



Obtaining Environmental Insurance: Three Areas for Negotiation

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The environmental insurance marketplace has evolved over the decades it has been in existence. Our experience over the last few years shows that the market is active, with carriers willing to be innovative in order to remain competitive. Because environmental policies are written on a manuscript basis, meaning the policy is written on a custom basis to include coverage or conditions not included in a standard policy, policyholders have an opportunity through negotiation to obtain the best policy possible to suit their needs. The following are three areas where we are seeing flexibility and creativity in the carrier's underwriting that address our client's specific needs.

Known Pollution Conditions – Pollution policies generally do not cover cleanup costs for conditions known at the time the policy is issued. How these known conditions are defined in the policy is critical to the scope of coverage provided. Accordingly, working with the underwriter so that the policy defines known conditions as narrowly as possible is worth the effort. Toward this end, providing the underwriter with a detailed summary or chart outlining each known condition, its location on the property, the media impacted (e.g., soil or groundwater) and the specific contaminants identified is particularly helpful in negotiating this aspect of the policy.

Coverage for Conditions Discovered During Redevelopment – Many environmental insurance policies contain an exclusion for contamination discovered when demolishing existing structures or during the course of capital improvements. Thus, for clients who are purchasing (or selling) property for redevelopment, this exclusion may effectively operate to bar coverage. While subject to more underwriting scrutiny, we have had success in limiting the exclusion to contaminants found in building materials rather than a broad exclusion for any contamination discovered during redevelopment. Carriers also are willing to entertain providing coverage for contamination discovered during redevelopment if such a claim is subject to a deductible or self-insured retention that is higher

than for other coverages afforded by the policy.

Named Insureds and Additional Insureds – Insurance is often purchased in order to allocate risk between parties to a real estate transaction. These transactions involve multiple parties, each with their own interests (e.g., the buyer and the seller and their affiliates, as well as even potential future owners of a property that is being redeveloped). These parties all generally want to have the benefits of coverage under the policy. Not all parties, however, should have or are entitled to the same coverage. Accordingly, it is important to carefully consider which entities receive the broadest rights under the policies (typically referred to as a “named insured”) and which parties have other insured status (typical referred to as an “additional insured”). This issue is further complicated by the fact that not all policies define a “named insured” and an “additional insured” in the same way. Accordingly, it is important to understand the rights, duties and privileges provided by the policy to each category of defined insureds to ensure proper coverage is extended to the appropriate parties. This may involve discussions with the underwriter about the interests of each party.

Procuring appropriate insurance can make the difference in whether a deal is done. Accordingly, best practice includes consulting with professionals experienced in procuring coverage (including both brokers and attorneys) to identify which carriers have an appetite and are willing to be creative in their underwriting to meet the needs of the deal as well as to negotiate with the carrier to develop policy terms that cover the risks for which the insurance is purchased.

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