



## **Environmental Liability Insurance**

Following the volatility of the early 2000s, the London Environmental Liability insurance market has rebounded and expanded. The market now consists of five insurers, namely: ACE, AIG, Chubb, Quanta and XL.

All of the insurers offer property transfer policies with periods of up to ten years, as well as a wide range of operational policies that are available for up to five years, with a maximum of three years for manufacturing and similar sites. The policies are renewable.

To complement the increased number of carriers Oasis and a limited number of other brokers have developed expertise in placing Environmental Liability policies.

### ***Types of products***

Three types of environmental insurance are now available for commercial risks: site-specific policies, policies for professionals and policies for general, remediation and asbestos contractors.

Homeowners may protect themselves against the risk of liability under Part IIA by warranties and an insurance policy. In addition, environmental insurance is often used as a central element of risk financing for commercial risks.

Most environmental insurance policies are underwritten on a claims-made-and-reported basis. A claim must be made against the insured and reported by the insured within the policy period. Some policies, such as property transfer policies, include an automatic and optional extended reporting period when the insured may receive and report a claim from pollution conditions. An automatic extended reporting period is around 60 days. An optional extended reporting period, which is available for an additional premium, has a maximum length of three to four years depending on the insurer.

Main Areas of cover:

- Third Party Liability for pre-existing pollution and/or land contamination
- Third Party Liability for new pollution and/or land contamination events
- Clean up costs, at neighbouring premises, following a pre-existing event
- Clean up costs, at own premises, following a pre-existing event
- Clean up costs, at neighbouring premises, following a new event
- Clean up costs, at own premises, following a new event



### ***Site-specific policies:***

This type of policy provides cover to the owner or operator of one or more insured sites for third-party claims for bodily injury and property damage, and works to remediate contamination that is on or migrating from the site(s). Specified legal and other fees and expenses that are related to the loss may also be covered as well as business interruption, loss in rental income and diminution in the value of third-party property. A lender, trustee, developer or seller may be listed as an additional insured. Coverage is not necessarily limited to sites specified at the inception of the policy; sites may be added (and deleted) during the policy period by endorsements to the policy.

The seven types of site-specific policies are described below. Some policies have a menu-type format that includes types of cover, allowing the insured party to select the cover that is required.

- (i) Environmental liability policies: An EIL policy provides cover to owners and occupiers of land as indicated above.
- (ii) First-party pollution policies: A first-party pollution policy provides cover for the cost of remediating contamination on the insured's site(s) as well as bodily injury and property damage that results from a pollution incident that occurs on the site(s) during the policy period. Other losses that may be covered include business interruption, loss of rental income and diminution of third-party property.
- (iii) Property transfer policies: A property transfer policy provides cover to owners and occupiers of land as indicated above. An insurer may agree to provide cover for pre-existing contamination that is known to the insured at the inception of the policy provided that the insured discloses such contamination to the insurer. Alternatively, the policy may carve out cover for remediating known contamination at the site(s).
- (iv) EIL, first-party pollution and property transfer cover is typically offered in a single policy with the insured choosing the required cover. A standard endorsement to such policies lists any known Underground Storage Tanks (UST's) that insurers agree to cover. The purpose behind listing UST's is to provide the insurer with details of their condition, in particular, integrity testing.
- (v) Remediation cost cap policies: A remediation cost cap policy provides cover for remediation costs that exceed a level agreed by the insurer up to the limit of indemnity provided in the policy. The agreed level is the estimated cost of remediating the contamination plus a buffer, or deductible. Remediation cost cap policies tend to be offered only for projects that are estimated to cost at least £1 million. They provide cover for cost over-runs, the failure of remedial works and unforeseen costs due to the presence of more extensive contamination than anticipated.



- (vi) **Post-remediation policies:** A post-remediation policy provides cover for any further remediation that must be carried out at an insured remediated site. The requirement to carry out additional remediation may result from a request or demand by a governmental authority or a change in law.
- (vii) **Lender liability policies:** A lender liability policy provides cover to a funder for the costs of remediating contamination at a borrower's site or the payment of the borrower's principal loan balance if the borrower defaults. The policy may also cover third-party bodily injury and property damage.
- (viii) **Commercial land insurance policies:** A commercial land insurance policy is a hybrid EIL, first-party pollution and property transfer policy providing cover for the cost of remediating pre-existing contamination and contamination that results from a pollution incident at the insured site during the policy period. The policy is offered for low-risk sites, including property portfolios, on the basis of a desktop report. It is offered for a renewable one-year period.

### ***Placing Cover***

Environmental insurance policies are placed in a different manner from general liability policies due to the site-specific nature of many policies and the environmental underwriting skills that are required. Over 70% of environmental insurance policies are negotiated. This does not mean that each policy is bespoke – such policies are issued only for highly complex sites. Instead, insurers provide a specimen policy, the terms and conditions of which may be altered by standardised endorsements during their negotiation.

The first step in placing an environmental insurance policy is to contact a broker, either directly or through advisors including, in many cases, an environmental solicitor. The client indicates the type of policy that is sought and possibly, the insurers to approach. The broker may also provide names of insurers who offer appropriate policies. If a site-specific policy is sought, the client will need to give details of the site(s) including environmental site assessments and verification reports of any remediated contamination.

At the next stage, the broker prepares a market presentation that outlines the requested policy, together with potential deductibles, limits of indemnity and policy periods. The broker puts the market presentation forward to the various underwriters, along with further details about the risk to be insured. Depending on the risk and the requested policy, an underwriter may visit one or more of the sites to be insured. The underwriter of an EIL or first-party pollution policy may, for example, wish to review the operations at one or more sites to evaluate the insured's environmental management system. The underwriter of a property transfer policy may wish to inspect the environmental condition of the site(s).



The underwriter then provides the broker with suggested premiums for the various deductibles, limits of indemnity and policy periods. The underwriter may state that it will not cover certain sites, cover only specified environmental liabilities arising from such sites or will carve out cover for specified contaminated areas at them.

The broker then presents a comparative analysis of the various submissions to the client. Following the analysis the broker and in some cases, the environmental solicitor negotiates the terms and conditions of policies. The client submits the completed proposal form. In the final step, the insurer binds the policy terms and conditions, issues the policy (including the negotiated wording) and the insured pays the premium.

### ***Future***

As described above, the London environmental insurance market has a long history. The times of uncertainty about whether the market will survive are now in the past. Every indication is that the number of insurers in the market will continue to grow while the range of policies issued by the market will expand.

The total premiums for the London environmental insurance market in 2004 were estimated to be £50 million, including policies underwritten for continental Europe and other locations outside the US. The London market is small compared to the US, where total premiums for 2004 are estimated at over £1,000 million.

The difference in the size is due to many factors, not merely the larger land area of the US. Reasons include more rigorous enforcement of environmental legislation, as well as more advanced and extensive brownfield remediation programmes, more financial security requirements in environmental legislation and a greater public awareness of environmental insurance.

Various factors will heavily influence the rate of growth in the London environmental insurance market. The scope of environmental legislation in the UK (and other member states of the European Union) now equals that in the US. If the Environment Agency, the Scottish Environment Protection Agency and local authorities enforce legislation rigorously, the need for environmental insurance policies will increase exponentially as the range of companies purchasing policies increases.

Much will, of course, depend on the companies' knowledge of the availability of policies together with their flexibility compared to policies offered in the early 1990s. The environmental insurance market has much work to do in continuing to educate the public about their products.

The development of the national brownfield strategy in England will continue to drive the redevelopment of brownfield sites. This will lead, in turn, to a demand for specialised policies – as in the US – to cover liabilities associated with redeveloped sites.



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Unlike the US, where environmental legislation includes financial security requirements for a range of activities from the ownership and operation of USTs and waste disposal sites to dry cleaners, financial security requirements are limited to waste-related activities in the UK. This is changing, however, with the inclusion of financial security requirements in recent and forthcoming European Community legislation. Insurance is not the only way to comply with the requirements, but is a common means of doing so. Such legislation is, therefore, likely to be a driver for the London environmental insurance market as it has been in the US.

### ***Environmental Liability Directive:***

Other events that will influence the future rate of growth of the London market include the transposition into domestic law of the EC Directive on environmental liability, with regard to the prevention and remedying of environmental damage, by 30 April 2007.

The environmental liabilities imposed by the Directive – in particular, liability for damage to protected species and natural habitats – will make the gap in cover for environmental liabilities in public liability insurance policies grow into a chasm. There is already a question about whether such policies provide cover for remedial works carried out by the insured on its own and third-party sites; most do not.

This does not mean that the potential does not exist for certain environmental liabilities under this Directive and other environmental legislation to be covered by the wording of public liability policies. It may lead public liability insurers and their reinsurers to consider deleting the qualified pollution exclusion in their policies in favour of an absolute pollution exclusion.

If – or rather when – the change to an absolute pollution exclusion occurs, environmental insurance policies are likely to be commoditised in the UK as they have in the US. In the meantime, the only way for a company to ensure that potential environmental liabilities arising from its operations or ownership of land are covered is to purchase an environmental insurance policy.