1

Environmental "Transactional Risk" Contrasted

- **"Transactional Risk"** – Environmental risks associated with "deals".
  - Arise out of pre-existing conditions in soil and groundwater unrelated to current or planned operations of the purchaser
  - Environmental matters may not be addressed by Reps & Warranties Insurance
- **"Passive Risk"** – Environmental risks that are present in all activities regardless of operations or activities of an organization
  - Example: Smog in LA, Water Pollution in Mississippi River, Climate Change, etc.
- **"Operational Risk"** – Environmental risks associated with operations and activities of an organization that could result in an environmental release
  - Example: Chemical blending, pulp and paper mill, metal plating, airport operations

2

Deal Risk Challenges…Environmental Liability Insurance Solutions

The strategic use of Environmental Insurance can help buyers and sellers reach their goals

3

Advantages to Sellers

Environmental Liability Insurance may help Sellers

- Expedite the sale process
- Exit deal with increased funds
- Attract best offers
- Reduce or eliminate post-closing indemnity obligations
- Reduce contingent liabilities

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Advantages to Buyers

Environmental Liability Insurance helps Buyers

- Transfer exposure to tort liability arising from known environmental liabilities to insurer
- Be viewed as a more attractive bidder
- Avoid credit risk of seller indemnity
- Provide recourse to address unknown environmental issues
- Provides an entrance and exit risk strategy

Environmental Insurance for Transactional Risks

There are several basic types of environmental insurance (and variations of each) that are typically purchased to address operational & transactional environmental risks:

- **Site-specific Pollution Legal Liability Insurance**
  - Most Flexible policy allowing customization
- **Contractors Pollution Liability Insurance**
  - Practice policies for individual contractors
  - Owner-controlled policies for all contractors on a project
  - Contractor-controlled policies for all contractors on a project
- **Underground Storage Tank Insurance**
  - Usually driven by a regulatory requirement for financial responsibility

Environmental Insurance in a Transaction

- Coverage is tailored to the specific environmental issues associated with a property or portfolio of properties
- Coverage may be provided in lieu of an indemnity for unknown pre-existing conditions or in excess of indemnity for known conditions
- Policy terms of up to ten years are available
- Policies can be assigned in a transaction to a future purchaser in lieu of an indemnity and are an important component of an entrance and exit strategy for an asset or operation
- Policy limits can be provided for fortuitous discovery of pollution conditions, third party or government claims only, mitigating the need to fully investigate conditions prior to divestiture
- Premiums increase based on number of sites insured, policy limit and retention structure, however cost is often nominal in a transaction and may mitigate any large purchase price adjustment

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Environmental Insurance Coverage & Construction

- First Party Property Coverage
  - **Remediation / Clean Up Costs***
  - Business Interruption*

  **Loss must arise from unknown pre-existing contamination*
- Third Party Legal Liability Coverage
  - **Bodily Injury & Property Damage – arising from known & unknown conditions**
  - Diminution of Value
  - Loss of Use
  - Transportation
  - Mold and Legionella
  - Non-Owned Disposal Site
  - Business Interruption
- Policy Triggers
  - Discovery
  - Third Party
  - Governmental/Regulatory

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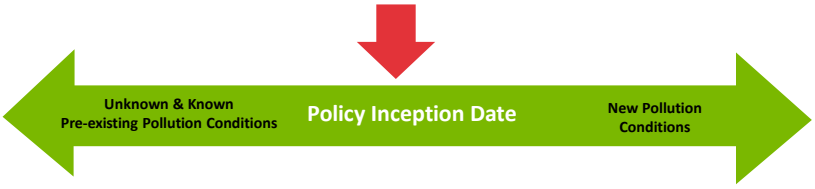
LOOK BOTH WAYS

Time Line of Coverage – Policies may look backward, forward or both

- Claims made vs. Occurrence basis



- Retroactive Date vs. Continuity Date/Delineation Date
  - distinguishes coverage for pre-existing conditions vs. new conditions

Policies can be designed to cover the entire time line

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Underwriting Pollution Insurance – What is required, How long does it take?

- **Site Pollution Liability Coverage**
  - Schedule of locations with occupancy information
  - Description of operations/hazardous materials
  - Tank Schedule
  - Environmental management protocols
  - Any available environmental reports, Phase I/Phase II or equivalent
  - Claims/litigation history
  - Draft copy of PSA, including any indemnities, if available

- **Contractors Pollution Liability Coverage – Owner Interest (if development is planned)**
  - Scope of work including delivery method
  - Project term
  - Project hard costs
  - Design Professional available limits

- Expectation is that all data is provided through a data room

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Environmental Insurance Market

Market Trends

Capacity	Coverage	Claims & Losses	Limits/Retention	Pricing
Capacity is continuing to expand as more markets enter and mature in sector.	Coverage continues to evolve and become more responsive to insured's unique needs.	Unique losses are being addressed — emerging constituents can be problematic, e.g. PFOA/PFOS Focused enforcement actions	Limits and retentions are responsive for insured's needs.	Pricing trends have been stable for past few years, however, certain higher risk categories should expect rate increases from 3% to 5%.
• Over 35 unique insurers provide environmental capacity. • Capacity is available domestically, in the EU, and in Bermuda. • There is over $800M+ in theoretical capacity available in the environmental marketplace.	• Pollution policies are typically highly manuscript and tailored to needs of insured. • Markets remain competitive but are beginning to require more underwriting information and loss review. • Engineering requires more detailed information before releasing terms. • Terms have become more restrictive over prior years, possibly due to AIG exit from PLL markets. • Multiple year policy terms are still typical for site-specific coverage. • Coverage for mold, redevelopment and older storage tanks has become more restrictive.	• Claims volume has increased as more companies buy coverage and understand how to use it properly. • Carriers have been mixed on claim responses — some pushing for delay and detailed coverage reviews while others have been responsive with minimal imposition on insured. • Due to the increase in claims for particular risks, carriers are considering increasing retentions or providing sub-limited coverage.	• High policy limits are available in the market, and can vary greatly based on industry class, size and unique exposures. • Retentions can impact overall pricing and terms. • Retentions have shifted upwards and now are typically $50,000 or more.	• Renewal premiums are generally holding flat or reducing with favorable loss history. • Higher risk operations can expect rate increases from 3% to 5%.

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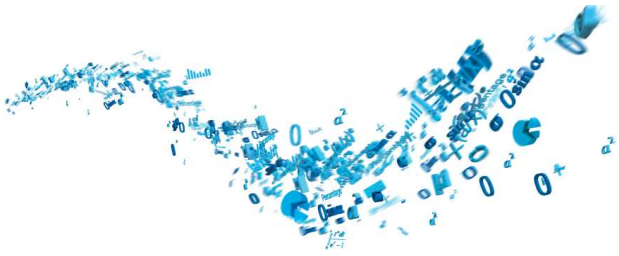

Examples

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Transaction: Single-Site Private Acquisition of Warehouse/Distribution Property in Oregon

Issues

- Historical petroleum underground storage tanks that impacted soil and groundwater
- Past cleanup actions left residual contamination in place
- Current tenant to continue operating existing diesel tanks and pump island

Solution

- Buyer secures site pollution coverage that includes third party claims for known or unknown pre-existing pollution conditions
- Operating underground tanks are covered excess the tenant's financial assurance tank policy
- Lender included as Additional Named Insured with automatic policy assignment in the event of default and foreclosure
- 10 year policy term with $20M limit and $100,000 deductible – premium approx. $140K

BENEFIT OF ENVIRONMENTAL COVERAGE TO BUYER

- Providing coverage to lender secured the financing
- Buyer protected for regulatory agency cleanup action or third party claim for known and unknown conditions
- Excess coverage for operating underground tanks in the event tenant insurance is exhausted

Transaction: Acquisition of Former Industrial Site and Habitat Restoration

Issues

- Former industrial property along the Willamette River to be restored to aquatic, riparian and upland forest habitat
- Potential to encounter unknown contamination from past industrial operations
- Potential of new contamination from offsite sources impacting the new habitat – loss of NRD credit value

Solution

- Site pollution policy providing coverage for on and offsite cleanup costs if required by a third party or regulatory agency – unknown pre-existing and new pollution conditions
- No cleanup cost coverage for contaminated soil that is part of the budgeted and planned removal action
- No exclusion for third party bodily injury and property damage for any pollution condition, known or unknown - includes Natural Resources Damage as part of property damage
- Additional adjacent acquired locations added during the policy term
- 10 Year policy term to encompass the planned construction and restoration work
- $25M policy limit, $100,000 deductible. Premium under $300K

Transaction: Reps and Warranties Coverage Limitation Drives Placement of Environmental Insurance Policy

Issues

- Target company is a commercial laundry with a history of dry cleaning operations – stock purchase
- Limited investigation data at many locations
- Rep & Warranty markets will not address environmental representations as a result of the known/suspected known conditions
- 21 Locations including current & former properties. One property has a transferrable indemnity from the prior owner for historical chlorinated solvent contamination.

Solution

- Client purchases $10M limit site pollution policy with a $100,000 retention
- Policy Term is 10 years pre-existing / three years new conditions (approx. $200K premium)
- Policy covers current and former properties, and sits excess the indemnity where applicable
- Policy restricts on the discovery of pollution conditions (no redevelopment planned)
  - Capital Improvement / Site Investigation Exclusions and Third Party-Trigger on remediation for some of the more challenging sites
- **Policy does not specifically exclude any constituents, which is beneficial to the seller, buyer, and R & W insurers**
- Policy enables R & W insurers to provide excess coverage for environmental reps in the PSA