

ASSESSING SITE POLLUTION RISKS

Key Principle: Strict Liability

One of the most unique characteristics of pollution risk is the principle of Strict Liability. Few realize that the EPA doesn't pay for environmental clean-ups. They just make sure someone cleans up pollution. And even though there may have been no negligence, you can still be named as a responsible party. For example:

While constructing a new sports stadium at a Western university, a contractor ruptured two abandoned 10,000-gallon underground storage tanks full of gasoline and diesel fuels. Since the land was donated to the university by a private company and the contractor did not have pollution insurance, the university was charged \$200,000 for the environmental cleanup.

Things to Ask

Below are some general questions and examples that should be considered on every commercial property:

☐ What supplies/materials do you receive or store?

Even the most responsible property owners can be held responsible for pollution released from stored chemicals. Many sites have the obvious exposure of stored chemicals, but there are many cases where "unconventional" pollutants have been released. Vandalism or attempted theft can also result in malicious or inadvertent releases of diesel fuel, gasoline, oil, coolants or other chemicals. For example:

In October of 2006 a recycling and waste handling facility in Apex, N.C. exploded causing nearly 17,000 residents to evacuate and hospitalizing 106 people. There have been numerous bodily injury claims over the last few months and a \$500,000 fine from the state of North Carolina

☐ What processes/services are provided on the site?

No process or service can be controlled at all times and under all conditions. Accidents happen. An Insured may even rationalize that they have been "in business for 30 years" without a problem. However, even though the insured is not directly responsible for a pollution condition, they can still get left with the remediation expenses.

In one instance, a privately owned solid waste landfill was sued by 35 local residents, alleging bodily injury and property damage due to contamination emanating from the landfill. Investigation found dangerous levels of vinyl chloride in the nearby drinking water. They also found five 55-gallon drums of organic solvents, dyes and metals from an unknown dumper, that were also leaking.

☐ What kind of risks do the neighboring properties represent?

This issue is often out of the control of most Insureds, but the risks are still relevant. Most Phase I environmental reports evaluate the risks that neighboring properties represent. Another good example:

One warehouse tenant stored a variety of chemicals. A Phase I Site Assessment performed on a parcel of vacant land neighboring the warehouse showed chemical contaminants whose origin was traced to the warehouse. Cracks in the reinforced concrete floor of the warehouse had allowed leaking chemicals to escape, causing extensive soil and groundwater contamination of the neighboring property. The owner of the vacant land filed suit to recover the costs to remediate his property, as well as money lost when a pending sale of the property was cancelled as a result of the contamination. Ironically, in this case the neighboring property owner could end up being held as a responsible party due to the Strict Liability nature of pollution.

☐ **Do you transport products to/from your facility?**

Transit pollution coverage can be added to most site pollution policies at a very minimal cost in most cases. For some contracting classes, like a road & street paving, this represents the bulk of their exposure and needs to be addressed. This situation in the Northwest is a perfect example.

Recently a tanker truck lost control and the resulting rollover caused the tank to rupture, spilling 10,000 gallons of gas and diesel. The spilled fuel caught on fire and burned the truck. The fuel on the side of the highway and the median caught fire also, burning the wetland and entering the creek. Cleanup activities have included booming the creek, product recovery in the creek, the use of interceptor trenches for additional product recovery, and sampling of nearby drinking water wells.



☐ **Are there underground or above ground storage tanks on the property?**

Storage tank coverage can be handled in a couple of different ways. Most carriers offer a full site pollution policy that includes coverage for issues with either underground (UST) or above ground (AST) storage tanks. Specific tank policies are also available (with lower minimum premiums), but typically only address clean-up costs and do not respond to the bodily injury or 3rd party property damage that may result from a spill.

Underwriters are often asking for a SPCC (Spill Prevention, Control and Countermeasure) plan when they offer terms – particularly in regards to AST's. Additional information is available directly from the EPA. Most states also require a Certificate of Financial Responsibility for every UST.

A large Midwestern university disposed of its science lab wastes in a 53-year-old, 20,000-gallon underground storage tank. The underground tank ruptured and contaminated the soil, the private wells and the groundwater that flowed into a nearby reservoir. Several third parties sued the university, with claims totaling \$450,000. In addition, costs to clean up the reservoir amounted to \$1.1 million.

☐ **Have there been any past, present or ongoing pollution issues or remediation activities?**

Underwriters will not necessarily decline accounts with a prior pollution incident, but they will be looking for an NFA (No Further Action) letter from some State agency. Site pollution policies can be structured a number of different ways, and can address or ignore prior problems. For example:

A buyer wanted to purchase property with a flower shop located on it. The Phase I assessment revealed that the site had once been a retail gas station. The seller was required to provide an indemnity agreement to pay for pollution that might be discovered after the sale. In most cases, a pollution policy will satisfy this requirement by a lender.

A real estate development firm acquired property historically used for farming on which they planned to build a mall. The firm hired a consultant to conduct a Phase I Environmental Assessment. The property was determined to be clean. However, when excavation for the mall began, 100 drums of buried pesticides and herbicides were unearthed. The chemicals contaminated the soil and had to be removed at the firm's expense. Remediation and drum-disposal costs exceeded \$750,000 and resulted in a two week construction delay.

☐ **Is there an exposure for Mold?**

Mold coverage is often provided on a site pollution policy by a separate endorsement. Carriers will require property owners to have a professionally prepared Mold Operations & Maintenance (Mold O&M) plan in place before offering coverage. A Mold O&M plan typically addresses the following:

- Routine Maintenance
- Indoor Air Quality issues
- Periodic inspections including exterior and interior plumbing and fixtures, HVAC systems, utility areas, etc.
- Conducting limited remediation and repairs
- Document training, maintenance, and incidents

☐ **Is there a exposure for "In Place" Asbestos or Lead-Based Paint?**

Older buildings may still contain dangerous lead-based paint or asbestos. Property owners need to be aware of EPA regulations about notifying tenants about the potential dangers. The EPA recently fined a San Diego property owner \$31,000 on top of the \$216,000 remediation costs for not issuing the proper disclosures.



Coverage for these two specific pollutants is available from most carriers, on most properties. As with Mold coverage, a professional prepared O&M plan is required before any terms will be offered.

☐ **Will you need a Phase I Report?**

Environmental carriers typically require a Phase I Site Assessment before offering to cover unknown Historical conditions on any property

A Phase I Environmental Site Assessment is prepared for a specific fixed site and identifies potential or existing environmental contamination liabilities. The analysis typically addresses both the underlying land as well as physical improvements to the property; however, techniques applied don't usually include actual collection of physical

samples or chemical analyses of any kind. Scrutiny of the land includes examination of potential soil contamination, groundwater quality, surface water quality and sometimes issues related to hazardous substances. The examination of a site may include: research into the historical land uses of the subject and neighboring properties, research into local, state, and federal regulatory environmental files and databases for the subject property and a site reconnaissance of the subject and neighboring properties.

☐ What about a Phase II Report?

If testing is needed at a property to definitively address an unknown condition, a Phase II Environmental report may be recommended. Phase II projects may include: surface soil samples, soil gas sampling, subsurface soil and groundwater samples from borings and monitoring wells, surface water samples, pond sediment sampling, drinking water samples, drum testing and tank testing.

The results of a Phase I or II test often include drawings, digital photographs, lab results and recommendations.

Coverage Basics

Site pollution policies, in general, cover three main exposures: 1st party clean-up costs, 3rd party property damage and 3rd party bodily injury. There are almost a limitless number of variations of these three coverage parts, and a policy can be customized to fit the needs of the Insured, requirements of a lender, the specific risks a property represents, or the past issues already involved.

Addressing sites with a long history can be a challenge. Carriers will generally offer New Conditions Only in these cases. A property transaction property could also be limited to Historical Conditions Only. The most complete coverage includes both Historical and New Conditions.

Please contact your agent to discuss your exposures further.

