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A Pollution Liability and Legislation Primer

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President, Collinsworth, Alter, Nielson, Fowler & Dowling Inc.

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The article has been shortened from the original version. The full article can be found on the A/E Pronet website at <http://www.aepronet.org/ge/no6.html>

In view of the ever-increasing interest in this area, I thought it would be helpful to identify the genesis of this coverage. This will enable many people to better understand this topic and the growing importance it plays in the insurance arena.

I would like to give a little background on the history of pollution legislation. Congress is the ultimate source of all federal environmental legislation. The main regulator of federal legislation is the Environmental Protection Agency, a.k.a. the EPA. The EPA develops and issues regulations and enforces these regulations nationwide.

The vast majority of federal environmental issues are handled at the EPA level, but critical cases usually end up in Federal Courts. The courts can sanction criminal prosecutions and force or mandate remedial action/clean-ups and disposal and listens to appeals of EPA requirements.

Let's review a few of the major pieces of pollution legislation briefly that are pertinent:

The Resource Conservation and Recovery Act of 1976 (RCRA)

The legislation marks the beginning of what has become the EPA's most far reaching and complex regulatory program. RCRA tracks hazardous waste from cradle to grave, retroactively and prospectively. It is applicable to arrangers, generators, transporters and storage facilities of any type of waste which is applicable to this law. There are permitting requirements that must be met and violation of any of these regulations can impose substantial fines and/or imprisonment if not handled properly. Remember... waste remains the insured's responsibility even after disposal.

The Comprehensive Environmental Response Compensation And Liability Act Of 1990 (CERCLA or SUPERFUND):

This legislation brought environmental concerns to the forefront for virtually every segment of American industry. This Act authorizes the EPA to mandate clean-up and disposal of abandoned dumps and other contamination waste disposal sites. This law does have some very stringent standards, e.g...retroactive, joint and generally unlimited

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Insider's Tips

Environmental insurance can be used to comply with regulations or insure against violations of the myriad of legislation.

Environmental Impairment

Liability: Covers pollution conditions emanating from your location and also can be used to comply with RCRA financial responsibility requirements.

Contractors Pollution Legal Liability:

Necessary when hiring contractors to do environmental and often non-environmental activities.

Remediation Cost Cap Insurance:

Caps the cost of remediation activities that are associated with Superfund or RCRA cleanups.

Property Transfer

Insurance: Used in place of the seller's indemnity when a property is being bought or sold.

Secured Creditors Insurance:

Protects the collateral interest of the lender.

(Continued from page 1)

liability. Hence, it is next to impossible not to be subject to these onerous standards. Superfund is not primarily a regulatory statute...its principal obligation imposes liability for remedial action/clean-up, transportation and storage costs. The successor to CERCLA is SARA and this acronym stands for Superfund Amendment and Reauthorization Act of 1986.

The Clean Water Act:

Congress established the basic framework of this program in 1972 and the statute provides heavy funding for the construction of municipal sewage treatment works. However, its main emphasis is on the control of discharges from industrial plants and it mandates a National Pollutant Discharge Elimination System (NPDES) which requires every industry which discharges any type of waste into public waters to obtain an NPDES permit. These permits specify numerical discharge limitations for a wide range of individual substances and requires self-monitoring.

The Clean Air Act:

This legislation was passed in 1970 and modifications were made in 1991. The law allows EPA to set a basic set of national ambient air quality standards for selected contaminants which provide the foundation for our national air pollution control program. This legislation has always provided for the establishment of the National Emission Standards for Hazardous Pollutants and it was the first standards of its kind. With the implementation of the revised statute in 1991, it is estimated that it will cost American business approximately \$50 billion a year to comply with the 1991 Clean Air Act, alone.

The Emergency Planning And Community Right To Know Act:

This act was enacted in 1986 and was a result of the Bhopal, India disaster. This act requires industrial plants to work with local community leaders and state officials to prepare coordinated plans for responding to emergency releases of hazardous chemicals. Included in this legislation was the employee right to know legislation. This law mandates that employers must notify all of their employees and others who may be working with them of any type of hazardous waste or materials which may have an adverse effect upon them. Remember that violation of these pollution laws may require remedial action/clean-up and disposal activities that can be extremely expensive. The EPA will usually mandate stringent requirements and I can assure you that their activities are going to be the "fail safe" variety. They are going to be redundant and

expensive.

The National Environmental Policy Act of 1970:

This act did mandate that each person, party or organization that was going to engage in activities that may impact on the environment must come up with an environmental impact study. This may sound like a very simple endeavor, but it has created gargantuan nightmares for many companies when trying to comply with each and every type of pollution legislation that may be affected by their activities. It's doubtful that the originators of this legislation could envision that this short document would require the extensive reporting and studies necessary prior to beginning of a project. This act also regulates federal government projects such as dams, highways, etc.

Pollution Prosecution Act Of 1990:

Congress authorized the EPA to hire as many as 200 criminal investigators and federal criminal prosecutors by 1995 in order to prosecute those people who they feel are "environmental criminals".

What makes the prospect of criminal prosecution for any environmental crime so daunting is that more and more frequently the targets are corporate officers or line managers. Unfortunately, many times their crime involved someone else's bad act or merely failure to file proper paperwork required under one of the many environmental statutes and regulations. The plethora of rules virtually guarantees that no company or individual can always be completely in compliance with these laws. Worst of all, if the violation of an environmental statute or regulation has occurred, there is no absolute defense to criminal liabilities.

Compliance:

Please understand that most of this legislation may apply to past, present and future activities and great care must be taken in order to comply with the statutes. One of the most important requirements is record-keeping and documentation, as this will save a great deal of grief should allegation of injury be brought by third parties.

Any remedial activities which are mandated do require the expertise of professionals in all of these areas because of the stringent and catastrophic results that can occur if not handled properly. Just because third parties are allowed to assist the owner with activities, does not relieve the owner of any responsibility. Hence generators must be particularly vigilant when

dealing with transporters and storage facilities who will handle and store hazardous materials. If the work is not done properly, the generator can be held responsible for the acts of the independent contractor(s) hired, and they will offer little defense in the event of violation on laws or non-compliance.

There are many factors to consider when businesses purchase or sell property. Today one of the most critical factors to consider is the environmental use to which the property has been or will be subjected.

Of utmost importance in making decisions to buy or sell property it is most important to know all about it's past environmental use. Superfund imposes liability for clean-up of hazardous substances on certain Potentially Responsibilities Parties (PRP's) and these parties include along with others:

1. current owners and operators of the site;
2. past owners and operators of the site;
3. mortgagees and other financial intermediaries;
4. others who may have input into the use or maintenance of the property

Environmental Auditing:

Environmental auditing has become an important risk management tool for anyone who is going to buy or sell property because of the catastrophic potential of problems that may result. Superfund cleanup costs are often in the range of tens of millions of dollars. Hence, to avoid unintentional acquisition of such liabilities, a thorough investigation of the current and past waste disposal practices or use of any property is an absolute requirement.

Environmental Due Diligence:

Environmental due diligence in support of mergers, acquisitions, divestments and financing transactions should also be considered in addition to the sale or purchase of property. This will typically involve additional paperwork such as a review of permits and compliance records and governmental regulatory files concerning the facility or facilities in question.

The standard of due diligence in the environmental area is rising and increased recognition in the business community of the potential liabilities involved are required.

Again, whenever doing any type of environmental auditing, it is recommended that professionals be used because of the potential catastrophic liabilities that may be involved. When conducting environmental auditing, do not

assume that it is possible to avoid action on the information found, as once knowledge is gained... it is a violation of the pollution laws not to act on the information. Also, do not assume these audits will uncover everything present.

Insurance:

Always be mindful that the most (if not all) standard commercial general, auto & umbrella liability policies issued today do not intend to cover any of the pollution activities which may be a part of an owner's arranger, generators, transporters or storage facilities operations. A quick review of the new pollution liability exclusion and the definition of pollutants will establish this point very poignantly.

The pollution exclusion specifically does not cover: any bodily injury or property damage arising out of the discharge, disposal, release or escape of smoke, vapors, soot fumes, acids, alkali, toxic chemicals, liquids or gasses, waste materials or irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water.

Such broad exclusionary language leaves little room for misinterpretation of the policy's intent. Common sense should be sufficient to determine that there is very little (intended) protection in the policies. Except in rare instances where there is an off-site pollution source and the owner or service provider did not place the pollutant(s) on the property or knowingly incorporate them in their products or make them a part of their completed operations. Other than this narrow potential for coverage, virtually any claim for pollution will be declined by the insurance carrier(s) covering the property or completed work in question with the possible exception of hostile fines and some products liability issues.

Note that non-compliance can freeze new facility construction or shut down an existing plant. Violations can lead to criminal prosecution of a corporation, the individual corporate officers and managers. This is not a topic to be ignored because of the potentially significant penalties for violation of the regulations, regardless of the innocent intent of the parties involved. Every business should examine their individual needs in this vital area and take the proper risk management steps to protect the corporation, its officers, employees, service providers and stockholders. Insurance properly arranged will go a long way in transferring the tremendous risks and responsibilities imposed by present day legislation.

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Newsletter Notice

SEiP has discontinued printing and mailing of our quarterly newsletter. To receive the newsletter via email, visit our website at www.armr.net or send your email address to webmaster@armr.net.

The State of the Pollution Insurance Market

Conversations with several senior environmental underwriting managers show a general hardening of the market on most lines of coverage. The biggest impacts will be in the traditional casualty lines including auto, general liability and umbrella, where price increases of 15% - 35% will be common on accounts with good loss experience. Expect higher costs for accounts with losses.

The pricing of traditional casualty lines on "environmental services" accounts look much like the rest of the insurance market. They have essentially the same historically inadequate pricing issues that are faced by other classes of business. Accounts that were priced below profitable underwriting rates will feel the double hit of a return to filed rates and the increased cost of reinsurance.

Environmental insurances such as EIL, CPL, and Cost Cap are less affected by the hardening casualty market. However, the increased demand for insurance capacity will affect the cost of environmental insurance. Expect 15% - 20% price increases on renewals as the market adjusts.

Environmental accounts that access the facultative reinsurance marketplace will see a change in rates and capacity as a result of the September 11th tragedy. It is now more difficult to obtain limits in excess of \$25,000,000 for policy terms in excess of ten years.

On smaller placements the underwriting markets are writing new business under similar terms and conditions to those in affect prior to September 11th.

One environmental underwriting executive noted that he expected a reduction of capacity on their reinsurance treaty in 2002. He was not concerned that the potential capacity reduction would affect his customers, noting 99.5% of their current clients bought limits that were within the companies net line retention and therefore would not be affected by the reinsurance market.

Total capacity of the environmental insurance market with reinsurance is still in excess of \$500,000,000. The total net line capacity of the major environmental underwriters without reinsurance is estimated to be in excess of \$90,000,000. Even if the entire reinsurance market abandons environmental insurance coverage, which is very unlikely, buyers will have access to significant capacity for environmental insurance.

Since September 11, producers may have assumed the environmental market is in trouble and stopped submitting new business. A regional manager of one of the major carriers pointed out that their reinsurance treaties renewed last spring therefore their ability or capacity to write new or renewal business has not changed since the tragedy. The market for pollution insurance remains healthy and competitive.

Risk Management for Insurance Professionals

By: David J Dybdahl CPCU ARM, American Risk Management Resources Network

Insurance agents, brokers, and attorneys can alleviate years of potential professional errors and omissions exposures that results from their client's uninsured environmental losses. By offering environmental insurance to their clients on a prospective basis with coverage for the insured's prior acts, risk management professionals can eliminate a possible E&O exposure. Lawyers and other advisors involved with property transfers or mergers and acquisitions have similar professional liability loss exposures if they do not address the environmental exposures in a transaction.

Recently, I reviewed the expert witness reports in three court cases that involved an uninsured environmental loss. The cases had several common issues. The first common issue was to determine the availability of environmental insurance over a specific period of time. Since environmental insurance has been continuously available since 1980, the difficult part of each case involved documenting the availability of environmental insurance for that class of business and for that particular loss exposure during the time frames in question.

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The second common issue was each case failed to recognize that environmental impairment liability policies (except for contractors forms) are and always have been claims-made policies. The significance of the claims-made policy form is that the policy in force at the time the claim is made is the policy that applies to the entire loss. Environmental impairment liability policies normally apply to all preexisting conditions at the insured site. Therefore, analyzing what could have been purchased prior to the date the claim became known is largely irrelevant. For the past twenty years environmental coverage has been continuously enhanced. The policy that could have been purchased immediately prior to the claim would have had the most up to date terms and conditions.

By some estimates 95% of this year's environmental losses will not be adequately or properly insured. An even starker statistic is only 8,000 environmental insurance policies will be issued this year to a universe of

2,500,000 accounts with environmental loss exposures. Poor utilization of modern environmental insurance propagates a billion dollar insurance coverage litigation industry that tries to find environmental insurance coverage on policy forms that exclude pollution. A pollution policy in place at the time of the claim could avert a significant number of these uncovered environmental losses.

Contrary to popular belief coverage litigation is rare on genuine environmental insurance policies. These policies have a stellar record of paying claims.

In evaluating environmental loss exposures for a client be sure to expand your thinking well beyond the hazardous waste industry. Many of this year's environmental losses will be on firms that are not in the "environmental" business.

The SEiP website has environmental loss exposure check lists for a wide range of businesses.

SEiP's Featured Resource: Ask the Expert

The Ask the Expert feature on the SEiP website is an opportunity to take advantage of the wealth of experience and expertise of those who have volunteered to help. The experts have extensive experience in the environmental insurance industry. Some examples include:

David Dybdahl CPCU, ARM

- Twenty years of experience in environmental insurance;
- Author of the CPCU chapter on environmental insurance;
- Knowledgeable about the history of environmental insurance and how today's insurance products can be structured to provide maximum value to the client;
- Advises on marketing plans, training, insurance placements, and expert witness.

John Beauchamp, CPCU, RPLU

- Author of a number of articles concerning environmental risk management;
- Experience in risk selection, pricing, development and management of insurance programs targeted toward remedial contractors and environmental consultants;
- Advises on contractor and consulting risk exposures and risk management;

George F. Curran, III, CHMM

- Author of numerous articles in legal journals and environmental trade association publications concerning environmental compliance, negotiating with regulators, risk management, and insurance issues;
- Experience in risk management, environmental auditing practices, ISO 9000 and 14000 standards, as well as complex environmental litigation;
- Advises on environmental compliance requirements for generator, transporter and treatment, storage and disposal facility owners and operators, including wastewater treatment plant permitting, pollution prevention and waste minimization.

Environmental MarketPlace

ECS Presents 2001 Excellence In Environmental Risk Management Award

ECS Underwriting recently honored Bowen Engineering Corporation of Fisher, IN, with the 2001 *Excellence in Environmental Risk Management* award. Bowen Engineering accepted the award at a reception held at the International Risk Management Institute (IRMI) 21st Annual Construction Insurance Conference on October 31, 2001 in New Orleans, LA.

Each year, ECS presents the award to one construction firm that demonstrates a strong commitment to actively managing its environmental risks and protecting the environment, its employees and public health. Bowen Engineering was evaluated on its implementation of employee training, health and safety programs, contract preparation, insurance programs, claims history and other risk management practices.

"In the construction industry, it is particularly important to implement effective risk management strategies," said Laura Wagner, vice president of ECS Risk Control Construction Services. "Bowen Engineering is setting an industry example in how it can be done and how wise risk management actually adds to a business' success." ECS is a pioneer in promoting quality and risk management in the insurance industry.

For more information, contact Neil Wernick, WernickN@ecsinc.com, 800-327-1414

Investors Underwriting Managers Offer Mold Coverage in Contractors Policy

One factor that appears to be of growing concern is mold. Investors Underwriting Managers (IUM) has approached the mold concern and offered the surplus lines market an alternative. IUM offers mold coverage through the Contractor Pollution Liability (CPL) Policy to trade and general contractors. The exception is accounts which are domiciled or that perform a significant amount of work in a "western state" (TX, AZ, CA, NV, WA). The general liability for the trade or general contractor will be written through other carriers.

Mold abatement contractors will be evaluated as an environmental abater. As for the GL, IUM can offer the coverage as a mono-line or via package form.

Mold exposure is a concern for various types of contractors. Likely business classes with mold exposures include residential, general contractors, heating and air conditioning (HVAC), plumbing, roofers, windows and siding, insulation contractors, fire damage contractors, sprinkler contractors, etc.

For more information, contact Scott McDougall, smcdougall@markelcorp.com, 800-243-6869.

AIG's BUILD Program Assists in Redeveloping Brownfields

AIG Environmental[®] has now made the redevelopment of Brownfields more assured with a program called BUILDSM - Brownfields: Utilizing Insurance for Land Development. This unique risk management program eases financial uncertainty by using environmental insurance to cover unforeseen costs and liabilities. With over two decades of experience in environmental insurance, AIG Environmental[®] creates programs like BUILDSM designed to reduce the repercussions of unexpected circumstances.

AIG Environmental[®] addresses potential liabilities up front. Remediation costs are quantified. Legal responsibilities are determined. And protection is provided from unexpected cleanup costs and lawsuits. This, in turn, helps speed up project negotiations and property redevelopment and allows all interested parties -- from real estate developers to municipalities -- to make the most of unused land. Brownfields can provide an important boost to local communities and their economies. New tax revenue, new jobs and new investment capital lets cities, towns and developers alike share in the success.

The benefits of AIG Environmental's[®] BUILDSM program include addressing all known/unknown environmental liabilities quickly, puts funding in place to resolve liabilities if they arise, responds to the concerns of multiple stakeholders, and lets redevelopment stay within budget. The BUILDSM program helps you gain the financial benefits of redeveloping a Brownfield without the financial risks.

Contact aigenvironmental@aig.com for further information.

Zurich's New Mid-Atlantic Office Reaches Out To Clients

"When we opened in February 2000 we hit the ground running, and we haven't stopped", says Steve Collett, manager of Zurich Environmental & Design Professional's Mid-Atlantic office, the organization's newest regional site, located in Philadelphia.

The Mid-Atlantic Region covers Pennsylvania, Ohio, Virginia, West Virginia, Delaware, Maryland and Washington, DC. The new office brings us closer to our brokers and insureds in these states, says Collett. Learning about their specific needs and developing insurance plans that meet those needs is an exciting and challenging opportunity.

The office offers many of Zurich North America's innovative products and services including environmental impairment liability for fixed -site owners and operators, as well as a real estate property transfer product for real estate owners, developers, managers, investors and brownfield redevelopers.

The office also offers coverage for the associated casualty lines commercial general liability, workers compensation, business automobile, owners and contractors protective liability, as well as commercial umbrella/excess liability that complement Zurich North America's environmental liability products.

To contact the Mid-Atlantic Regional office Steve Collett, Zurich North America, 1818 Market Street, Suite 3202, Philadelphia, PA 19103, (215) 979-6652
www.zurichna.com/environmental

For any other questions, regarding Zurich North America Environmental & Design Professional, please contact Monica Rivera at (312) 496-9556 or monica.rivera@zurichna.com

Gulf Introduces Pollution Products Liability

Gulf Insurance introduces a new, stand-alone Pollution Products Liability policy. The policy provides third party bodily injury and property damage liability and/or cleanup costs resulting from pollution conditions from a defective product or the failure of a product. It is intended to cover equipment that carries, contains, measures, moves or otherwise stores or processes pollutants, not the pollutants themselves.

For more information, contact Barbara Deas at Gulf Insurance, 404-497-7226.

EIL is Growth Area for Freberg

Freberg Environmental Inc. (FEI) continues to see growth in Environmental Impairment Liability (EIL) coverages. FEI's EIL program can accommodate a wide range of facilities. "Many of our insureds are companies that need coverage due to refinancing requirements by financial institutions," says Stacy Brown, Environmental Manager of FEI. "The cross-section of accounts that we write is broad and is a reflection on how financial institutions continue to shift liabilities to owners. I cannot say that there is one class that is written more often than another."

FEI's book is not limited to transactions, "we also see our share of manufacturing facilities, treatment plants and landfills in addition to writing complex sites with pre-existing pollution conditions.

For more information, contact Stacy Brown, sbrown@feiinsurance.com, 800-377-4152.

Chubb Sets Sights On Environmental Legacy Issues

With the creation of Chubb Environmental Solutions and the addition of several seasoned environmental insurance personnel, Chubb is making a move to become a significant player in the loss portfolio buyout and financial closure to environmental legacies. These are insurance programs designed to transfer known and unknown environmental liabilities off corporate balance sheets. The policy terms can be written for 10 to 30 years. These are the hottest growth areas in the environmental insurance market place.

Michael Murphy joins Chubb as the President of Chubb Environmental Solutions Division. Michael was most recently CEO of ICC a brownfield development company in Washington D.C. The Chubb Environmental Solutions Division helps businesses tackle large-scale environmental exposures.

For more information contact: Bill Hazelton, whazelton@chubb.com, 212-329-8169.

Royal Sun Halts Environmental Underwriting

Royal Sun Alliance will stop underwriting environmental insurance on January 1, 2002. An RSA underwriter stated that the reason for the withdrawal from the market was lack of demand for the products and not adverse loss experience from the book.



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- The Basics of Environmental Insurance
- The Future of EIL Insurance
- Understanding Environmental Legislation
- Environmental Technology
- Environmental Risk: Manufacturers and Industrial Facilities
- The Environmental Insurance Underwriting Process
- Special Session on Mold: A Growing Insurance Problem
- Marketing Environmental Opportunities
- Meet the Markets

Day 2

- Environmental Risk: Contractors and Consultants
- Environmental Risk Assessment
- Environmental Claims Strategies for Traditional Coverages
- Successful Environmental Insurance Placement Strategies
- Completing the Transaction

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