e.g., 10 to 15 percent).

TYPES OF PRODUCTS

Carriers offer a broad array of products. They are listed, by carrier, along with links to their Websites (sometimes offering their latest “template” policies) as well as contact information, in the *Contact and Product Information* table.

Specific product types include:

- **Pollution Liability** (often called Pollution Legal Liability or PLL), which can protect Insureds against lawsuits and related defense costs that allege the defendant is responsible for damages, including cleanup costs, caused by their pollution. This can be obtained on both a primary and an excess basis.
- **Cleanup Cost Cap** (Cost Cap), which fixes the maximum cost of the environmental cleanup caused by existing pollution.
- **Contractor’s Pollution Liability** (CPL), a coverage designed for the particular needs of contractors,

protecting them from risks of releases in the course of their operations (but typically not for releases on their own properties).

- **Lender Policies** designed for the protection of financing sources such as banks.
- **General Liability combined with Pollution Liability.** Several carriers, e.g., AIU and ACE, offer products that combine General Liability and Pollution Liability coverages into one form.
- **Underground Storage Tank** (UST), typically statutorily required on a state-by-state basis (with each state meeting or exceeding minimum requirements set by the federal government).
- **Finite Structures**, which are alternative risk financing mechanisms, typically combined with PLL and/or CCC policies, and used to fund exposures that may not be otherwise insurable or may not be insurable for the time periods required. AIU is alone in offering finite structures, and it has done so on policies of up to 30 years and with \$100 million or more in coverage.

SPECIFIC COVERAGES AVAILABLE

(some of the categories below overlap)

- **Pre-Existing Conditions** (known and unknown; below cleanup action levels and not).
- **New Conditions** means coverage for new releases (that is, releases that occur after the policy’s inception). New conditions coverage is distinct from a “new discovery” of pre-existing pollutants.
- **Third-parties (BI and PD)** means coverage for claims brought by third parties alleging bodily injury and/or property damage.
- **On- and Off-Site** refers to coverage for pollutants that are on the Insured’s property or that may have migrated from the Insured’s property on to a contiguous or other nearby property. (This coverage is distinct from coverage for pollutants that have been transported from one’s site to a distant Non-Owned Disposal Site, see following).
- **Non-Owned Disposal Sites** (NODS) is coverage for claims that arise out of pollutants at disposal sites not owned (or controlled) by the Insured.

- **Transportation** refers to coverage for events that arise out of the transportation of material to Non-Owned Disposal Sites (see above).
- **Business Interruption** is coverage for expenses resulting from incidents at an insured site that suspends operations at that site.
- **Natural Resources Damages** refers to coverage related to damages caused to natural resources such as wildlife, water, land, and wetlands.
- **Mold** is coverage for Third-party (claims brought by) and/or First-party (damage to the Insured's own property).
- **Finite/EPP:** One carrier (AIU Holdings, Inc.) offers a "finite" program. In almost every case (if not every case), finite policies offered by AIU in the environmental arena are offered for very long periods (*e.g.*, 10 years, and sometimes longer) and have, traditionally, been purchased by Insureds specifically because they wanted longer periods (*e.g.*, 15 or even 30 years).

RISK MANAGEMENT SERVICES

Valuable risk management services are offered by several of the carriers. Many of the services provided by the carriers are oriented toward training. ACE, for example, can provide engineering services that include mold awareness training. The AIU RiskTool System provides a wide variety of information and training materials, while Arch offers newsletters, workshops, presentations, and risk management guidance.

ACE, AIU, and Chubb offer a number of additional specific services as well, such as incident response systems, planning and tracking tools, and terrorism threat assessments. All can provide extensive loss control analysis, including an evaluation of the impact of an incident on the media and how that impact might affect the loss.

EI coverages are a natural for risk management services, although many of the Insureds will be able to provide their own services (or contract with engineering and other firms) for them.

Leading carriers can help their Insureds improve their loss exposures with a judicious application of high quality services; Insureds should take advantage of them.

SUMMARY

The EI market is supported by a variety of carriers, both large and small. The coverage is important to many types of Insureds, and although it requires as careful design and attention to detail as any other complex legal contract, it provides a vital service, both private and public.

For example, EI has provided an enormous benefit to private entities and to the public by enabling environmental cleanups to be done on a fixed-price basis (which emerging statistics are showing are done faster, better, and for less money). EI is also critical to ensure that small businesses have the resources to address USTs and other releases.

The future of EI is promising. Although one of the largest insurers in this area, AIU, has fallen on difficult times, the insurance components of AIU are somewhat separate and protected from those parts of the company that have notoriously incurred great losses (again, a detailed discussion here is beyond the scope of this survey). Moreover, other insurers (*e.g.*, Great American; Philadelphia) have recently entered the field, and the field—now over ten years old—is increasingly populated with underwriters, claims professionals, and others who have the experience to issue EI and address its claims with increasing efficiency and care.

We would like to see the Cost Cap market improve, both with the addition of one or two additional underwriters (right now there are only four), and with the lowering of premiums for Cost Caps that apply to fixed-price cleanups where the Remediation Contractor shares in the risk of cost overruns. EPA is increasingly involved in this area (applying IFCs at more sites and, having just hired a full-time environmental insurance attorney to lead this area), as are many states.

It is an exciting field, one where good underwriting and incentive-alignment can lead to good margins for all, while also advancing the public policy goals of better cleanups, done more quickly and efficiently and at lower cost.

ENVIRONMENTAL INSURANCE GLOSSARY

Excerpted from EPA Environmental Insurance and Risk Management Tools Glossary of Terms
http://www.epa.gov/brownfields/insurance/ei_glossary_06.pdf but with significant modifications and additions

Additional Insured – An individual or entity that is not automatically included as an Insured under the policy of another, but for whom the Named Insured’s policy provides a certain degree of protection. The Named Insured’s impetus for providing Additional Insured status to others may be a desire to protect the other party because of a close relationship with that party (*e.g.*, redevelopment authority serving as an intermediary during the cleanup and redevelopment process) or to comply with a contractual agreement requiring the Named Insured to do so (*e.g.*, customers or owners of property leased by the Named Insured). Importantly, in most cases, Additional Insureds are protected only: (1) for liabilities that derive through the Named Insured; (2) when they are named in a suit; and (3) when the suit also includes the Named Insured. (All three conditions must be met.) Thus, whereas a lender (which derives its liability through its relationship with a site owner) may be protected as an “Additional Insured,” a prior owner (*e.g.*, that has sold property to a new owner that is the “Named Insured”) might not be covered as an “Additional Insured” since the prior owner’s liability typically derives not through the Named Insured but because of its “prior owner” status. CERCLA Section 107(a)(1). Even then, the prior owner would be protected only if it is actually sued and only if that suit also includes the Named Insured.

Additional Named Insured – Has most if not all of the rights of the Named Insured, but typically does not have the payment and administrative obligations (*e.g.*, reporting obligations). Importantly, does not have many of the coverage restrictions noted above with respect to Additional Insureds.

Admitted Policy – An insurance policy that is written and issued in a specific locale, by an insurer authorized to transact business under the confines of the local insurance laws. (See “Non-Admitted Policy,” below, for comparative purposes).

Assumption, Retention, and Releases Provisions – A risk allocation tool used in property transactions, typically wherein the buyer accepts or seller retains responsibility for known or unknown environmental conditions and releases the other party from liability for current and future claims arising from the specified conditions.

Attachment Point – Monetary level of expenditures that must be spent before payments from the insurance policy begin. Thus, in a Cost Cap policy where the anticipated cleanup is expected to be \$10 million but the “attachment point” is \$11.5 million, the insurer would typically not be required to begin making payments until \$11.5 million had been spent. Moreover, quite often, the \$11.5 million must be spent “in the Named Insured” as a pre-condition of insurance payments (and thus, no portion of the \$11.5 million can be paid by other insurance or by third parties).

Bodily Injury – Bodily injury, sickness, disease, mental anguish injury, shock, or building-related illness sustained by any person, including death resulting therefrom, caused by pollution conditions. In some cases, the term “bodily injury” (and payments to cover “bodily injury”) includes some coverage for medical monitoring costs.

Business Interruption – Business expenses and loss of income resulting from fire or other insured peril.

Captive Insurer – An insurance or reinsurance company that is established and owned by a parent company or group of companies (who are non-insurance companies) to insure their own risks. Captive insurance is sometimes used instead of (or, by some perspectives, as a form of) self-insurance.

“Claims Made” Coverage – Coverage that is triggered by a claim being made during the policy period. Typically must also report the claim to the insurer within the policy period or an Extended Reporting Period.

Co-insurance (also, Co-Pay) – Co-participation that involves the payment by the Insured of a predetermined proportion of costs above the amount at which the insurance begins to pay (that is, after the deductible or attachment point).

Manuscript – To customize the writing (and therefore the terms) of a policy, in order to “customize” it to fit the needs of a particular site or circumstance, or of the parties who are Insureds or otherwise affected by the policy (*e.g.*, as Additional Insureds”). Unlike “boilerplate” policies typically used for things like homeowners, auto, general liability, and other risks, environmental insurance policies are almost always manuscripted.

Named Insured – Has all of the coverage rights as well as the obligations (*e.g.*, cancellation; payment of the premium; reporting). See also definitions for “Additional Insured” and “Additional Named Insured.”

Non-Admitted Policy – An insurance policy that does not require the insurer to transact business under the confines of local insurance laws, allowing the insurer greater flexibility in the design and manuscripting of the coverages.

Occurrence – An event that results in an insured loss under an occurrence based policy.

Occurrence Based Coverage – The trigger of insurance coverage is the occurrence, not the claim; therefore, the claim can be made anytime during or after the policy period, but the occurrence (*e.g.*, a release of pollutants) must be made during the policy period.

Portfolio – Insurance coverages for a combined set of sites, whether, or not, there is more than one insured organization. Insuring a portfolio of properties is, in itself, a way to spread risk.

Product Liability Insurance – Provides coverage against loss arising out of liability incurred by a manufacturer, merchant, or distributor because of injury or damage resulting from the use of a covered product.

Property Damage – This can have a number of meanings: 1) physical injury to or destruction of tangible property, including the personal property of third parties; 2) loss of use of such property that has not been physically injured or destroyed; or 3) diminished third-party property value provided that such physical injury or destruction and/or loss of use are caused by pollution conditions.

Re-opener Coverage – Coverage for liabilities associated with the need for further response actions law after a cleanup has been completed and a regulator has provided a Certification of Completion (CoC), a No Further Action (NFA) letter, or some similar assurance that no further responses actions are required. Under CERCLA Section 121(c), EPA is required to review sites every five years even after a CoC or NFA has been issued, and such reviews can result in re-openers.

Toxic Tort Claims – Include a wide variety of claims of harm due to long-term exposure to toxic chemicals and contamination. Includes claims for cleanup costs, bodily injury, property damage, property stigma (and thus loss in value), medical monitoring, and product liability. Toxic tort theories include nuisance, negligence, trespass, strict liability, and a wide host of other legal theories.

Endorsements Commonly Provided	
Additional Insured	The Additional Insured (AI) as well as the Additional Named Insured (ANI) (described below) endorsements are among the most important and most misunderstood. Environmental Insurance (EI) policies are very frequently used to protect multiple parties to a transaction. Examples include a Seller and Buyer of a particular Site; or a Remediation Contractor that is cleaning up a particular Site, as well as the Owner(s) of that Site. Whereas Additional Insured protections offer parties <u>some</u> protections, it is critical that the wording be carefully reviewed. In most policies, Additional Insureds are protected only: (1) for liabilities that derive <u>through</u> the Named Insured; (2) when the AI is named in a suit (that is, actually sued); <u>and</u> (3) when the suit also includes the Named Insured. All three conditions must be met. Thus, whereas a lender (which derives its liability through its relationship with a Site Owner) may be adequately protected as an Additional Insured, a prior Owner (e.g., that has sold property to a new Owner that is the “Named Insured”) might not be adequately covered as an Additional Insured since the prior Owner’s liability typically derives not through the Named Insured but because of its “prior Owner” status. CERCLA Section 107(a)(1). In addition, the prior Owner would not be covered unless and until it was actually sued and unless it was sued along with the Named Insured. This is not a hypothetical limitation; we are aware of one case (that went to litigation) where an Additional Insured that had, in fact, paid for a policy, the carrier denied all coverage on a \$5+ million claim because of this status.
Additional Named Insured	The Additional Named Insured (ANI) endorsement is also critical. As a starting point, it should not have the three coverage restrictions noted above with respect to Additional Insureds. Moreover, an ANI should not have many of the administrative obligations (e.g., payment, reporting) that a Named Insured has. Therefore, in many ways an ANI can be in the best position possible. However, it is important to manuscript this Endorsement (or other portions of the policy) to make sure that the ANI receives notice of any problems (e.g., if the Named Insured encounters pollution and is receiving payments that will erode the policy limits; or if the Named Insured or Insurer has given notice of cancellation of the policy) and that the ANI has a right to “cure” any problems that may otherwise lead to a cancellation of the policy.
Asbestos, Lead, Mold	Some EI carriers will exclude (or place sublimits on) claims related to asbestos, lead, and mold, particularly to the extent that those pollutants are contained within a building structure (as opposed to having been released into the environment).
Claim Trigger	Whether placed in the endorsements (which often occurs) or in the policy body, the claim trigger provision is critical. Some policies do not cover pollutants that are discovered by the Insured itself and are not the subject of claims by third parties. Others are triggered only by claims by third parties. Still others are triggered only by claims by the government and/or only cover claims where the pollutants exceed government-determined cleanup action levels but not levels that a court in a private (toxic tort) lawsuit might impose.
Coinsurance	Typically required in Cost Cap policies, and typically running between 10% and 20%
Covered Locations	Identifies the insured properties. Best (though not always necessary) to do through legal descriptions.
Deductibles (and aggregation thereof)	EI policies will typically require a per occurrence deductible (e.g., \$50,000); they may offer to cap with an aggregate deductible (e.g., \$200,000); if they do, will typically require a maintenance deductible (e.g., \$25,000).
Diminution in Value	Provides that, in the event of a release that may, because of stigma or for other reasons, decrease the value of one’s own property (as well as one’s neighbor’s) even after a cleanup, the diminution in value is covered.
Disclosed Documents	Related to the Known Pollution Events endorsement (below), many policies have a Disclosed Documents endorsement. This is because, unless it is a Cost Cap policy, most EI policies exclude coverage for pollution or releases about which the Insured knew at the time of inception but failed to disclose. A Disclosed Documents endorsement protects Insureds by identifying clearly what was told at the time of inception.
Downgrade Endorsement	This endorsement has been increasingly requested by Insureds, beginning (for obvious reasons) in late 2008. Essentially, it gives the Insured a right to cancel the policy, and receive some portion of the premium back, in the event that the Insurer is financially downgraded below a certain level (e.g., below an A.M. Best rating of A-). Important provisions to negotiate are: (1) the period following a downgrade by which the Insured must give notice of the Insured’s desire to cancel; and (2) amount of premium that will be returned, particularly if the insurer may have paid some amount out as claims.
Fines & Penalties	By their nature, environmental releases are sometimes not just the subject of government-required cleanup but also of government-imposed fines and penalties. Whereas insurance typically will not (indeed, by law, it usually cannot) cover <u>criminal</u> fines and penalties, oftentimes insurers can and will cover <u>civil</u> fines and penalties. This negotiated term is often reflected by endorsement.
Insured Contract	Ordinarily, all policies (not just EI policies) state, for obvious reasons, that the Insurer is not obligated to pay for obligations that an Insured assumes voluntary by contract. However, because EI policies are very often specifically designed to back-up obligations that are assumed by contract (such as an environmental indemnity in a Purchase-and-Sale or Lease Contract, or in a Cleanup Contract with a remediation company) it is imperative that the normal exclusion for Contractual Obligations contain an exception for the PSA, Lease, Cleanup, or other contract. To do so, however, one must specifically identify the contract as an Insured Contract.

Known Pollution Events	Unless it is a Cost Cap policy, most EI policies exclude coverage for pollution or releases about which the Insured knew at the time of inception but failed to disclose. A Known Pollution Events endorsement protects Insureds by identifying clearly what was disclosed at the time a policy was bought. This is most often done by identifying specific documents that were disclosed.
Material Change In Use	Some policies exclude coverage where there has been a Material Change in Use. Indeed, in some policies, carriers may cancel a policy (with no right to cure) where there has been a Material Change in Use. Particularly given the possibility of differing interpretations of the term, “material”, this provision must be carefully negotiated to fit specific needs. In some states, insurers may not cancel unless the change is “substantial.”
Minimum Earned Premium	Many EI policies contain endorsements providing that the premium is 100% earned on the day that the policy is issued. Some are more limited (e.g., 25% earned). Particularly given the 3 to 10 year duration of many EI policies, this is an important provision.
Newly Acquired (and sold) Properties	Provides automatic coverage for newly acquired properties that it is anticipated the Insured will want added to an insured portfolio. Also provides partial return of premium for properties that were within the insured portfolio but for which insurance is no longer desired (because of a sale or for other reasons). It is important to negotiate terms that make the terms of addition clear. For example, will a “Phase I” report be required? Will a Phase I be sufficient absent its finding problems? What will be the added cost (e.g., if a new property is added half-way through the term of a 5-year policy, can the Insured pay only half of the premium?) Similarly, what will be the returned premium for a property for which coverage is dropped half-way through the period of a policy?
Non-Owned Disposal Site (“NODS”)	Typically used for Cost Cap and Pollution Liability policies. Covers risks associated with pollutants that are sent off-Site to a Disposal Site that is owned by entities other than the Insured. NODS coverage is a major concern because, under Section 107(a) of CERCLA, the Owner of a Site whose pollutants are sent to a Site that may, itself, require cleanup (even far into the future) may in many circumstances be held jointly and severally liable for all response costs required at that NODS. It is not uncommon to specify one or two pre-approved NODS at the time of a policy’s purchase. It is in the Insured’s and Insurer’s mutual interest to pick NODS that are operated well and otherwise carry little risk of problems. Insurers, which have a broad array of experience in this area, are a particularly good source of input on this endorsement.
Nuclear Exclusion	EI policies almost never cover risks associated with radioactive materials. This is a standard exclusion, and one that will appear in endorsements if not within the policy body. Obtaining coverage for such materials is possible, particularly for low-level wastes, but beyond the scope of this article.
Re-Opener	Coverage for liabilities associated with the need for further response actions law after a cleanup has been completed and a regulator has provided a Certification of Completion (CoC), a No Further Action (NFA) letter, or some similar assurance that no further response actions are required. For many sites, Section 121(c) of the Superfund (or CERCLA) statute requires EPA review every five years, even after a CoC or NFA has been issued, to determine whether the remedy in place remains adequately protective of human health and the environment. If the remedy is not protective, the matter must be “re-opened.” Some endorsements provide coverage for such re-openers, some do not, and some leave it largely to the insurer’s discretion.
Transportation to NODS	Covers risks from releases while hazardous substances are transported from one’s own Site to a Non-Owned Disposal Site (NODS, see above). Typically provides coverage only if the transportation occurs in vehicles that are not owned by the Insured.
Underground Storage Tank	This provides protection for Underground Storage Tanks (USTs) located on the property. For USTs that are known, it is critical to ensure that this endorsement (and the policy in general) meets all of the very strict and specific regulatory requirements that the government imposes for USTs (e.g., the Insurer cannot insist that the Insured pay the deductible before coverage begins). For example, one policy purported to meet these legal requirements for hundreds of USTs and hundreds of service stations, and yet the policy endorsement – although it covered USTs – expressly could <i>not</i> be used to meet Financial Assurance requirements, resulting in the Insured unintentionally violating strict UST laws for years. Whereas substantial cost and administrative efficiencies can be gained from combining a “normal” PLL policy with a policy that is specifically designed to meet regulatory UST requirements, particular care must be taken when doing so.
Waiver of Subrogation	Requires the insurer to waive what would otherwise typically be its right to pursue a claim that the Insured might have against another, designated party. Thus, for example, in a normal circumstance, an insured buyer of contaminated property has a right to sue a seller for contamination that was on the property at the time of the sale. If the insurer pays for the cleanup of that contamination, the buyer’s right to sue the seller is “subrogated” to the insurer, so the insurer has a right to sue the seller and keep at least a portion of whatever is recovered. Particularly in policies with more than one Insured (e.g., where both the buyer and the seller are Insureds), the Insureds will often request that the insurer waive this right of subrogation. A waiver of subrogation endorsement is intended to provide this waiver.

FREQUENT PURCHASERS OF ENVIRONMENTAL INSURANCE

Reflecting the wide range of products available, there is a wide range of Insureds. A partial list is shown below.

- Asbestos and Lead Abatement Contractors
- Buyers and Sellers of Companies (Mergers, Acquisitions, etc.)
- Buyers or Sellers of Properties
- Chemical Manufacturing and Blending
- Commercial Property Owners and Developers
- Construction Managers
- Convenience Stores (typically by portfolio)
- Developers (including but not limited to Brownfield redevelopers)
- Environmental Engineers and Consultants
- Fuel Depots
- Gasoline Service Stations (typically by portfolio)
- Hazardous Waste Transporters/Non-Hazardous Waste Transporters
- Marine Contractors Mining Landfill and Liner Contractors
- Lending Institutions
- Municipalities
- Office Buildings and Parks (often by portfolio)
- Paving Contractors
- Petroleum Pipelines
- Recyclers
- Refineries
- Remediation Contractors
- Superfund PRPs (Potentially Responsible Parties)
- REITs and other real estate portfolio owners and managers
- Trade Contractors (HVAC, paving, carpentry, concrete)
- Treatment, Storage, and Disposal Facilities (TSDF)
- Underground (and Above-Ground) Storage Tank Contractors
- Utilities
- Warehouses
- Wastewater, Sewer & Utility Contractors

CLIMATE CHANGE – RISK AND OPPORTUNITY FOR ENVIRONMENTAL INSURERS

BY:

SANDY HAUSERMAN, (MANAGING MEMBER, STONES RIVER CONSULTING, LLC)

There seems little doubt that that the federal government will soon enact legislation to regulate greenhouse gas emissions. In addition, as the United States Climate Change Program has recently said, “the impacts of climate change are underway and projected to grow.” Both these developments will present Environmental insurers with risk and opportunity.

CHANGES IN REGULATION

In Massachusetts v. EPA the Supreme Court held that greenhouse gases are pollutants under the Clean Air Act. The definition of “Pollution Conditions” in most Environmental policies is broad enough to include greenhouse gases despite the fact that insurers did not contemplate or price for this exposure. Furthermore, coverage for “Natural Resource Damage” could potentially include lawsuits against greenhouse gas emitters. NRD in most Environmental policies covers loss of value of, land, fish, wildlife, water, etc. held in trust by some government entity. Arguably the impacts of climate change have just that effect. Regardless of the success of such lawsuits defense costs could be substantial. Therefore, when greenhouse gas regulation is enacted Environmental Insurers will have to decide whether to;

- remain silent and argue the coverage issue in court; or
- affirmatively exclude coverage for greenhouse gases going forward.

Despite these potential issues, climate change regulation should help to create new opportunities. Environmental insurance products developed during the 1980s were a response to conditions created under evolving environmental laws. It is likely that any legal regime put in place to fight climate change will likewise drive product development.

Possibilities include;

- creating a reverse Cost Cap type policy to insure reduction targets for greenhouse gas emitters under a cap and trade system; or
- capturing the market for insuring alternative energy project performance; or
- investigating the feasibility of providing insurance for carbon capture & sequestration (although, for now, this technology does not work and is probably uninsurable); or
- utilizing existing consulting expertise to help non-greenhouse emitters measure and reduce their carbon footprint through energy audits and assessments and then creating a reverse Cost Cap policy to insure emission reduction targets.

Several academics have proposed that an efficient way to mitigate climate change is with mandatory Environmental insurance—once appropriate standards have been set for regulated activities. Although such an approach would lead to significant industry growth, it would also, if not constructed carefully, create substantial moral hazard.

It is important, therefore for Environmental insurers to fully engage with government regulators and the public in order to influence the debate on climate change regulations. Certainly government climate regulation will spur growth in new energy technologies such as wind, solar, hydrogen, geothermal, wave, tidal and the electric grid to deliver them. The growth of these technologies will create new markets for Environmental coverage and opportunity for growth.

IMPACTS

Scientists predict climate change will cause stronger hurricanes, higher storm surges, rising seas, droughts & fires, and heavier rains and flooding. These impacts will increase the frequency and the severity of releases of environmental pollutants. Environmental insurers should begin to assess their rate structure now to account for these increases. The most sensible approach would be to assign a numerical credit or debit range for susceptibility to climate impacts. It would also be advantageous for Environmental insurers to start promoting improved siting and safeguarding of hazardous materials to help minimize future losses. This, in turn, will require Environmental insurers to become involved in local and regional land-use planning. By taking these steps to help

insureds deal with climate change Environmental insurers will be able to continue to make coverage available in the face of potentially more frequent and devastating catastrophic events.

Finally, climate change adoption strategies that promote energy, water and transportation efficiency will enlarge existing contracting and fixed-site markets. To facilitate this growth, Environmental insurers would be wise to take an active role in educating the public about climate change and engage first hand in public policy discussions. Such involvement will go a long way toward making sure that the opportunities presented by climate change are greater than the risks.



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