

Environmental Risk Resources Association



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Environmental Insurance To Protect the Interest of Lenders

By: William Seuch, Goulston & Storrs

Even with the advent of statutory 'safe harbors' that protect lenders from becoming liable for pre-existing environmental contamination, lenders worry about the costs of cleaning up properties. Simply put, lenders worry about whether their collateral (e.g., a manufacturing facility or a Brownfield site slated for redevelopment) is really worth what they think it is given the potential environmental liabilities.

Discussion of any business situation that presents issues of risk and liability quickly leads to consideration of insurance. Through insurance one may convert all sorts of unknown potential future liabilities, including environmental liabilities, to a known premium payment. However, many lenders and property owners have discarded environmental insurance as a viable solution to the problems of environmental liability. Historically, environmental insurance has been both expensive and limited, or ambiguous, in its coverage. Now may be time for reconsideration. Environmental insurance policies have evolved to the point where they are very effective risk management tools.

There are two different types of environmental insurance policies that are typically used to protect the interests of lenders. The first is "Pollution Legal Liability" (PLL) insurance that runs to the benefit of the property owner and covers legally required investigation, defense, and remediation costs associated with previously unknown historic and/or future contamination. Lenders rely on these policies to ensure that environmental conditions will not have a material adverse affect on a borrower's financial stability if the borrower is forced to perform a cleanup. Lenders can also be named as additional named insureds on these policies so that coverage running to the benefit of the lender is in place in case the lender is ever forced to foreclose on the real property.

In a recent transaction the lender was making a loan to an entity that was acquiring a large manufacturing plant. Even though the bank was not taking a security interest in real estate associated with the plant, the lender was concerned that potential clean-up costs associated with historic contamination could have a significant and adverse effect on the borrower's ability to repay the loan. In this case, the lender's concerns were addressed when the seller of the manufacturing plant and the borrower agreed to cooperate and purchase environmental insurance policies designed to respond to historic contamination. The policies provided approximately \$20 million in limits.

The second kind of environmental policy used to protect lenders is called a "Secured Creditor" or "Lenders" policy. Some of these policies are designed to pay the outstanding loan balance if the borrower defaults and environmental contamination exists on the collateral property. In other words, these policies allow lenders to avoid foreclosing on contaminated properties. Instead of pursuing a foreclosure, the insurance pays off the loan balance and the insurer obtains the lender's foreclosure rights. Policies with this coverage are often referred to as "Loan Balance" policies. In some instances, the lender's coverage is structured to pay the lender either the loan balance or the cost of cleanup, whichever is

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less. These policies are often referred to as “Lesser Of” policies.

As of the time of the writing of this article, one major insurer had just pulled its Loan Balance policy from the market and is instead offering Lesser Of coverage. While other carriers have expressed a commitment to continue to offer Loan Balance policies, it will be interesting to see what the future brings. It is important to note that both Loan Balance and Lessor Of policies provide lenders with protection from claims for bodily injury or property damage.

In another example, the borrower’s window of opportunity to acquire a “downtown brown” (i.e., potentially contaminated) property was set to expire before the borrower could meet the bank’s environmental due diligence requirements. Instead of passing on the deal, the bank had the borrower pay for a Secured Creditor policy which allowed the bank to close on the loan even though some of its standard environmental due diligence requirements had not been met. In exchange for a one time premium payment of approximately \$22,000, the insurance policy covered the entire loan amount (approximately \$14 million) for five years. In the end, the lender was comfortable and the borrower acquired a terrific urban location for redevelopment.

Environmental insurance underwriters and brokers have seen the volume of deals closing with the benefit of environmental insurance increase in the last twelve to eighteen months. This increased deal flow is also confirmed by the fact that Goulston & Storrs is now routinely asked to evaluate whether an environmental insurance coverage proposal makes sense in light of the details of a particular transaction. Many of our clients are increasingly aware that:

- Environmental insurance can sometimes be used in lieu of recourse environmental indemnities and/or costly Phase II environmental investigations.
- Secured Creditor policies are often utilized in large securitizations (e.g., portfolio transactions) and have been looked upon favorably by the rating agencies.
- Pursuing a borrower for recovery of environmental costs when they default on a loan can jeopardize the status of additional loans that borrower may have with the bank - making a bad situation worse. Secured Creditor policies often waive all rights of subrogation against the borrower except the right of foreclosure (meaning the insurer will only look to the value of the secured property

and will not pursue the borrower for recovery of losses), thereby aiding in the prevention of additional defaults.

A number of states have adopted incentive programs designed to encourage lenders to make loans that are secured by industrial or previously contaminated properties. For example, the Massachusetts program is known as the Brownfields Redevelopment Access to Capital (BRAC) program for environmental insurance. The BRAC policies utilize standard, pre-negotiated forms issued by AIG Environmental.

This standardization means that policies may be obtained quickly, with very favorable pricing. Any lender qualified to do business in Massachusetts may participate in the program and obtain BRAC Secured Creditors insurance. Lenders take note - all BRAC policies, including Secured Creditor policies, are currently eligible for a state subsidy of the lesser of 25% of the insurance premium or \$25,000. Since the borrower typically pays for environmental insurance, these subsidies can be a terrific and concrete way for a lender to show its willingness to cooperate with and help a borrower.

Environmental insurance can be an extremely useful tool for satisfying a lender’s environmental concerns, accommodating a borrower’s concerns about due diligence costs and personal guarantees, and getting a deal closed. It is important to note, however, that policy language can change from deal to deal and is often manuscripted to fit a particular transaction. Accordingly, an environmental insurance policy, like any other legal contract, should be reviewed carefully to verify that anticipated coverages are, in fact, available. It is also important to note that pricing and long term financial stability can vary widely from insurance company to insurance company. Used properly, environmental insurance can provide savvy lenders and borrowers with a competitive advantage.

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This article should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer concerning your situation and any specific legal questions you may have.

Environmental Insurance Market Update

Mold E&O Claims

We have heard of the first professional liability claim against an insurance agent who failed to offer mold coverage to their client. We are predicting up to 10,000 professional liability claims per year against agents who leave their clients unintentionally uninsured for mold losses. Some carriers still do not have mold exclusions on their E&O policies offered to insurance agents and brokers. If you are an insurance agent lucky enough to have this coverage available, buy higher limits!

Claims Adjuster's Mold Exclusions

Mold related claims exclusions are finding their way into claims adjuster's professional liability policies. With mold exclusions, adjusters will need to avoid working water intrusion claims.

Mold Market

A survey of the environmental underwriters shows most markets ahead of plan for the first half of 2003. Look for more emphasis on annual renewable policies and fewer discounts on multiple year policies.

Up to half of all new business being submitted is mold related, which is still a tiny fraction of

the businesses that are now bare for mold related damages due to exclusions in traditional policies.

ERRA members can view the mold insurance market at www.erraonline.org. Watch for new mold insurance products in the near future. Many new products are under development.

Secured Creditors Coverage

Most markets have moved away from writing "loan balance pay off" coverage, but continue to write "lesser of" coverage on their secured creditors policies. For more information on these coverages, see the article "Environmental Insurance To Protect the Interest of Lenders" in this issue.

Finite Risk Policies

Watch for restrictions in the number of insurance companies offering funded fixed price remediation insurance products. This is still a competitive market.

Traditional Environmental Coverages

Demand for traditional environmental insurance products remains strong and rates are relatively stable. Underwriters are competing for business.

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.

Coming Soon!

The Premier Conference Series on Environmental Insurance

The Environmental Insurance Forum

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.

Join ERRA for these one day conferences in

**November 2003
Sacramento, CA**

**November 2003
Los Angeles, CA**

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.

Standards Needed for Mold Exposure, Testing and Remediation

By: Richard Zarandona & Kent Holland, Arch Insurance Group

There Once was an Authoritative and Consistent Standard

Currently, there are no federal or state established standards of safety thresholds for mold exposure. Scientific agreement has not even been reached on whether mold (or various types of mold) are hazardous or injurious to health. Nor are there standards for mold testing and remediation.

The only authoritative standard we have found for examining, monitoring and remediating mold was written several thousand years ago. That's right. It's found in the Bible – Old Testament (or Pentateuch) at Leviticus 14:33-45. With regard to mold or “spreading mildew,” “The Lord said to Moses,” that if an owner of a house sees mildew in his or her house this is what must be done:

“The owner of the house must go and tell the priest, ‘I have seen something that looks like mildew in my house.’ The priest is to order the house to be emptied before he goes in to examine the mildew, so that nothing in the house will be pronounced unclean. After this the priest is to go in and inspect the house. He is to examine the mildew on the walls, and if it has greenish or reddish depressions that appear to be deeper than the surface of the wall, the priest shall go out the doorway of the house and close it up for seven days.

On the seventh day the priest shall return to inspect the house. If the mildew has spread on the walls, he is to order that the contaminated stones be torn out and thrown into an unclean place outside the town. He must have all the inside walls of the house scraped and the material that is scraped off dumped into an unclean place outside the town. Then they are to take other stones to replace these and take new clay and plaster the house. If the mildew reappears in the house after the stones have been torn out and the house scraped and plastered, the priest is to go and examine it and, if the mildew has spread in the house, it is a destructive mildew; the house is unclean. It must be torn down—its stones, timbers and all the plaster—and taken out of the town to an unclean place.”

Today, in a world without standards, we are more likely to get less consistency and more unpleasant surprises, as described in the Texas newspaper report below. Texas has been one of the states with a skyrocketing number of reported cases of mold related claims by homeowners. According to an article in “The

Dallas Morning News,” (February 16, 2003, Ed Timms reporting), “Across the state, Texans whose homes were gutted, or left unfinished, say they are casualties of botched mold remediation. Some fly-by-night companies, they say, have abandoned jobs after stripping the interior of houses to the studs.

Homeowners complain that mold remediators failed to properly contain mold in their homes, charged for services that were not provided, forged signatures, falsified claims and walked away with the jobs unfinished.” The newspaper reports that one Dallas homeowner was billed three times the tax value of his home, and that numerous others were billed for cleanup costs that exceed their home's value. The article goes on with example after example of homeowners that have had terrible experiences with contractors they hired to remediate their homes of mold.

The Dallas Morning News reporter asks rhetorically, “What does it take to be a mold remediator?” and he answers, “While the state requires manicurists to complete 600 hours of instruction in an approved program, the training requirements for mold remediators are not quite so rigorous: *There are none.*” He then quotes Brenda Wells, a University of North Texas associate professor of insurance and director of the university's Financial Services Center as follows: “You've got to have a license in this state to kill bugs, but you don't have to have a license to tell an insurance company you need to spend \$50,000 instead of \$5 to clean up mold. I literally can take out a Yellow Page ad tomorrow that says I'm a mold remediator [and] I don't know the first thing about cleaning up mold.”

The Mold Litigation Explosion

Mold is turning to gold for plaintiff's lawyers. An article in the American Bar Association (ABA) Journal (December 2001), interviews Alexander Robertson IV, an attorney in California that has earned “multimillions” for his firm handling toxic mold litigation. When asked how many cases he had, he answered, “Thousands—I don't want to count them.” He explained, “The use of asbestos isn't occurring anymore, and most of the asbestos products were done away with. With mold, it's naturally occurring, and the supply is endless.”

Another attorney quoted in the ABA Journal article, Guy Keith Vann, says, “I've learned

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these can be terrific cases from the plaintiff's perspective, in terms of the percentage of cases that turn into money vs. cases that don't." He obtained a \$1million toxic-mold verdict that was sustained on appeal in the case of *New Haverford Partnership v. Elizabeth Stroot*, 772 A.2d 792 (Del.1999).

From reading through numerous articles in newspapers, magazines and journals, on the subject of the mold threat, it is apparent that there are a growing number of law suits and claims alleging that homes must be remediated or even destroyed because of a mold "problem." Yet, many of these same articles and papers quote extensively from medical specialists and other professionals who state as a general proposition that mold is not a problem for people other than those who have allergies, and that even then, it is not nearly the problem it is made out to be.

It has been estimated that over 10,000 cases related to mold have been filed in the United States. And the number seems to be growing exponentially. Construction contractors are brought into these cases on the theory that their defective means, methods and procedures of performing their work caused water leakage, condensation accumulation or other conditions that caused the growth of mold. Design professionals are being brought into these cases on various theories such as specifying improper materials for construction, failing to specify a design to effectively eliminate or minimize mold growth; and failure to adequately monitor or review construction during the construction phase of the project.

Suppliers of various materials such as wall and roofing materials and water pipes and couplings are being sued on theories such as their materials (a) failed to keep water from infiltrating a building, (b) failed to allow water to seep back out of a building, (c) were too easy a source for mold to grow; or (d) in the case of pipes and couplings, were too subject to leakage inside of wall cavities. As seen from the newspaper articles cited herein, the remediation firms that are subsequently hired to repair water damage and remediate mold are also subject to suit for faulty workmanship during remediation.

As reported in the *Corpus Christi Caller Times* (November 3, 2002, Joy Victory reporting), "Mold claims filed with insurance companies have taken off in just the past few years. Farmers Insurance Group had 11 mold claims filed in 1999 and 10,813 in 2001. The average cost of cleaning up mold also grew eight times between 2000 and 2001, going from \$17.09 per policyholder in the first part of 2000 to \$147.68 in the second quarter

of this year, according to the top three insurance companies in Texas."

Connecting Mold to Adverse Health Effects

According to the *Corpus Christi Caller Times* article, the Texas Medical Association's Council of Scientific Affairs commissioned a literature review and found no reputable studies linking health problems to mold. They concluded that black mold only causes problems in people who are allergic to it. And for those who are allergic to the mold, the newspaper cited professional allergists for the conclusion that "The allergy symptoms probably will be no worse than a cat or dog dander allergy, causing symptoms such as congestion, sneezing and water eyes. In some people, it can cause asthma-like problems."

The supervisor of health hazard evaluation with the Wisconsin Department of Health and Family Service, William Otto, was quoted by the *Milwaukee Journal Sentinel* (December 13, 2002, Michele Derus reporting), as saying, "There's a lot of debate out there about what symptoms are from mold and what aren't. To us, the health effects are allergy-type symptoms. Maybe 20 percent of the population has some type of sensitivity. But at what level does someone get sick? That seems pretty much an individual thing." Otto was further quoted as saying, "That doesn't mean we can't address the problem. We emphasize getting at the moisture source, fixing it and getting rid of the contamination. More and more state health departments are following that philosophy."

But there are certainly numerous reported instances where individuals have asserted that their health was so significantly impacted by mold that they could no longer work or enjoy a good quality of life. In the *Detroit Free Press* (February 18, 2003, Patricia Anstett reporting), the story is told of a medical doctor who, after his building was renovated in 1999, started sneezing, suffering with itchy eyes, nosebleeds, shortness of breath, skin rashes and fatigue. Environmental health firms found "foul-smelling black mold substance blanketing his office—the result of several flooding incidents that were attributed to a construction flaw." Prior to the renovation, it is reported that he hadn't missed a day of work in 28 years, but due to his worsening in the months after the renovation, he hasn't worked since November 25, 2000.

Courts in some jurisdictions have permitted testimony linking adverse health to mold exposure. See, for example, *Mondelli v. Kendel Homes Corp.*, 631 N.W.2d 846, 856 (Neb. 2001) (plaintiff alleged asthma –related symptoms from

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mold). Courts in other jurisdictions, however, have excluded testimony attempting to make the link between mold exposure and adverse health. See, *National Bank of Commerce v. Associated Milk Producers, Inc.*, 22 F.Supp.2d 942 (E.D. Ark. 1998)

Defective Construction is the Alleged Cause of Mold Growth

Some reasons offered for the recent increase in mold litigation include the following: (1) fast construction during the housing boom of the past several years has led to faulty workmanship; (2) also as a result of the fast pace of construction, lumber has been used before it sufficiently dried and materials have been permitted to lay uncovered and exposed in the weather before their use; (3) complex designs with multiple roof angles and gables, skylights, innovative angular and tiered wall systems, and the like have exacerbated the likelihood of leakage; (4) as buildings have become more air-tight, they may prevent materials that get wet either by condensation or leakage from drying out; and (5) building materials that are being used today are more susceptible to mold growth. The number of theories and potential defendants seems to grow almost as fast as mold itself.

As with the medical building renovation reported in the Detroit paper, it appears that many of the reported cases of mold problems began following renovation or remodeling of an existing house or office. In many other cases, the problem is alleged to be caused by faulty new construction that permitted leaks of water into the building from roofs or wall systems, or from interior water pipes. Other cases have alleged that condensation from HVAC systems has caused or contributed to the growth of mold.

In another article in *The Milwaukee Journal Sentinel* (December 29, 2002, Dan Benson reporting), the reporter describes the situation of a Michigan family that moved out of their house into a hotel for two months, and then into a rental home (all at insurance company expense) following a remodeling job on their home. They allege that faulty workmanship resulted in leaks and condensation around light fixtures, causing mold to grow on the roof sheathing, soffit area, and even in the basement. Now they are in a dispute with their homeowner's insurance company over repairs and damages.

A jury in one Texas case awarded judgment for a homeowner against her homeowners' insurance carrier in the amount of \$32 million, on a claim property damage, bodily injury and mental anguish, all resulting from water damage and mold. In Florida, a jury awarded judgment over

\$11 million to Martin County Florida against a construction manager and its sureties for water damages and mold caused by construction defects. There was water infiltration through the exterior synthetic hard coat wall system and there were problems with the HVAC system. A significant part of the County's monetary damages arose from its decision to vacate the entire building while construction problems were corrected and remediation was carried out.

The Insurance Company's Perspective

Insurance premiums have historically been based upon actuarial information and underwriting guidelines that were in place before the massive mold litigation began. Consequently, the premiums collected have only covered risks and losses from the old bread-and-butter issues surrounding design and construction. Insurance companies that are defending against mold-related claims, and in some instances paying significant damages for mold-related claims, are being hurt financially because of insufficient collected premium to cover unforeseen claims on risks for which they charged no premium.

With new insurance policies for homeowners, and for design professionals and contractors that are involved in home design or construction, insurance companies are at significant risk unless they do something to limit their own exposure to loss resulting from claims alleging damages arising out of mold-related matters. For reasons such as those discussed in this newsletter, insurance companies currently underwriting policies such as these are finding it difficult, or even impossible, to evaluate the risk of potential mold-related damages and claims. Without actuarial data and scientific information to assist the underwriters, it is impossible to know how much premium is actually necessary to cover the potential risk. In the absence of standards for mold exposure and for mold testing and remediation, it is hard to see how this situation will change anytime in the near future.

In the meantime, some insurance companies are devising ways to provide limited mold coverage to some of their insureds, while at the same time protecting the insurance company against the financial disaster that could ensue from an avalanche of mold claims. For example, it may be possible to endorse policies to provide a sub-limit of coverage for mold. A design professional liability policy or contractor's general liability policy, for example might include an endorsement stating that damages related to mold shall be limited to a dollar amount less than the full policy limit. Another approach is to limit coverage to property damage only, and to

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specifically exclude bodily injury claims. It is likely that for the foreseeable future, decisions concerning the terms, conditions and amounts (if any) for granting mold-related coverage in new policies will be made by insurance carriers on a case-by-case basis.

Need for Standards

It is clear that there is a need for standards related to mold. Until standards are established, it will be hard for insurers to cover design professionals and contractors for this exposure. Many of these firms may have to operate without coverage or with limited coverage that may expose them to serious financial risk. Standards are needed now, and they need to address, at a minimum, licensing, and certification of mold evaluators and mitigators. Standard testing methods are needed to enable accurate and consistent analysis of the potential problems. Establishing criteria and methodology for clean-up must be accomplished in order to determine a reasonable standard of care for designing and carrying out mold mitigation efforts.

Finally, more research needs to be done by the medical community to develop quantitative exposure guidelines and causal links to health effects. A cooperative effort between local, state and federal agencies is needed—and needed soon—so that we can move ahead from the biblical standards for dealing with mold in earthen houses to the standards required by a modern society.

Arch Insurance Group Inc. has \$25 million capacity for environmental insurance coverages, including pollution legal liability, contractor's pollution liability, and environmental consultant pollution liability. Arch is also providing professional liability coverage for design professionals, construction managers, contractors and project owners. For information on design professional liability and environmental liability insurance available from ARCH, contact Richard Zarandona at 973-206-8025 (senior vice president), rzarandona@archinsurance.com; or Kent Holland (risk management) at 703-623-1932, kholland@archinsurance.com.

Keeping Cleanup Costs Palatable

By: William McLellan, GAB Robins Environmental & Marine, Inc.

Although the costs associated with pollution cleanup and remediation activities are never going to leave a good taste in your mouth, there are ways to keep them at least palatable. Most parties at risk of a pollution incident appreciate the availability of a professional cleanup contractor and are willing to pay a fair and reasonable price for the cleanup services performed. What they do not want to feel, however, is that they were abused (overcharged) in the process.

The best way to ensure that you are being charged fairly is to be informed. A party at risk of a pollution incident must become familiar with a standard remediation contract and how it may impact the cost of cleanup. Understand up front that these contracts are geared towards a spill response of limited duration and will prove costly if left unchanged for extended cleanups.

Accordingly, if you have a set contractor(s) that you most likely will use for response activities, meet with them to discuss the following items. If you do not know which contractor you may use, become familiar with these items and be prepared to address them at the outset of the response. Also included are items to be aware of during the response activities as well as when reviewing the actual invoices.

Although the suggestions and items listed appear to be more applicable to large spills where a lengthy cleanup period is expected, knowledge of these

items should serve a client just as well when dealing with smaller incidents. These items are not exhaustive.

Pre-Incident

- 1. Markup Charges.** Many contracts include a clause allowing a markup of 20% or more to be added to subcontractors' invoices and any third party charges. Depending on a client's resources, he can avoid this markup if all subcontractor and third party charges are billed to him direct. The client should follow this procedure with disposal charges as well.
- 2. Standby Rates.** Some contracts call for full charges for the entire period a piece of equipment is at the site whether it is used or not. A client should address this issue and document the contractor's billing procedure and timeframe for removing unneeded equipment from the spill site.
- 3. Reduced Rates.** Some contracts include clauses that charge a reduced rate for equipment being decontaminated, demobilized, or after it has been in service for a specific time period. Examples of such equipment include boom and heavy equipment.
- 4. Materials.** The parties should discuss the issue of reduced rates where there is a high volume use of materials. The parties should

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also address the prospect of the client dealing directly with the vendor for all materials. In no event, should the contractors responding to an incident be allowed to sell materials to one another and then back to the client without written approval from the client.

5. **Payout Clause.** The total charge on a number of items used during a cleanup may exceed the actual cost of the item. A sample list includes boom, cell phones, radios, computer equipment, small boats, trailers, and hand tools. An agreement should be reached as to when these items reach a “no charge” or “maximum charge” status.
6. **Personal Protection Equipment (PPE).** In many instances, contractors submit a PPE charge for each billable person whether that person actually had a need or used PPE that day. Examples include clerical staff and command center personnel. Charges for PPE should be limited to those individuals actually donning PPE. The client should also discuss how many change outs the PPE charge includes.
7. **Per Diem.** Charges for per diem should be well defined. Some contracts state that there will be no per diem charge for incidents that occur within 50 miles of their home office. The parties should discuss 1) the number of people in the home office available to respond to an incident, 2) the likelihood of having to bring in additional workers outside the 50 mile radius, and 3) whether the clause covers these workers. Note: The author is not suggesting that workers outside the 50 miles should not be paid a per diem, he simply believes the parties should address this issue up front. The parties should also acknowledge that the meal portion of a per diem (or a part of it) will be subtracted when the client makes a meal(s) available during the workday.
8. **Day Rate/Hourly Rate.** Most contracts have clauses stating that equipment will be charged portal-to-portal and include a rate schedule showing that some equipment is charged a day rate while some is charged by the hour. The portal-to-portal clause generally means that there is a charge associated with the equipment the moment it is dispatched until it is returned to the yard. Where disputes arise is when a piece of equipment that has an hourly rate is charged for 24 hours even though the

cleanup operations are limited to a maximum of 12 hours each day. The parties should address this issue and agree, where feasible, on a day rate for those items charged by the hour if the likelihood is that the equipment will be on site for more than one day

9. **Lunch Break.** Many contracts are silent concerning whether the workers should be paid during the time they take off for their lunch and or dinner break. Some contractors do not charge for this time, while others do. To avoid a dispute in this area, the client should address this issue. A half hour deduction generally is acceptable.
10. **Management/Command Structure.** The management/command structure and personnel the contractor will utilize and invoice to support the cleanup should be well defined. Too often, disputes arise over the necessity and reasonableness of a whole hierarchy of management/command personnel that are invoiced during a response. Also, the necessity of a command/communications mobile office should be addressed in instances where a fully operational command center is activated.
11. **Accounting System.** The parties should discuss whether the client will be charged for the contractor’s accounting system (software and or personnel) and, if so, what the client receives for this charge other than an invoice at the end of the day. If the system is used to prepare daily reports, the parties should agree when these reports will be provided to the client and the penalty for not providing as agreed. Prompt receipt of the daily reports is necessary to reconcile any disputes timely. In instances where invoice disputes arise, the OSRO often complains that the time to discuss challenges to certain charges is when the daily reports are submitted. The client often responds that he did not receive the dailies until several days after the day in question. To alleviate this scenario, consider an agreement whereby the contractor must provide detailed dailies by 10:00 am the following morning or face a penalty of 10% of that day’s billing if the dailies are not received timely.

During Cleanup

Again, one goal the client and contractor have in common is to resolve any disputes or discrepancies on a daily basis or, in the very

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least, prior to submission of the invoice(s). Accordingly, discussion and agreement as to the mechanism to address the following items during a spill response should work towards accomplishing the desired goal. In regard to Paragraphs 1-3, the client should reconcile its independent counts with the contractor's daily worksheet.

1. **Personnel.** A daily confirmation of the contractor's personnel conducted by the client to reconcile personnel charged on the dailies.
2. **Equipment.** Immediately upon reporting to the site, the contractor must provide a list and working status of all equipment mobilized to date and each day thereafter until the response is concluded. Visual confirmation of the number and working status of equipment by the client on a daily basis. The list and visual confirmation can be used to reconcile discrepancies and remove redundant or unused equipment. Secondary confirmation by the client during decontamination is also useful to reconcile discrepancies.
3. **Materials.** A system should be activated to confirm all materials consumed. Be aware that some contractor's own companies that sell materials used in cleanup. Ask your contractor if he owns or is a part owner in such a company. The conflict of interest in such an arrangement needs no further discussion.
4. **Qualitative Analysis.** In some instances, a dispute will arise relative to the proper ratios between personnel classifications, vehicles to personnel, and equipment to personnel. Although these ratios may be incident or job specific, we encourage a discussion between the parties so that each can disclose what they believe these ratios generally should be. During cleanup operations, these ratios should be monitored by the client and contractor on a daily basis.
5. **Disposal.** Research your disposal options as methods and costs can vary greatly. Also, inquire whether your contractor owns or has any interest in the disposal facility that is being contemplated.

A client should not initial or otherwise sign off on a contractor's daily worksheet without including the notation "Subject to Audit". If the client simply initials the daily, it leaves the door open for the contractor to argue, in court should a discrepancy arise, that the initials signify the client's agreement to all items charged.

Government agencies have no motivation to save costs and may demand that the client do something that is costly and inefficient during

cleanup. Do not be afraid to challenge these demands and strongly offer alternative measures. In many instances, the agencies will defer to your suggestion if you can convince them that you have a workable plan.

Post Spill Response

If all of the above issues are addressed in earnest prior to and during the course of a response, the invoice review should be routine. If the foregoing issues have not been addressed adequately, the invoice review most likely will be troublesome.

1. **Invoice Review and Reconciliation.** The invoice should be checked for accuracy and reconciled with the contract and response specifics. The client should alert the contractor that he expects the following documentation to be submitted with each invoice.
 - a. Daily worksheets listing each person, all materials and supplies, and each item of equipment being charge for each day.
 - b. Personnel daily sign in sheets and or daily safety meeting sign in sheets
 - c. Supporting Invoices for all Third Party Charges.
 - d. Subcontractor Charges - Complete copy of subcontractor contract and all support items listed in a, b and c.
 - e. Disposal manifests and related charges/ invoices.
 - f. Rental Charges - Copy of Rental Agreement. Note: Most contracts state that the client will be responsible for repairs to any equipment damaged during the response operations. To avoid paying for damages to rented equipment, the client should ensure that the contractor accepts the daily insurance coverage offered by the rental agency.
 - g. Repair Charges - Copy of Repair Invoice.
 - h. Incidental Charges - Copy of support including airline tickets, car rentals, and hotel bills.

Be persistent when requesting invoice support documentation. Many contractors do not provide complete documentation until the client insists that they will not be paid without it.

Conclusion

Be informed. Be prepared. The time to get organized is not after an event happens. Proper advance discussion and agreement between the client and the contractor relative to the contract and expectations during the response will result in limited surprises on both sides, the pollutant being cleaned up at a fair and reasonable price, and the contractor being paid timely.