



*Buying, Selling, Redeveloping Commercial Real Estate –
How Environmental Insurance Can Help*



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SMART Remediation – Ottawa – Feb 6, 2020

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Overview

- 1) What are the risks
- 2) What is Environmental Insurance
- 3) Environmental Insurance Claims
 - Types of claims
 - How Remediation Technology Can Help
- 4) Questions and Answers

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Common Environmental Exposures and Losses

1st Party Cleanup

- Cost overruns for pre-existing conditions
- Discovery of unknown pre-existing conditions
- Re-opener of "closed" issues

Third Party

- Offsite cleanup
- Property Damage
 - Bodily Injury
 - Loss of value

Regulatory and Legal

- Natural Resource Damage
- Toxic Tort Claims
 - Legal Defense Costs *
- Off-site Disposal Legacy
- Fines and Penalties
- Governmental re-openers

Business Risks

- Business interruption
- Loss of Rents
- Increased development costs

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Triggering Events

- Transactional Acquisition or Sale (M&A) with legacy liabilities
- Simple Real Estate Purchase and Sale and Refinancing
- Leases...existing and exiting
- Bankruptcy Issues/Corporate Restructuring
- Plant Closings
- Redevelopment Projects
- Construction
- Third Party Contractor Operations
 - on site cause or exacerbate an environmental issue
 - result in a claim from adjacent properties or operations
- Transportation of chemicals and materials
- Evolving and New Legislation/Regulation (eg Excess Soil)

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Managing Environmental Risks

- “Prevent” - Develop Environmental Policies and Procedures – eg Environmental Management System
- “Avoid” - Perform Environmental Due Diligence
 - Eg Phase I and II ESAs
- “Transfer” Environmental Risk/Liabilities
 - Releases and Indemnities in Agreements
 - **Use Environmental Insurance**

Note: not generally for use in isolation or as a substitute for other risk management methods

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Pollution Legal Liability

Overview

- Insures against risk of costs and liability associated with **Pollution Conditions**
- Know conditions typically excluded*
- Reduces financial uncertainty and impact from unforeseen events
- Common uses:
 - Real Estate Transactions incl. Financing
 - Brownfields Redevelopment
 - Portfolio management
 - M&A

Coverages

- **Clean-up Costs related to New Pollution Conditions**
- **Clean-up Costs related to unknown pre-existing conditions**
- Third party claims of Bodily Injury and/or Property damage
- Business Interruption costs
- Non Owned Disposal Sites liability
- Fines and Penalties (where allowable by law)
- Natural Resource Damages
- Transportation to/from Covered Locations
- Legal Defense of all of the above

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Trends in Environmental Insurance Claims

- Mostly first party discovery claims by Insured
- Redevelopment projects
 - Salt in soil/groundwater
 - Handling of contaminated and/or “impacted” excess soil/fill
- Indoor Air Quality (IAQ) for mould and vapour intrusion
- Emerging Contaminants (US experience):
 - PFAs (Per/Polyfluoroalkyl Substances)
 - 1,4 Dioxane
 - Pharmaceuticals/Personal Care Products
 - Coal Ash
- Regulators chasing any potentially responsible parties they can find
- Some third party claims – eg cleanup costs and/or diminution in value

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How Claims are made on Environmental Liability Insurance Policies

- Pollution Condition is a) discovered by Insured and/or b) is discovered by a neighbour(s) and/or a regulator and a claim is made against the Insured
- Claim details provided to Broker and Insurer
 - Emergency Response costs incurred – eg. in the event of a spill
 - Details (incl. costs) of any investigation/delineation of the impact related to a loss event
 - Remediation plan including a discussion of options, potential costs, and rationale for option chosen
 - Insurers typically want the opportunity to review and comment before agreeing to cover remediation/cleanup costs

Note: Pollution Legal Liability type policies are written on a “claims-made” basis meaning a claim must be made during the policy period or any extended reporting period

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Definition of Remediation Costs/Cleanup Costs

Example for Environmental Liability Insurance policy:

CLEANUP COSTS means the reasonable and necessary expenses incurred for the investigation, monitoring, testing, removal, disposal, neutralization, or treatment of a POLLUTION CONDITION to the extent required:

1. by any legislatively or administratively enacted law, rule, regulation or order applicable within the jurisdiction in which the COVERED LOCATION lies including any government action or demand pursuant thereto; or
2. to satisfy STANDARDS.

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Environmental Insurance Claims and Remediation Technology

- The insurance claim process involves a certain amount of “back and forth” between an Insured, and their advisors, and the Insurer and their advisors
- The site owner/Insured may have more than just regulatory considerations to deal with when it comes to deciding what remediation/cleanup approach to pursue (eg future tenants, lenders, development partners)
- Claims managers and adjustors at the Environmental Insurance companies have varying degrees of understanding and experience with remediation technologies
- Many look to outside consultants and contractors when it comes to the management and/or oversight of claims involving remediation

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Claims Example

- Petroleum Hydrocarbons found on/in groundwater at former retail fuel outlet on covered location
- Initial remedial efforts involved pump & treat. This was followed by groundwater “vacuuming” followed by in-site injections
- Risk Assessment was also performed to determine if Ok to leave remaining contamination in place
- Combination of air sparging and vapour extraction applied to further reduce contaminant levels
- Remedial efforts still underway after more than 10 years.....

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QUESTIONS AND ANSWERS

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