

Environmental Risk Resources Association



"Expanding the use of environmental insurance as a risk management tool through education, technology, resources, innovation and networking."

Featured in this issue:

Environmental
Insurance 101

Recent Pricing for
Environmental
Insurance

Toxic Mold: Managing
The Risk in the Post
Insurance Exclusion
Era

Getting A Handle on
Emergency Response
Costs

Environmental Insurance Forum

November 18, 2003
Wilshire Grand Hotel
Los Angeles, CA

Environmental Risk Resources
Association
4901 Pine Cone Circle
Middleton, WI 53562

1-877-735-0800
www.erraonline.org
anne@erraonline.org

Fall 2003

Environmental Insurance 101

*By: Mary S. Busby, J.D., Assistant Vice President, Technical Environmental Leader
Gallagher Environmental Risk & Insurance*

Environmental risk management and insurance issues are often one of the last things (if at all) on a typical risk manager's mind. Many of our clients tend not to think about environmental risks or insurance because it is either too burdensome, perceived to be too expensive, not within his/her "job description," and/or a myriad of other reasons.

Unfortunately, because potential severity of most environmental liabilities facing organizations is so high, and the writing of this sort of insurance is such a specialty, environmental risk and insurance issues need to become a priority.

This article approaches the subject of Environmental Liability Insurance and Risk Management in a way that is as simple. We have endeavored to answer the most common questions in plain English. Because we talk with many clients on a routine basis we know you are thinking of this subject consciously, conscientiously and routinely when it comes to the well being of your organization. However, there are a lot more of you out there that do not give environmental risks and insurance enough attention.

We hope that our efforts here allow the subject to enter your thoughts and, in turn, reduce the overall costs of environmental risks to your organization.

"Is environmental insurance real? Does it really provide protection?"

It does not take a leap of faith to believe in Environmental Liability Insurance and Risk Management mechanisms. There is plenty of concrete evidence to consider regarding environmental liability insurance.

Underwriting of insurance designed to specifically cover environmental liabilities began over 20 years ago. We are NOT writing about litigation over old "Comprehensive General Liability" (CGL) insurance policies or the removal of or the numerous redrafting of the pollution exclusion by the Insurance Services Office (ISO). We ARE writing about insurance contracts that have the purpose of indemnifying the insured against environmental liabilities in the policy's Insuring Agreement.

(Continued on page 2)

Recent Pricing for Environmental Insurance

Cost Cap - rates of 7% to 10% of limits purchased, SIR 10% to 15%

Hotels - 400 locations, \$250,000 SIR, \$200 per million per year premium

Drywall Contractor - \$100+ revenue, 250,000 SIR, \$75,000 premium

Condo - multi-year policy, \$10,000,000 limit with mold, \$1/sq foot premium rate

(Continued from page 1)

Insurable environmental risks can include, but are not limited to the following:

1 The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, a.k.a. Superfund) which has as its purpose one thing - to act as an enforcement tool to make polluters and owners and operators of polluted property responsible for the cost to clean up that property,

2. The Resource Conservation and Recovery Act (RCRA) which has as one of its purposes making those responsible for generation, storage and disposal of hazardous materials and waste liable for the harm caused by the substances (including the need for cleanup) from the point of generation until the end of time,

3 . The Clean Water and Clean Air Acts,

4. Third party plaintiffs who claim to have been injured (whether property damage or bodily injury) by pollution.

These policies have specific and express insuring agreements that come right out and say "we will indemnify you for pollution events or incidents." They can be designed to cover the insured for cleanup at their owned/operated sites, whether that cleanup is on or under the site or it has migrated from or through the site. Since liability for cleanup of pollution is "Strict" (attaches without regard to fault), an insured may be liable for the entire cost to cleanup a site, even if they had nothing whatsoever to do with polluting the site.

This type of liability makes pollution liability coverage invaluable.

The coverage can also be designed to cover an insured for bodily injury or property damage that is caused by the pollution. Further, coverage is available for those non-owned disposal sites where the hazardous materials generated (stored or transported) by the insured are eventually disposed. This is where a truly bottom line, crippling, liability can hit your client, and they often don't know it. The policies may also cover the pollution incident that occurs along the route from A to B (e.g. the transport of the hazardous material to its disposal site, or the transport of product over the road or air or water or in a pipeline). Coverage is also available for MOLD, ASBESTOS and LEAD.

These policies are specifically designed to indemnify the insured from environmental liability. They don't just say "pollution" somewhere on the page.

"Do environmental insurance carriers pay claims? I've heard that they don't pay, or you have to sue them to get paid."

Once upon a time, there was a rumor - that environmental insurers do not pay claims. Oh, the power of the rumor. It simply is not true.

You can believe us, or you can believe the evidence we have in our files. Environmental claims are probably the least litigated claims in the entire insurance industry. Less than 1% of environmental claims are litigated. They are usually paid outright or settled within a reasonable time.

Who do you call for environmental claims assistance?

We always advise you to call coverage counsel within the state to which any choice of law provision in the policy applies. In addition, competent environmental insurance brokerage assistance must be used. As environmental insurance brokers, we act as advocates in claims discussions with carriers and often make progress in the right direction.

"I think I can do this myself. I don't need you, do I?"

As environmental insurance brokers, we hear this a great deal from our colleagues and, often from counsel and traditional risk management clients. Our advice is simple, if you focus all of your time on identifying and analyzing environmental risks in terms of potential frequency and severity, and then designing and negotiating environmental insurance coverage terms and conditions with the appropriate environmental underwriters, then, by all means, proceed.

These policies are routinely manuscripted to meet specific needs of the risk and the situation (e.g. transactions, operations, mergers & acquisitions, etc.). The answer is "No, it is not safe to go it alone."

Gallagher Environmental Risk & Insurance (GERI) specializes in providing environmental risk management and insurance services. Our role as an industry leader is to identify potential environmental risks and recommend risk control and financing program mechanisms available to address these risks. For more information contact Mary Busby at 440-338-3259 or Mary_Busby@ajg.com .

The Premier Conference Series on Environmental Insurance

The Environmental Insurance Forum

November 18, 2003, 9AM—4PM, Wilshire Grand Hotel, Los Angeles, CA

A world class conference focused on providing attendees with a working knowledge of environmental insurance and risk management featuring senior practitioners offering solutions to real world problems and state of the art advice. The need for working knowledge in environmental insurance has never been greater. **Hot News!** Millions of businesses now need environmental insurance to cover mold losses.

The Environmental Risk Management Process

The classical risk management process of identifying, preventing, controlling and financing risks can be applied effectively to environmental risks. This session provides an overview of a methodology that can be used to develop an environmental risk management strategy.

Recent Developments in Insurance Coverage for Environmental, Toxic Tort & Mold Claims

Richard Giller, Of Counsel, Weston, Benshoof, Rochefort, Rubalcava, MacCuish, LLP

An understanding of the developments in environmental insurance coverages is essential to a risk management program. How important is it to address pollution issues before a claim occurs? What are the trends in this coverage area? What does the 'The Bar' see as the next environmental legal issue that insurance professionals should be anticipating?

Litigating Mold Claims

Nana Nakano, Associate, Weston, Benshoof, Rochefort, Rubalcava, MacCuish, LLP

In 20 years of pollution exclusion litigation there is no consistency in how they are interpreted. The mold exclusion is proving to be equally ambiguous. In the absence of accepted standards for exposure levels to mold, common law theories produce variable outcomes. What is the legal background for mold claims? What will the future bring?

The Environmental Insurance Market

William McElroy, Vice President, Environmental, Liberty International Underwriters

The environmental insurance market is constantly expanding the depth of products offered and the risk that is underwritten. Environmental insurance carriers are stepping in to fill the coverage gap created by the new mold exclusions. Where are the best opportunities to utilize these tools to serve the needs of customers? How can risk management professionals position themselves to capitalize on these emerging opportunities?

Hot Topic: Mold, Fungus, Microbial Matter, Bio and Nuclear Terrorism Exclusions are all Related to Pollution Exclusions - Environmental Insurance as a Solution

Dave Dybdahl, CPCU, ARM, President, American Risk Management Resources Network

With exclusions for these new sources of "pollution" being added to virtually all commercial and personal lines insurance policies, new forms of environmental insurance coverage are being introduced into the market. These new exclusions have created unprecedented professional liability for risk advisors. What insurance coverage is available to fill the coverage gaps created by the new wave of pollution exclusions? What is the current insurance market for mold related damages? How can risk advisors protect themselves from this new professional errors and omissions loss exposure at the same time they provide valuable and competitive services to their clients?

Marketing Environmental Opportunities and Successful Placement Strategies

Robert Rosenfeld, PhD, Variance Management Risk and Insurance Services, LLP

Environmental insurance can be the solution to your customer's risk management problems. How do you recognize and capitalize on an environmental insurance opportunity? How to create a team of individuals with expertise in environmental law, environmental engineering and environmental risk management to structure and close deals? What factors determine success in selling environmental insurance? What works when talking to a client? How can you move from simply selling insurance products to becoming one of your clients' key business advisors?

Mold Risk Management Seminar Series

"Uninsured mold claims on property insurance policies will domino into liability claims for multiple defendants including insurance agent's and broker's E&O. New exclusions in insurance agent's professional liability policies for mold related claims makes personal risk management essential for insurance agents"

This seminar series is specifically designed to:

- Make the agency immune to professional liability claims from uninsured mold losses.
- Enable the agency to provide state of the art environmental insurance solutions for mold and other environmental damages to its clients.

If you would like more information on our turnkey Mold Risk Management seminars, please call 608-798-2904, email webmaster@erraonline.org or visit the seminar webpage at www.erraonline.org/moldeoseminar.html.

Toxic Mold: Managing The Risk in the Post Insurance Exclusion Era

By: Dave Dybdahl, CPCU, ARM, Senior Consultant, American Risk Management Resources Network

A summary of the presentation by David Dybdahl to the Society of Chartered Property and Casualty Underwriters annual meeting on October 13, 2003 in New Orleans.

The presentation details the impact of various mold related damages exclusions in traditional insurance policies and then details what kinds of insurance policies should be purchased to insure mold loss exposures on a prospective basis. The presentation contains new research comparing and contrasting the relative magnitude of mold claims to asbestos, superfund and fire damage claims in the United States. Surprisingly mold claims mirrored insured fire damage in 2002! Mr. Dybdahl predicts which business sectors will be most affected by mold damages and presents some of the state based hazard rankings generated by the new Madison Mold Relative Hazard Ranking Model. Some of the results in Mr. Dybdahl's research are surprising. If you thought insurance companies were going to be the big losers from mold damage claims they are number seven on the list. Insurance agents are ranked number two on the list! If you thought mold was a Texas homeowners insurance problem, you will be surprised by the state relative hazard rankings for mold damage claims.

Introduction

A rapid increase in mold claims, followed by universal insurance exclusion for mold related claims will create hundreds of thousands of uninsured mold related losses. An army of specialized plaintiffs lawyers will gravitate towards liability lawsuits to seek recovery when the property policies deny the mold loss. Insurance to cover mold is available in the environmental insurance market, but risk management advisors historically ignore environmental insurance. The result is unprecedented E&O exposure for insurance advisors, which will trigger separate mold related claims exclusions in the advisors own E&O policies. In anticipation of the claims morass, adjusters professional E&O policies also have mold related claims exclusions.

Where did all these claims come from?

Prior to the new science linking mold to adverse health effects in humans, prior to the lawyers and prior to the media attention, mold claims were water damage claims without Bodily Injury and Defense Costs

Why are mold related losses difficult to insure and adjust?

- No recognized standards for exposure
- Poor medical cause and effect relationship
- Losses are expensive – multi-million dollar claims are common
- Insurance coverage is being eliminated nobody knows to what extent.

Is this just a Texas homeowners insurance problem?

Wrong

- There are mold claims in every state
- Mold grows well in places humans find comfortable
- This is an indoor air quality issue
- Mold claims can be 'company busters'

Top Ten States With The Most Risk To Mold Damage

1. Texas
2. Florida
3. Oklahoma
4. South Carolina
5. Nevada
6. Arizona
7. California
8. South Dakota
9. Tennessee
10. Kansas

What Type Of Mold Exclusions Are Used Today?

- Hundreds of variations, no standards
- Basically three categories
- Total exclusion for all mold related damages
- Partial exclusion for resulting loss from mold
- Full coverage if caused by a covered loss

How to find appropriate coverage for mold damages?

- Buy backs on homeowner's policies
- Environmental insurance on commercial accounts
- The biggest constraint in the market for consumers will be the number of educated insurance advisors

For more information contact David Dybdahl at 608-798-2904 or dybdahl@armr.net

Getting A Handle on Emergency Response Costs

By Daniel Morganelli, P.G., Senior Project Manager, Tetra Tech FW, Inc

It's in the news almost every day. Somewhere in the world, there has been a petrochemical spill, a power blackout, or an explosion. Root causes for these incidents often are similar - aging infrastructure, facility maintenance budget constraints, and, unfortunately, even terrorism. Whatever their cause, our reaction justifiably tends to be emotional. Then calmer heads prevail and experts move in to protect human health and the environment, assess and repair damages, and provide financial relief. For those who insure against environmental disasters and terrorism, it is a time to be both empathetic and vigilant. It is simply good business practice to be aware of and understand what is happening in terms of emergency response actions.

Costs of emergency response generally are viewed in a different context than normal, everyday cleanups. Costs of services and materials are almost always higher when required under conditions that warrant rapid action. Other factors that impact costs are supply and demand, contractor qualifications and experience, and quality control. Supply and demand becomes an issue when, due to the magnitude of resources required to deal with a large-scale incident, contractor and equipment shortages develop. In these situations, many responders may be needed and some may not be ideally qualified to perform tasks assigned to them. Therefore, quality control is essential for tracking response activities to be sure they are executed and completed in accordance with contract agreements, even if these are of short duration.

Insurers must accept the challenge of negotiating claims in good faith and, at the same time, being able to recognize potential waste, fraud and abuse relative to submitted charges. To be sure, it is a sensitive issue, and becomes a matter of balancing good client relationships with the need to manage future insurance premiums. One only needs to look at trends of the past few years; oil pipeline failures and regional power outages are glaring reminders of the country's aging infrastructure. Until that infrastructure is

renewed (and that process will take substantial time and money to accomplish), the incidence of high-cost emergency responses is likely to increase. We cannot continue to pick and choose what is insurable, we must learn how to insure the existing infrastructure reasonably. To do so, we must become more efficient in managing emergency response costs.

For a number of reasons, it is difficult to track or manage emergency response costs after the fact. Inadequate and improper documentation of work performed and time and material quantities results in cost overruns and sometimes shoddy work. Additionally, project audits are nearly impossible. The end result is contract retention, and/or disputed invoices and payments. No good can come of these negotiations; they create heartburn and breed distrust. Better to keep good records as activities progress and make coverage and payment determinations from these logs and photographs.

In the final analysis, the key to successful management of emergency response is good project management that dictates appropriate pre-emptive planning for such events.

What's going on?

The first step in managing emergency response costs is to assign an individual or team to monitor work in progress. Note the operative word here is *monitor*, which carries a totally different meaning than direct. It is difficult enough to track contractor activities without your role being construed as one of interference. In order to gain a perspective on what is happening as the activities unfold, try to get a copy of an existing facility (emergency) response plan. Ideally, the insurer would have reviewed and commented on this plan before an emergency occurs. With or without this "blueprint" for response actions, it is incumbent upon a monitor to understand what tasks are being performed and who is responsible for completing them. Industry refers to this information as a work breakdown structure and project staffing. It

(Continued from page 5)

helps an observer to understand project work components and the various responders' roles and duties ("organizational breakdown structure"). This knowledge becomes useful later when invoices are submitted. Perhaps the most difficult aspect of evaluating project tasking is in assessing what the drivers are for a given activity; certain actions may be required by regulation or code, while others constitute best management practices (i.e., good engineering judgment).

Who maintains a project (incident response) logbook?

Chances are no one will if you don't. In the heat of getting emergency response accomplished, contractors' interests are focused on completing the job done, not necessarily keeping a journal of their daily work activities. With government work, third parties frequently are retained in a project oversight capacity, however; this usually is not the case in the private sector. It makes sense for an insurer to dispatch an observer to a major response to witness and document activities. This may require a significant time commitment by the insurer's onsite representative but it should greatly facilitate the post-incident invoice reviews.

It is unreasonable and illogical to apply the same limited degree of scrutiny to a major emergency response such as might be given to simpler incidents with easily identified responsible parties, obvious causes and lesser damages. The degree of scrutiny for major versus minor incidents needs to be proportional for coverage and payment allocations to make sense.

What other documentation is appropriate?

In addition to having an insurance company representative keep a field logbook and take photographs throughout the response, there are a number of other items, including what commonly is referred to as "invoice backup," that should be obtained and reviewed. These documents may consist of basic ordering agreements between the

owner/operator and emergency responders (useful for evaluating labor categories and stipulated rates), daily work logs, and timesheets. Timesheets need not be subject to detailed auditing but should be used to confirm that laborers were onsite during the prescribed time frames indicated on the submitted invoices. Other relevant backup documents may include vendor receipts and waste disposal manifests. To request these data after the incident is an exercise in futility; an insured needs to be afforded a "heads-up" on the quantity and quality of support material that are required pursuant to a timely processing of their claim.

These data requirements should be provided to the response contractors by policyholders. Avoidance of payment retention and protracted claim processing times benefits everyone who is involved. Vigilance and good record keeping are paramount to effecting this result.

In summary, the old adage "an ounce of prevention is worth a pound of cure" really has special meaning relative to an insurer's attempts to exert some degree of control over emergency response costs. Proactive incident observation and record keeping is much more beneficial than a fuzzy retrospective on incident causes, remedial actions and contractor/vendor project tasks and billings. This forward-looking process facilitates claim processing and negotiations and ultimately may lead to a win/win situation wherein more policies are written and more competitive premiums are realized in conjunction with improved damage cost control.

Tetra Tech FW, Inc. is a U.S. based leading environmental consulting, engineering and remediation firm. We provide our clients with a full range of traditional and innovative services, that are delivered cost effectively, timely and in compliance with applicable regulations and requirements. For more information contact Daniel Morganelli at 215-962-4052 or DMorganelli@TtFWI.com.