

The Evolving Environmental Insurance Market

Pitfalls and Stitching it all together in the PSA

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- LEGAL reasons why transacting parties need environmental insurance
- For property acquisitions:
 - To protect against improvident advice leading to ownership of a contaminated property:
Product: Consultant's Errors and Omissions

Ownership of contaminated property confers liability under the federal Comprehensive Environmental Response Compensation and Liability Act 42 USCS 9601 et seq. and analogous state environmental laws including New Jersey's Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq. and Site Remediation Reform Act, N.J.S.A. 58:10C-1 et seq.

The Phase I Environmental Site Assessment is a highly underpriced investigation. It is easy to miss an environmental issue due to data gaps and the absence of visible evidence of subsurface site conditions.

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If your consultant missed something and you close title, it's now your liability (and your practical problem) as the owner, making the scope of the work to be performed, the quality of your consultant's errors and omissions insurance and a contractual indemnity in your services agreement important.

- Going beyond the ASTM Phase I scope:
 - In addition to looking for releases of threats of releases of hazardous substances, consider risks associated with federal and state land use constraints. Violations during site development of state and federal wetlands, flood hazard and threatened and endangered species laws can disrupt construction schedules and increase costs.
 - Consider building risks like asbestos, lead-based paint, drinking water and indoor air quality.

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- LEGAL reasons why transacting parties need environmental insurance
- For discharges that may occur while you are performing environmental due diligence on someone else's property:
Product: Contractors Pollution Liability Coverage

During pre-acquisition environmental or geotechnical due diligence, a discharge can occur through during work performed by your consultant or its subcontractors. Accessing party typically has to indemnify seller/landlord for discharges occurring during due diligence.

Common field work claims:

- cross-contamination of aquifers during drilling
- piercing underground tanks.
- Ruptured utility lines

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- Contractual issues to consider in the PSA (or lease):
 - The accessing party's liability/indemnity to the property owner/Seller under the PSA should be mirrored by consultant's liability to entering party.
 - Exclude mere discovery of a pre-existing contamination condition from indemnity.
 - Contract should not state that buyer will maintain the coverage if buyer does not have the coverage or if buyer's consultant and its subcontractors have sufficient coverage.

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- Contractual issues to consider in consultants/contractor services agreements:
 - Require specific insurance coverages and ensure they match coverage requirements in PSA or access agreement;
 - Ensure that coverage limits are sufficient for the risk
 - Coverage is not dedicated unless dedicated coverage is purchased
 - Require stacked coverage if that is what you need
 - Contractual indemnity

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- Contractual issues to consider in consultants/contractor services agreements:
 - Breadth of Indemnity
 - Everything arising out of the Work (including subcontractors?)
 - To the extent of Consultant's negligence
 - To the extent of Consultant's insurance
 - Recoverable vs. recovered?
 - To the value of the job

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- Sample NJ coverage clause for environmental consultant services agreement:

Insurance Coverage. During the performance of the Work, the Consultant shall, at its own cost and expense, maintain the insurance coverage set forth below with insurance companies licensed to do business in the State of New Jersey, or the state where the Work is performed and acceptable to Counsel:

- The Consultant shall be a named insured under each policy, and as the named insured, the Consultant shall include all of its past, current, and future employees. **If more than one type of coverage is provided under the same policy, the policy shall be written so that each type of coverage has, at least, the respective limit of coverage set forth above.** The Professional Liability insurance may be provided in any combination of primary and umbrella coverage, and shall be maintained for three years following issuance of the RAO (with Certificate of Insurance provided annually to Customer and which shall provide that Customer will receive 30 days' notice prior to cancellation or non-renewal). Further, the Consultant represents and warrants to the Customer that: (1) they have fully disclosed to the insurance companies issuing the policies and coverages set forth above that the Consultant employs LRSPs, including without limitation the LSRP designated pursuant to paragraph 2(c)(v) above, and that such LSRP will have the obligations set forth in SRRA in connection with the performance of any of the Work by the LSRP; and (2) the Work to be performed by an LSRP, if any, is included in the operations that are covered under such insurance policies.

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- **General Liability.** The commercial general liability insurance maintained by the Consultant pursuant to this Agreement shall include, without limitation, **coverage for completed operations and contractual liability.**
- **Certificate of Insurance.** The Consultant shall promptly deliver to the Customer, a certificate of insurance, in form and substance satisfactory to the Customer, **naming the Customer and such other party in interest, if applicable, as specified by the Customer, as an additional insured, with respect to the commercial general liability insurance policy, the excess liability insurance policy, the employer's liability insurance policy, and the contractor's pollution liability insurance policy.** Each policy, with the exception of the professional errors and omissions policy, shall be an occurrence based policy and not a claims made policy. The Consultant shall, at its own cost and expense, maintain and keep in full force and effect the professional errors and omissions policy, as set forth in subparagraph (a) above, from the date of this Agreement until six (6) years after the completion of all Work undertaken pursuant to this Agreement. This paragraph shall survive the expiration or termination of this Agreement.

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- **Insurance of Subcontractors.** The Consultant shall cause all subcontractors undertaking any aspect of the Work to obtain, maintain and keep in full force and effect, at all times during the performance of the Work, the insurance set forth above (with the exception of the professional errors and omissions policy if not applicable) with insurance companies licensed to do business in the State of New Jersey, or the state where the Work is performed, and acceptable to the Customer in its sole discretion, and **shall cause all subcontractors to deliver to the Customer a certificate of insurance naming the Customer and such other party in interest, if applicable, as specified by the Customer, as an additional insured with respect to the commercial general liability insurance policy, the excess liability insurance policy, the automobile liability insurance policy, the employer's liability insurance policy and the contractor's pollution liability policy.**
- **Waiver of Subrogation.** Each policy referred to above (with the exception of the professional errors and omissions policy), shall contain a waiver of subrogation by the insurer against the Customer and such other parties in interest as shall be specified by the Customer.

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- LEGAL reasons why transacting parties need environmental insurance
Product: Pollution Legal Liability Coverage
- To get coverage for unknown conditions (not revealed during site characterization), new conditions, known conditions after regulatory closure, and third party claims for bodily injury and property damage.
- Whether you identified issues during your environmental due diligence or not, surprises happen given the challenging nature of sub-surface investigations. This insurance is an investment, the cost of which is contractually allocated between/among the parties to cover both those unknowns (to the extent they are not excluded) and the known conditions once the cleanup is complete. Coverage is for cleanup costs and for bodily injury and property damage.

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- Affordable and meaningful PLL coverage typically:
 - Requires a well investigated site to get meaningful coverage.
 - Either a clean Phase I (or state analogous report) or a developed site and remedial investigation so that the issue is fully characterized for the underwriter's risk assessment.
 - Excludes broad classes of contaminants
 - Educate the underwriter by clarifying the boundaries of areas of concern and the specific contaminants at issue, so that exclusions are not overly broad without justification.

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- PLL coverage issues to consider:
 - Understand the disclosure obligations during the application process.
 - Term of coverage – get through your site development period.
 - Do you want coverage for pre-existing AND new conditions?
 - Carefully review notice of claim provisions
 - Certain jurisdictions requiring notice to a specific address with any default as to timeliness or location barring coverage.
 - Understand definition of a pollution condition and application of deductible/self-insured retention
 - Excluded contaminants/conditions

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- PLL coverage issues to consider:
 - Insured vs. Insured exclusion
 - Make sure this excludes contracting parties.
 - Non-owned Disposal sites
 - Include all sites that you may use and contract for additional undisclosed NODS.
 - **Voluntary vs. government-mandated investigations**
 - Coverage for regulator audit period and Natural Resource Damages

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- Contractual issues to consider in PSA regarding PLL

Unless you've determined that "vague is better" for your deal, properly define what the PLL policy required in the PSA should look like.

- Policy term, coverage limits, named insureds and scope of policy.
 - Additional named insured vs. Additional Insured. An additional insured only gets coverage to the extent the named insured gets coverage. An additional named insured gets coverage for its own liability as well. A buyer typically should be a named or additional named insured on the PLL policy.
- PLL coverage is typically bound at closing – be careful where party demands coverage by end of their due diligence period.
- Cost allocation. Cost sharing is common. Clarify who is paying for self-insured retention and for policy renewals.

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- LEGAL reasons why transacting parties need environmental insurance
- To cap your known cleanup costs.
Product: Cleanup Cost Cap/Stop Loss/Cost Containment coverage

Depending on the degree of data gaps, projecting accurate remediation costs is difficult. Cost-cap insurance is back on the market and provides coverage for known cleanup cost overruns. Provides security for a deal but coverage is not cost-effective for every cleanup or deal.

Cost cap coverage IS NOT not liability coverage.

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- Issues to consider when looking at cleanup cost cap coverage:
 - How big does the cleanup need to be for this coverage to be a good business decision.
 - How much is the deductible/self-insured retention?
 - In the past it was 10%-30% of the cleanup
 - What will trigger the coverage? In the past:
 - Discovery of unidentified pollution during cleanup
 - Additional quantities or concentrations of pollution
 - Change in regulatory requirements
- Typically backs up Guaranteed Cleanup Cost Contract (GCCC)
 - Carefully draft scope of Included and Excluded work in GCCC
 - Carefully define Guaranteed Amount for work in GCCC