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Premises Pollution Liability Coverage: Essential Protection for Operational Risk

Day-to-Day Environmental Risks
a Growing Concern

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Environmental problems arising from business operations can present significant financial challenges, including remediation and business interruption expenses.

Environmental concerns form an integral part of daily life and business today. From households to multinational corporations, preserving nature and providing healthier spaces for living and working have become key societal goals. This evolution extends to the insurance marketplace where coverage has continued to adapt to reflect both the heightened environmental concerns and the changing nature of pollution risks. Increasingly, environmental policies seek to address exposures that may arise out of daily operations and not just those tied to transactions or historical uses of a property.

At the same time, casualty insurance markets continue to grow more cautious about pollution risks, even as countries around the world take a stricter stance toward protecting the environment. This means that traditional property and casualty policies may leave significant gaps in coverage. To deal with these new challenges, businesses and other organizations need to be aware of how the market has changed; how it affects their risk management strategies; and how they can protect themselves against a new and wider range of environmental exposures as well as changing regulatory requirements at home and abroad.

A Growing and Changing Market

While the environmental movement began more than four decades ago in response to crises such as oil spills and historical contamination, the concerns now encompass everyday issues such as indoor air quality in office buildings or mold in hotels and hospitals. Traditionally, environmental coverage was often tied to real estate transactions, mergers and acquisitions or redevelopment projects and it was

purchased as protection against acquiring potential liabilities arising from past uses of a specific property. More recently, businesses and other organizations have had to deal with growing coverage gaps as casualty insurance markets have added exclusions for operational exposures. The environmental insurance market has responded and offers coverages to address these gaps.

Now, the environmental insurance marketplace encompasses day-to-day exposures in businesses ranging from hotels and office complexes to multi-family residential housing, health care facilities, manufacturing, chemical plants, and gas stations. This is a proactive response to the growing recognition among a wide range of industries - many of them not normally seen as presenting significant pollution risks - that environmental problems arising from their operations can present significant financial challenges, including remediation and business interruption expenses. A mold problem at a senior housing facility, for instance, might require that a portion of the building be shut down and isolated, and that residents be relocated until the remediation is complete. In such a case, the facility might also incur significant expenses for expert help in crisis management to protect its reputation. This transition from a focus on historical liabilities to more fortuitous, operational risk has made environmental insurance more of a mainstream coverage.

The environmental insurance marketplace has also grown consistently in terms of total premiums and the number of participating insurance carriers. Over the last decade and a half, the number of insurers writing environmental coverage has expanded significantly from just a handful. The growth in the number of insurance

carriers and capacity has fostered competition and innovation while keeping rates more manageable. With a greater range of choices, however, customers should remain mindful of the financial strength and expertise of the individual insurance carriers when placing pollution risks.

Covering Multinational Operations

One of the main drivers of growth in the marketplace over the last few years has been in providing coverage for United States-based multinational and other international companies. The trend, which began in Europe, has spread through other regions such as Asia and South America as companies look to ensure that their international operations comply with local regulations in the countries where they operate.

For multinationals, environmental insurance helps to provide continuity of coverage across national boundaries amid the varying - and changing - national laws for environmental liability. China, for instance is taking a much stricter approach to combating its intractable air pollution problems. The European Union's Environmental Liability Directive now sets a common minimum standard among all its members for environmental and biodiversity damages. In South and Central America, countries have been applying greater scrutiny to environmental issues.

Multinational corporations are seeking coverage that follows them as they expand and that provides the capability to handle and manage claims locally. Along with continuity in coverage, multinationals are increasingly trying to take a consistent approach to their own environmental protection and risk management strategies in the various countries in which they do business. This consistency is an important consideration for insurance carriers seeking to evaluate how a given company addresses pollution risks.

Updated Site Assessment Standard Impacts Brownfields Liability Protection

Businesses that are considering acquiring "brownfield" properties should be aware of the recently updated environmental site assessment standards that impact liability protections afforded by federal environmental law. The American Society for Testing and Materials (ASTM) published the new version of its Phase I Environmental Site Assessment (ESA) Standard 1527-13 in November 2013. The U.S. Environmental Protection Agency has since determined that the new standard is compliant with the All Appropriate Inquiries (AAI) rule, which concerns liability protections that may be available when due diligence is conducted on a property. The EPA has indicated that the revised standard can be used for conducting AAI, and has amended its own rule to recognize the changes for the purposes of CERCLA liability protection.

Here are some of the key changes in the ASTM's revisions to the 2005 Phase 1 standard:

- 1. ASTM updated the definition of "Recognized Environmental Condition (REC)."**
The updated definition provides more clarification on what constitutes a REC to specifically include "conditions indicative of a release." This change will require environmental experts to use a greater degree of professional judgment in order to recognize conditions that would indicate a REC, and will require more experienced environmental professionals to make REC determinations. The new definition of REC is: "the presence or likely presence of any hazardous substances or petroleum products in, on, or at a property due to release to the environment; under conditions indicative of a release to the environment or under conditions that pose a material threat of future release. De minimis conditions are not recognized environmental conditions."
- 2. ASTM updated its definition of "Historical Recognized Environmental Condition (HREC)."**
The definition was revised to clarify that the scope and application of an HREC is limited to include only past releases that have been addressed to unrestricted residential use. In addition, the new term "Controlled Recognized Environmental Condition" is defined to include past releases that have been addressed but allow contamination to remain in place.
- 3. ASTM added a definition of "Controlled Recognized Environmental Condition (CREC)" to the standard.**
A Controlled Environmental Recognized Condition (CREC) describes the condition where previous releases at properties that underwent risk-based closures were addressed, but contaminants are allowed to remain in place under certain restrictions or conditions.
- 4. ASTM revised the definition of "migrate/migration" to specifically include vapor migrations.**
This revision clarifies that releases of contaminants that migrate via vapor in the subsurface or in soils are RECs, giving prospective property owners an added assurance about such releases. In the past, some consultants did not address vapor-intrusion and concluded that it was not part of the scope of the ASTM standard.



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The Changing Regulatory Climate

Organizations also face new regulatory-driven exposures as lawmakers and environmental agencies seek to tighten rules on a variety of fronts. For example, the United States Environmental Protection Agency (USEPA) is taking a more rigorous approach to the intrusion of potentially harmful vapors into commercial and residential buildings. The agency is expected to issue its final guidance on subsurface vapor intrusion sometime in early 2015.

In many cases, vapor issues on these properties can be addressed by engineering controls, such as soil caps and subsurface venting systems, rather than wholesale removal of the affected underlying soil. Vapor intrusion, however, may still occur, causing potential health issues for tenants and residents.

In addition to the USEPA, states such as California, New York, Washington and Wisconsin are taking a fresh look at sites that had been previously cleared for

redevelopment. Companies involved in redeveloping such sites should include in their planning the possibility that further remediation may be required and the liabilities that may entail.

Besides vapor intrusion, commercial and residential developments may have to deal with air quality issues stemming from vapors from carpeting or furniture. Mold, of course, remains a major concern. Other issues might arise from building design issues, such as locating an air intake near a loading dock, which may draw exhaust fumes into the building's ventilation system.

Even buildings that may seem at little risk of indoor air quality issues may experience problems such as odor problems arising from paint after a remodeling project. The potential exposures in situations involving indoor air quality include third-party bodily injury, along with any associated remediation, cleanup and legal defense costs.

As regulators take a closer look at indoor air quality issues, they also are applying greater scrutiny to ambient air emissions. In 2012, the USEPA issued revisions to the Clean Air Act standards to reduce mercury and particulate pollution from boilers used to provide heat for industrial and manufacturing processes and from solid waste incinerators. The agency also has been targeting emissions from energy producers. In the midstream energy sector, transporters of oil and gas face operational exposures from potential leaks in storage tanks and pipelines as well as risks arising from transportation by rail or roadway.

Another growing area of concern revolves around storage and sedimentation ponds for chemicals and wastes after recent high-profile spills. In January 2014, about 10,000 gallons of a coal processing

chemical leaked from a storage tank near a West Virginia river, leading to a 10-day ban on drinking tap water by state environmental authorities that affected about 300,000 people.² In February, tens of thousands of tons of coal ash mixed with millions of gallons of water spilled from a pond in North Carolina.³ After the West Virginia spill, the state enacted legislation to require aboveground chemical storage tanks be inspected annually,⁴ and the state's two U.S. senators introduced similar legislation in the U.S. Senate.⁵ For its part, the USEPA was expected to decide in 2014 on changes to the Clean Water Act that would mandate that power companies remove impurities from coal ash wastewater.⁶

Regulatory focus could widen to include containment ponds and storage tanks for non-hazardous wastes that are located near waterways and used by a variety of manufacturers and chemical companies. While the materials may not in themselves be hazardous, regulators are concerned about the impacts that accidental releases of large quantities of the substances from

holding and sedimentation ponds might have on nearby waterways and water resources. Such spills may impact water companies that have intakes on rivers or rely on ground water sources, forcing them to shut down water supplies until water quality issues are resolved.

Catastrophe Exposures

Another growing concern stems from the widespread environmental impacts that can be caused by hurricanes and other catastrophes. Storm-related flooding can damage aboveground or underground storage tanks causing a release that can impact a wide region. Heavy rains can overwhelm wastewater treatment plants, leading to discharges that affect a large area.

Even extraordinarily cold weather such as the United States' Midwest and East Coast regions experienced in the winter of 2014 can cause problems when water lines freeze and then leak, which may

lead to mold growth. A company whose operations span a catastrophe-hit region may have to deal not only with significant property damages but also the cleanup and associated costs of a number of pollution incidents tied to a single disaster.

A Proactive, Sector-Oriented Approach

As the market has evolved, environmental coverage has expanded to include associated costs, such as for catastrophe management and decontamination. Whether it is a spill, a mold problem or a bacterial outbreak, an environmental problem can cause lasting damage to an organization's reputation. To address that reputational risk, some policies may provide coverage for expert catastrophe management services that include public relations and media outreach assistance. A crisis response that is seen as effective by the public may actually enhance a company's reputation in the long term.

FEMA Major Disaster Declarations by Year					
Year	Any	Severe Storm	Flooding	Hurricane / Tropical Storm	Winter Storm
2014	45	27	30	2	10
2013	62	36	41	2	15
2012	47	25	19	16	3
2011	99	47	50	22	16
2010	81	61	51	5	28
2009	59	46	38	3	17
2008	75	57	51	14	8
2007	63	55	43	1	12
2006	52	40	36	1	8
2005	48	27	27	12	7
2004	68	37	40	22	3

Disaster Declarations by Year, Federal Emergency Management Agency - http://www.fema.gov/disasters/grid/year?field_disaster_type_term_tid_1=All

U.S. EPA NPL Site Totals by Status and Milestone*

Status	Non-Federal (General)	Federal	Total
Proposed Sites	47	4	51
Final Sites	1169	157	1326
Deleted Sites 358	17	375	19

<http://www.epa.gov/superfund/sites/query/queryhtm/npltotal.htm>
 * As of January 5, 2015

Another non-traditional area of coverage involves decontamination costs for health care facilities and the hospitality industry. For instance, a facility-borne illness resulting from an outbreak of bacteria or viruses may force a hospital to relocate patients or a hotel to close during the decontamination efforts. Environmental policies can help to defray those costs. Coverage for decontamination costs may be expanding from health care into other industries, such as food and beverage manufacturing, where discovery of a bacterial problem may force a plant to shut down.

Environmental policies can also offer coverage for business interruption losses stemming from a pollution incident. Such incidents could include a manufacturing plant that has an accidental release and has to shut down for days or weeks. The discovery of a mold problem in a commercial office complex or a retail shopping center may force the closure of the building while the problem is addressed. The coverage could include associated loss of income and the extra costs of having to relocate until the cleanup is finished. For the owner of a shopping mall or apartment complex, the coverage could include loss of rental income.

Increasingly, the marketplace is offering policies that seek to address concerns within specific industries. Health care is a prime example as environmental policies are now available that include coverages for facility-borne bacteria and viruses, catastrophe management costs, and transportation and disposal of medical-specific wastes on a single form. This proactive, sector-oriented approach reflects the demand from various industries and public entities for coverage that offers protection for environmental exposures that are not necessarily catastrophic but which still may present significant financial consequences.

Environmental Coverage: An Essential Part of a Proactive Risk Management Strategy

Today, environmental insurance has become less of a specialty coverage and more of a necessary purchase for day-to-day operational risks. As society takes a broader view of environmental risks, so too should businesses and other organizations. Along with spills, leaks and other pollution incidents, environmental problems such as vapor intrusion and mold present significant exposures that should be addressed by a proactive risk management strategy.

Coverage considerations should include the full range of exposures linked to operational environmental risks and pollution incidents. Premises pollution liability policies can provide coverage for the potentially significant first-party costs of environmental cleanup and remediation, as well as third-party pollution liabilities for bodily injury and property damage. Business interruption coverage can offset the expenses of a shutdown linked to an onsite incident. Companies should also consider the potential liabilities that may stem from pollution incidents involving the off-site transportation and disposal of operational wastes. Coverage can be included for company-owned and third-party vehicles that transport waste or products, as well as coverage for an insured’s liabilities at disposal sites run by outside vendors. Because environmental laws are constantly evolving, the coverage should be adaptable and provide protection for changes in regulations. Damages are not only financial. To protect against lasting damage to their reputation or brands, organizations may want to consider coverage that includes expert help to manage the public relations component of a catastrophic pollution event.

Pollution exposures continue to expand as the public, regulators and legislators take a greater interest in protecting the environment. Organizations that make environmental coverage an essential part of their overall risk management strategy can better position themselves to withstand the financial impact of pollution incidents while protecting the environment, their staff and customers, and their reputations.

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Endnotes

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