Management and Transfer of Environmental Risk in the Acquisition and Development of Brownfields Sites

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Introduction

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The Program

The development landscape and lending practices are ever changing. While projects continue to focus on transit hubs, interstate access, waterfront, and inner-city contaminated properties, sellers are requiring developers to accept environmental legacy risks. These risks can be managed, mitigated, and transferred in ways that make the projects financially attractive.

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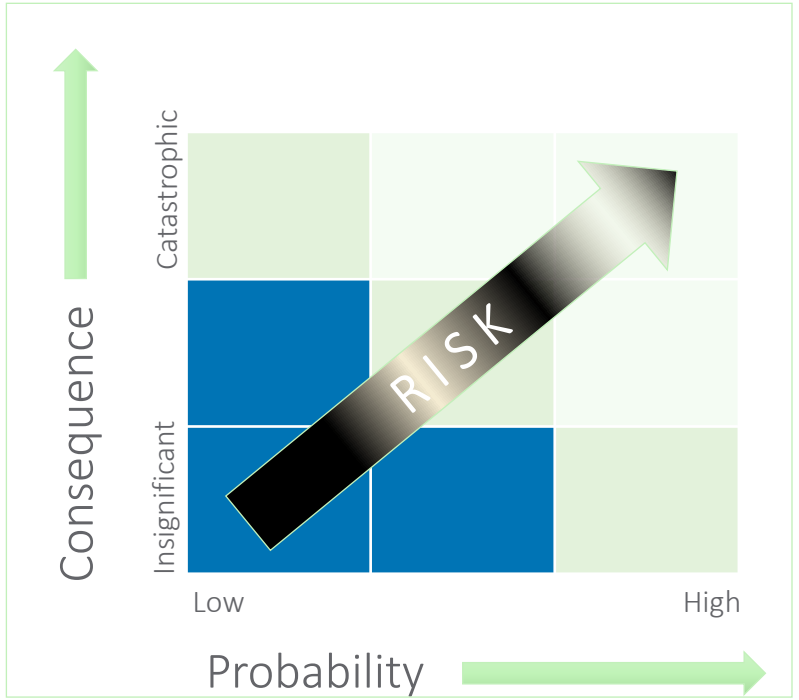
Proper Risk Management Requires a Process

- Risk is the relationship between *probability* and *consequence*
- Risk assessment is often "*gut-based*" or based on past "*similar*" experiences + human nature
  - Science of Decision Making
- Early assessment is key to success
  - Planning & Preconstruction
  - Due Diligence
  - Underwriting
- What is required for Mitigation?
  - Integration of risk transfer mechanisms
  - *Quantification* of risk to determine true financial or schedule impact



Identifying the Risks

Environmental and Construction Risk

- Project Risk
  - Scope of Work
  - Schedule
  - Budget/Cost Overruns
- Worker Exposure
- Unknown/Unforeseen &Emerging Contaminants
- Improper Handling & Disposal
- Regulatory Actions

Identifying the Risks (cont'd)

- Transaction Risk
  - Indemnification
    - Allocation and Transfer
  - Lending & Funding Covenants
- Insurance Underwriting
  - Coverage, limits, term and SIR
- Third Party Claims
  - Property Damage, Personal Injury, Business Interruption
- Public Relations
- Diminution of Value

DUE DILGENCE = RISK QUANTIFICTION

The Traditional Methods

Phase I Environmental Site Assessment

Phase II Environmental Site Assessment

Remedial Action Work Plan

Regulatory Driven & Not Adequate to Quantify Environmental Risk

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Integration - Environmental Due Diligence + Development Plan

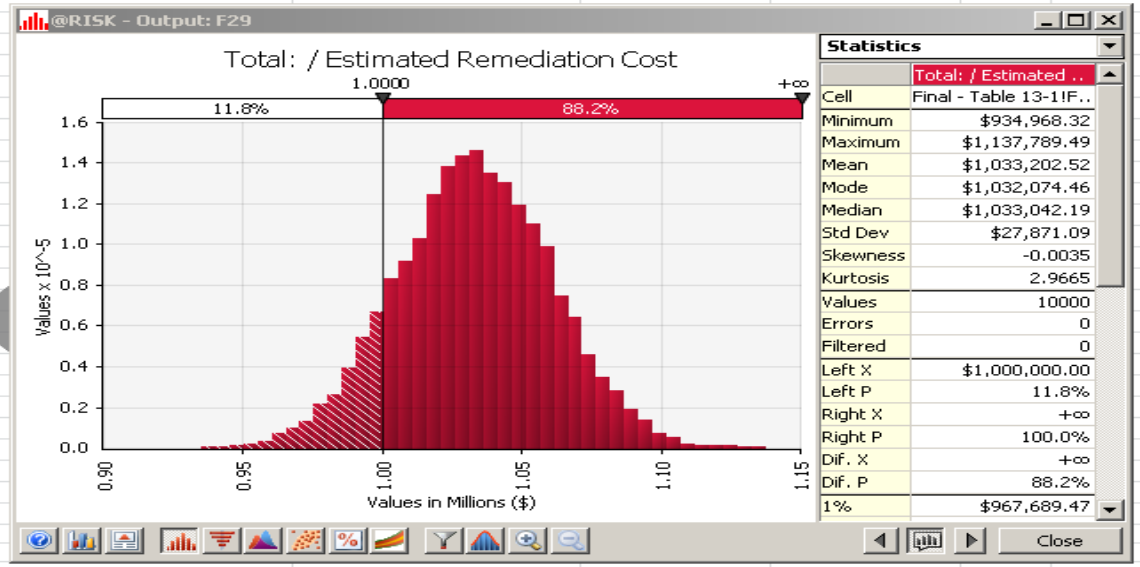
- Environmental Science Data
  - NESHAPS Pre-demolition survey
  - Soil and GW Data
  - Site condition (e.g. capped?)
- Engineering Data
  - Elevation Survey
  - Utilities

- Anticipated Development Plans
  - Sub-surface facilities (e.g. parking, basement, elevator pits, etc.)
  - Foundation; piles, CMCs, footings
  - Future FEMA Elevation / Fill
    - Clean or “Like on Like”

Modeling Tools and Process

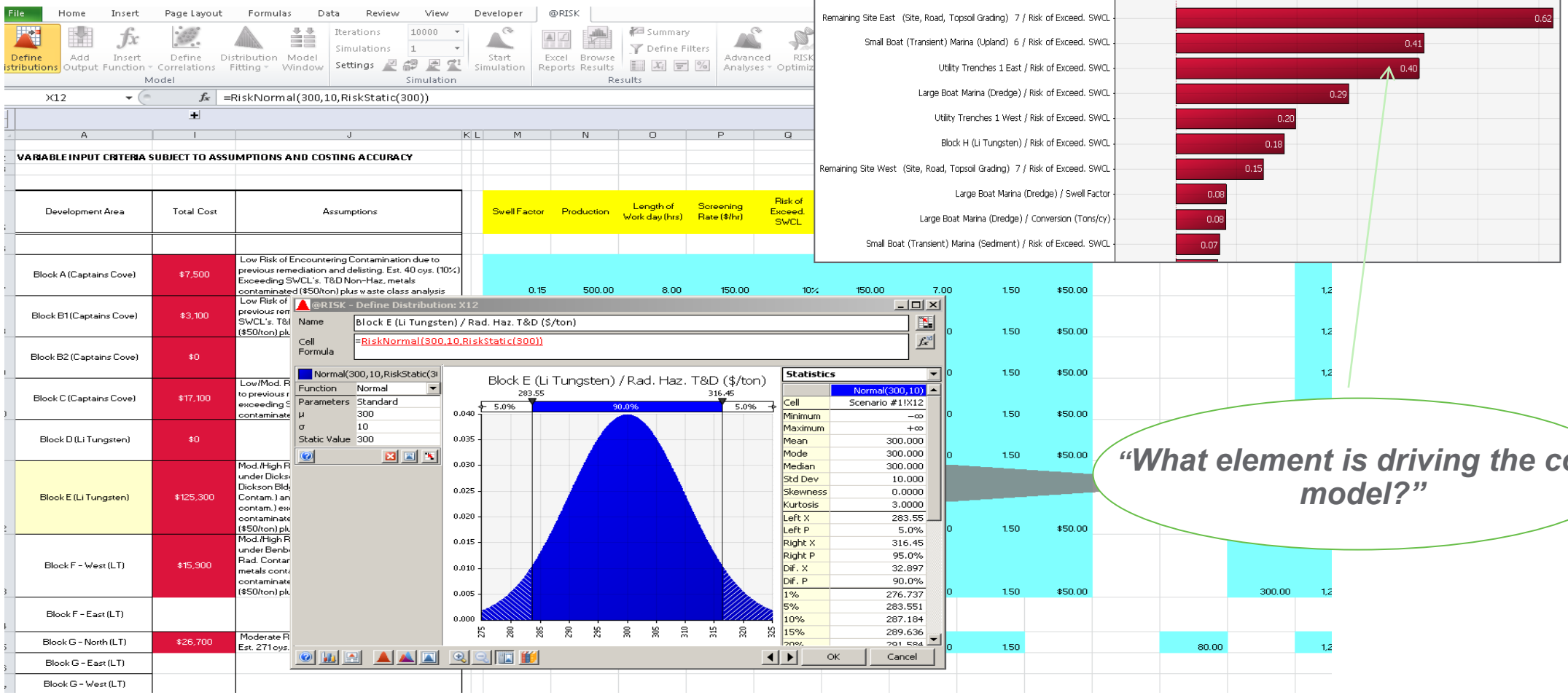
Acme Manufacturing Remediation	Quantity	Unit	Unit Cost	Extended Cost
General				
Mobilization/Demobilization	1	ls	$43,560.64	$ 43,561
Contractor Site Management	1	ls	$86,798.00	$ 86,798
Upland Excavation				
Site Preparation - Clearing/Grubbing	1	ls	$47,208.57	$ 47,209
Stormwater Pipe Realignment (48" dia and 20" dia HDPE)	210	lf	$299.37	$ 62,868
Install Upland Facilities (pads/roadways)	1	ls	$36,004.80	$ 36,005
Flood Protection (Porta-Dam)	210	lf	$299.37	$ 62,868
Excavate - Source Area	1,500	cy	$6.99	$ 10,485
Dust and Odor Controls	1	ls	$97,590.88	$ 97,591
Soil Dewatering	1,500	cy	$34.22	$ 51,330
ISS - Source Mixing	1,500	cy	$109.06	$ 163,590
Perimeter Cut Off Wall	1	ls	$31,052.07	$ 31,052
Off-Site Transport and Disposal of Excess Treated Soils (non-haz)	1,500	ton	$4.00	$ 6,000
Off-Site Transport and Disposal of Treated Pad Gravel (non-haz)	800	ton	$4.00	$ 3,200
Site Restoration and Backfill	1	ls	$29,273.08	$ 29,273
Thermal Treatment - Soils	1,500	tn	$82.94	$ 124,410
Thermal Treatment - Gravel From Pads	800	tn	$82.94	$ 66,352
Riverbank Excavation	-			
Excavate Contaminated Soil/Sediment	800	cy	$72.71	$ 58,168
Bank Soil Dewatering	800	cy	$34.22	$ 27,376
Bank Restoration	1	ls	$10,757.01	$ 10,757
Thermal Treatment - Soils	200	tn	$82.94	$ 16,588
Off-Site Transport and Disposal of Excess Treated Soils (non-haz)	600	ton	$4.00	$ 2,400
			Total:	**$1,037,880**

"What are the probability factors affecting cost and schedule?"



"With given information and acceptance of assumptions 88% likelihood remediation will exceed $ 1 Mil?"

Modeling Tools and Process (cont'd)



Case Study Cost Drivers

"54% of the variance in total estimated cost is explained by ISS-Source Mixing Quantity variance."

Acme Manufacturing Remediation					
General					
Mobilization/Demobilization	1	ls	$43,560.64	$	43,561
Contractor Site Management	1	ls	$86,798.00	$	86,798
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Sto			37	$	62,868
Inst			80	$	36,005
Flo			37	$	62,868
Exc			99	$	10,485
Dus			88	$	97,591
Soi			22	$	51,330
ISS			06	$	163,590
Per			07	$	31,052
Off-			00	$	6,000
Off-			00	$	3,200
Site			08	$	29,273
The			94	$	124,410
The			94	$	66,352
Riv					
Exc			71	$	58,168
Bar			22	$	27,376
Bar			01	$	10,757
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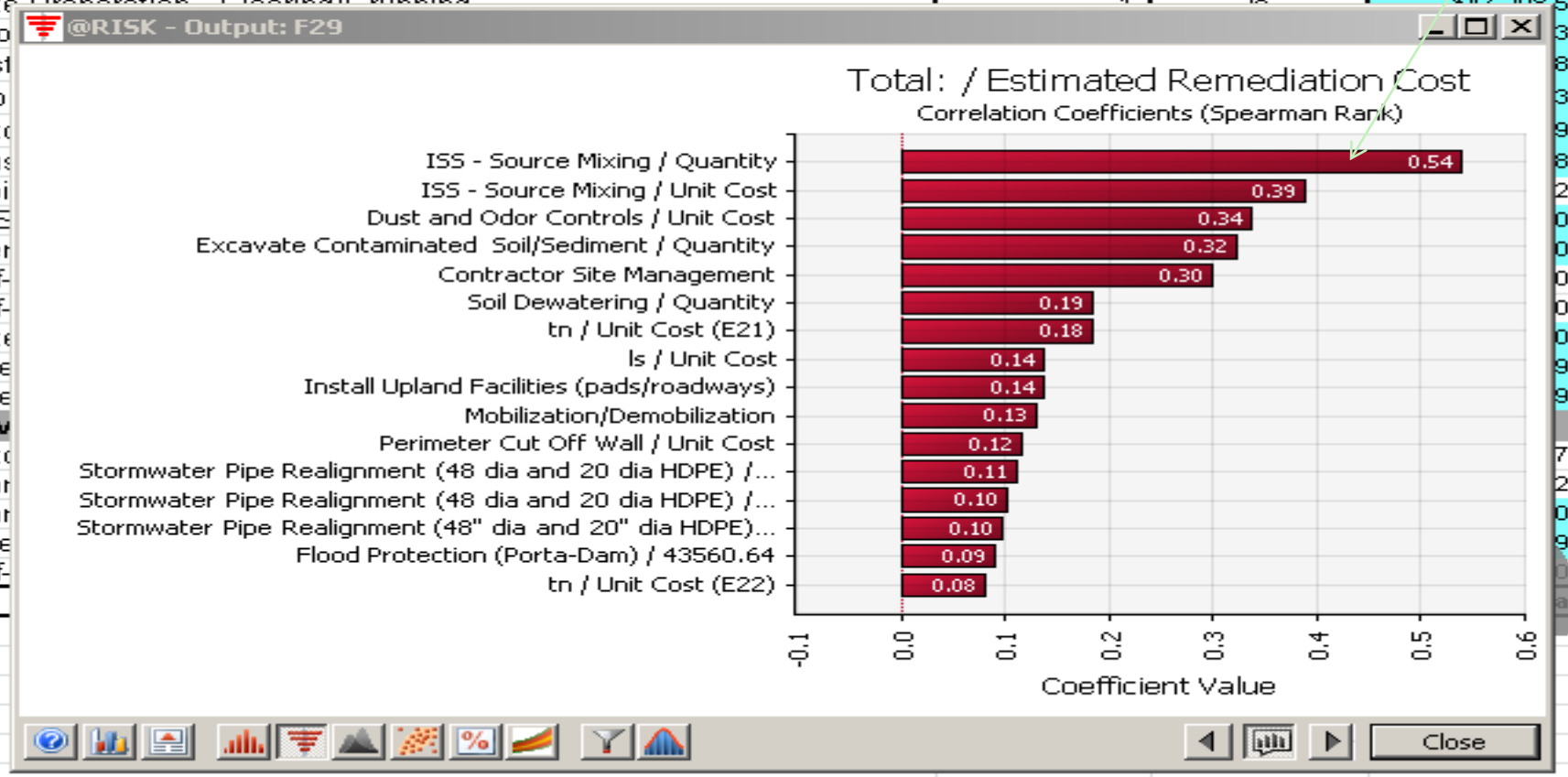

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QUANTIFICATION IS THE KEY

INSURANCE

Integration & Specialty Coverages

Is Brownfields development an Environmental Project or a Construction Project ?

- Integration of Environmental & Construction Insurance Coverages, and each party having adequate coverage
- Common Environmental Coverages
  - General Liability, Workers' Compensation, and Auto all standard
  - Consultants and Professional Liability (Errors and Omissions)
  - Contractors Pollution Liability
- Construction Coverage
- Owners' Coverage

Environmental Specialty Products

Contractors Pollution Liability (CPL) policies address gaps in coverage due to pollution-related exclusions on standard commercial general liability programs.

Contractors Pollution and Professional Liability (CPP) insurance addresses the unique risk exposures against the uncertainty of environmental and professional liabilities associated with the daily operations encountered by contractors and design-build firms.

Packaged General Liability, Professional and Pollution Liability for Contractors combines GL and Environmental Liability policies to help eliminate gaps in standard GL forms.

Owners & Contractors Protective Professional Insurance (OPPI & CPPI) offer project-dedicated professional liability insurance to protect a project owner or General Contractor from losses arising out of an architect's or engineer's negligence.

Environmental Impairment Liability (EIL), also known as Site Pollution Liability, protect property owners, operators, buyers, sellers, and developers from both known and unknown risks associated with pollution incidents on real property.

Cyber & Privacy Security coverage options to protect insureds from risks and substantial costs stemming from malware, ransomware, and other cyber threats – including financial losses, risks and costs of litigation, asset losses, and damage to corporate reputations.

Stock Throughput policies provide comprehensive seamless coverage for an insured's stock as it travels through the entire supply chain. Coverage commences the moment the insured assumes responsibility until their interest ceases eliminating potential gaps between multiple policies.

Real Estate & Hospitality leverages Synapse's expertise in environmental and complex casualty to provide coverage across all aspects of this specialized industry

Energy Casualty coverages from Synapse address the unique, wide-ranging risks facing oil/gas companies and utilities – whether the insured's focus is upstream, downstream, midstream, power generation, distribution, single location or a diverse portfolio of locations.

Combined Casualty for Manufacturers & Distributors combines GL and Environmental Liability policies into one blended policy form, resulting in more comprehensive overall coverage.

Product Recall expertise and policies from Synapse help mitigate risks and costs associated with recalled products, including litigation, effects ad distribution channels, shipping, marketing, and negative impacts on corporate reputation/brand equity.

Technical Property provides risk coverage for Industrial, Manufacturing and Energy Generation Occupancies. Varying technical expertise to obtain bespoke coverage for the unique exposure.

Inland Marine offering protection for movable property and equipment typically used in construction and transportation industries. Coverage includes contractors' equipment, warehouse legal liability and motor truck cargo.

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Contractor Pollution Liability (CPL)

Protects contractors from risks of bodily injury, property damage, defense, and cleanup as a result of pollution arising from contracting operations performed.

CLAIMS EXAMPLE

- Industry/Class of Business: Environmental
- Pollutant: Fly Ash
- Type of Claim: Bodily Injury
- Award Amount: $54,000,000
- Case name: *Queen v. Constellation Power Source Generation, 2008 WL 5567534 (MD, 2008)*
- Overview: Constellation owned a sand and gravel quarry in Maryland. For over ten years, Constellation used old pits at the quarry to dispose of coal ash from its coal-fired power plants. Contaminants including arsenic, lead and cadmium were detected in groundwater wells in the vicinity of the quarry. Area residents brought a class-action suit against Constellation and the quarry operator, alleging that the coal/fly ash had contaminated their drinking water, causing bodily injury and property damage.
- Potential implications: Although the environmental contractors involved in the transport and disposal of the coal and fly ash were not directly part of this litigation, there may be exposure for claims such as this where multiple parties are named in a suit
- Pipeline contractor, contractor installed something improperly

TARGET CLASSES

- Construction Trades (Carpenters, Mechanical, Drywall, Electrical, Masonry, Painting, Plumbing), General Contractors, Roofing, Street & Road, Construction Managers, Utility Contractors, Industrial Maintenance, Oil & Gas contractors, renewable contractors

KEY FEATURES

- Pollution Liability for all contracting operations
- First and Third-Party Transportation Pollution
- Blanket Non-Owned Disposal Site coverage
- Microbial Substances (Fungus)
- Legionella and Silt
- Financial Responsibility for Storage Tanks
- Emergency Expense Coverage
- Automatic coverage for newly formed entities or acquisitions for 90 days
- Sudden and Gradual Pollution coverage at insured owned sites
- Annual and Multiyear Terms available
- Practice or Project Specific Structure (with Extended Completed Operations if needed)
- Claims made and Occurrence-based coverage
- Defense outside the limits
- Project specific increased limits

LIMIT RANGE

- Limit for single carrier ranging from $500k-$50M (Depends on the carrier)
- Tower with limits of $100M+ are available utilizing multiple carriers

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Contractor Pollution Professional (CPP)

Addresses unique pollution and professional risks associated with the daily operations of contractor and design-build firms.

CLAIMS EXAMPLE

- **Industry/Class of Business**: Transportation/Hauler
- **Pollutant**: Hazardous Industrial Waste
- **Type of Claim**: Indemnification/Defense Costs
- **Award Amount**: $18,400,000
- **Case name**: *Emerson Elec. Co. v. Aetna Cas. & Sur. Co., 319 Ill.App.3d 218 (IL, 2001)*
- **Overview**: Emerson secured excess/umbrella comprehensive general liability ("CGL") policies with multiple insurers to cover its commercial activities (manufacturing a variety of industrial/consumer electronic products). Emerson initiated a claim after being charged with environmental property damage liability at approximately 60 environmental contamination sites, involving materials such as solvents, petroleum hydrocarbons and waste oil. Emerson's liability was predicated on its transportation of wastes. Standard Pollution exclusion provisions were present in each policy except one. The court focused on the sudden and accidental language within the pollution exclusion.
- **Potential implications**: The court explained that "'sudden and accidental' in a pollution exclusion clearly means both abrupt and unexpected." A temporal element was needed in such an interpretation. While the Circuit Court's decision was initially in the Insurers' favor, the previous holding was "Affirmed in part, reversed in part, and remanded."

TARGET CLASSES

- Construction Trades (Carpenters, Mechanical, Drywall, Electrical, Masonry, Painting, Plumbing), General Contractors, Construction Managers, Roofing, Street & Road Contractors, Utility Contractors, Excavation Contractors

KEY FEATURES

- Protective Professional Indemnity coverage
- First and Third-Party Transportation Pollution
- Blanket Non-Owned Disposal Site coverage
- Microbial Substances (Fungus)
- Mitigation of Damages (additional limit)
- Coverage for LEED Accredited Professionals
- Coverage for use of Building Information Modeling (BIM) design assist programs
- Coverage for Technology Services provided in the course of performing professional services
- Automatic coverage for newly formed entities or acquisitions for 90 days
- Practice or Project Specific Structure (with Extended Completed Operations if needed)
- CPL can be either Occurrence or Claims Made and Professional Liability is Claims Made
- Faulty Workmanship Coverage (via endorsement)
- Site Pollution Liability coverage (via endorsement)
- Defense Outside Limit coverage (via endorsement)

LIMIT RANGE

- Limit for single carrier ranging from $1M-$25M (Depends on the carrier)
- Tower with limits of $100M+ are available utilizing multiple carriers

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Environmental Impairment Liability

Protects property owners, operators, buyers, sellers, and developers from known and unknown pollution risks associated with an insured location.

CLAIMS EXAMPLE

- **Industry/Class of Business**: Commercial/Office Building
- **Pollutant**: Mold
- **Type of Claim**: Personal Injury/Property Damage
- **Award Amount**: $8,860,000
- **Case name**: *R. Paul Bauer Jr. et al. v. Barton-Malow Co. (FL, 1998)*
- **Overview**: A new courthouse building was constructed in Polk County in 1987. Over the next five years, substantial water intrusion and mold growth issues were observed in the building, and employees were diagnosed with "Sick Building Syndrome." Approximately 183 employees brought claims against various defendants, including the general contractor.
- **Potential implications**: The jury award and settlement here illustrate how the awards can vary greatly, ranging here from $30,000 to $4,000,000. In addition, following an engineering investigation that discovered multiple construction defects that facilitated water and moisture access through various means, such as via the roof and windows, the building had to close for reconstruction and the cost for this more than three-year reconstruction project surpassed the costs associated with the original construction.

TARGET CLASSES

- Real Estate, Mergers & Acquisitions, Private Equity, Adaptive Reuse & Brownfields, Institutional, Industrial, Redevelopment Projects, Waste Disposal & Recycling Facilities, Agricultural Facilities, Energy Facilities

KEY FEATURES

- Coverage for unknown, historic, and operational pollution releases
- On & Off-site Clean-up of Soil/Groundwater
- Coverage for Third Party Bodily Injury and Property Damage
- First and third party clean up
- Indoor Air Quality/Mold & Legionella
- Emergency Expense Coverage
- Business Interruption and Contingent Business Interruption
- Transportation Pollution Liability
- Non-owned Disposal Site Liability
- Third-Party Claims for Asbestos and Lead Based Paint
- First-party diminution of value (DIV)
- Aboveground and/or Underground Storage Tank Coverage
- Annual and Multiyear Terms available
- Practice and Transactional Specific Terms (with Extended Reporting Period if needed)
- Claims made coverage with pre-existing and/or new conditions available

LIMIT RANGE

- Limit for single carrier ranging from $1M-$50M (Depends on the carrier)
- Tower with limits of $100M+ are available utilizing multiple carriers

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Combined Casualty Insurance

Combined General Liability and Environmental Liability policies help minimize gaps present in standard general liability policies by blending General Liability and Pollution liability into one comprehensive policy form.

TARGET CLASSES

Programs can be customized to address the needs of manufacturers, distributors, and processing operators including but not limited to:

- Chemical
- Plastics and Resins
- Cosmetic
- Valves/Fittings/Metal Products
- Oil and Gas
- Import and Export
- Recycling

COVERAGE OFFERINGS

- Comprehensive General Liability
- Pollution Legal Liability
- Hostile Fire
- Products Pollution
- Contracting Operations
- Transported Cargo
- Emergency Response Costs

KEY FEATURES

- Includes traditional GL coverages within the policy form with many common ISO upgrades
- Coverage for pollution arising from an Insured's locations or operations including:
  - Non-owned Locations
  - Non-owned Disposal Sites
- Transportation coverage including loading and unloading
- Minimum Premiums: $15,000 - $20,000
- Minimum Deductible-Pollution: $10,000-$25,000
- Excess Limits including pollution: up to $25,000,000 (layering available for higher capacity)
  - Excess coverage over the WC & Auto
- Commonly offers competitive rates with Standard Market ISO placements

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Owners Protective Professional Indemnity (OPPI)

Provides professional liability insurance to protect a project owner from losses arising out of the architect or engineers' negligence

CLAIMS EXAMPLE

- **Industry/class of business**: Scrap Metal Facility/ Auto Salvage
- **Pollutant(s) involved**: Thorium
- **Type of Claim:** Property Damage
- **Demand amount:** $11,000,000 **- Award amount**: $0.00
- **Case name:** Hogan vs U.S., 407 F 3rd 778 (OH, 2005)
- **Overview**: Landowner operated a scrap metal and automobile salvage yard in Ohio. Upon purchasing 2,900 pounds of scrap metal from the U.S. Air Force, the landowner subsequently discovered that the scrap metal contained thorium, a radioactive element. The cleanup and removal of the material cost $80,000, and the landowner subsequently brought **bodily** injury/property damage claims against the U.S. government in excess of $11M.
- **Potential implications:** While the landowner's claims were dismissed by the court, the case demonstrates potential exposure facing scrap metal operators from naturally occurring radioactive material in scrap materials.

TARGET CLASSES

- Architectural and Engineering Firms
- Hospitality
- Hospitals
- Schools
- Arenas
- Commercial and retail offices.

KEY FEATURES & COVERAGE

- Protection for projects owners in the event of significant loss
- Protective Professional indemnity
- Protective contractors' pollution
- Third party claim defense & Indemnity
- Excess Indemnity on first party claims brought against the design team
- Primary Coverage if the design professional's policy limits are eroded by another claim
- Cost effective alternative to project insurance
- Difference In conditions coverage above underlying professional liability
- Project specific or "blanket" Basis for all construction projects of the new owner

LIMIT RANGE

- Individual carrier limits ranging from $1M to $ 25M
- Towers with limits of $100M+ available using multiple carriers

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Packaged CGL and Pollution Liability for Contractors (CGL)

Assists in minimizing the gaps present in the standard general liability policies by blending general liability and pollution liability into one

CLAIMS EXAMPLE

- **Industry/class of business**: Excavation Contractor
- **Pollutant(s) involved:** Natural Gas
- **Type of claim:** Property Damage
- **Award amount:** $1,530,000
- **Case name:** Acuity v. Chartis Specialty Insurance Company, 361 Wis.2d 396 (WI, 2015)
- **Overview**: A general contractor was hired by the Wisconsin Department of Transportation to perform road construction, including subsurface excavation work. While excavating, the contractor encountered a pressurized natural gas pipe and incorrectly concluded it was not in use. While moving the pipe, the pipe was damaged and released natural gas into the air. The escaped gas exploded, causing a fire, damaging nearby buildings and injuring several people in the vicinity of the explosion. The contractor maintained both Commercial General Liability (**CGL**) coverage and a separate Contractors' Pollution Liability policy. Four separate lawsuits were brought against the contractor, including claims for bodily injury and property damage. These claims were ultimately settled for over $1.5M in damages.
- **Potential implications**: This contractor benefited from maintaining both CGL and Contractors' Pollution coverage, as its insurers were required to share equally in providing a defense and indemnity to the third-party claims. The Court's holding that the release of natural gas represents a "pollution condition" means that an insured relying solely on a CGL policy for coverage may not be covered for similar claims.

TARGET CLASSES

- Waste brokers
- Laboratories
- Environmental consultants and Engineers
- Environmental redemption contractors

KEY FEATURES & COVERAGE

- Comprehensive General liability
- Contractors' pollution liability
- Professional Liability
- Excess liability available
- Site pollution coverage on sudden and accidental basis for temporary locations utilized for construction activities
- Mold/ Legionella coverage
- Blanket non owned disposal site coverage
- Emergency repose costs
- Transportation coverage including loading and unloading
- Employee benefits liability coverage
- Blanket waiver of subrogation
- operations and primary and non-contributory clause
- Common Iso upgrades
- Rents and leases for their company operation
- Available with total pollution Exclusion or time

LIMIT RANGE

- Individual Carrier limits ranging from $1M to $25M
- Towers with limits of $100M+ available using multiple carriers

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A & E Professional Liability

Provides a wide range of protection to professionals and their staff, allowing your insured to concentrate on running and operating their company.

CLAIMS EXAMPLE

- **Industry/class of business**: Architect/ Engineer/ Consultant / Construction/ Interior Design Professionals
- **Pollutant(s) involved**: Fuel Oil
- **Type of claim**: Professional Liability / Indemnification
- **Demand amount:** $1,350,000 **Award amount: $**560,982.00
- **Case name**: Becket v. Kovacs, 1995 WL 765563 (NY, 1995)
- **Overview**: This claim arose out of the construction of a Sheraton Hotel in Stamford, Connecticut. After several delays and issues in the construction of the hotel, the project owner brought claims against the general contractor and architect seeking over $10M in damages. One of the construction issues involved interior lighting and chandelier work, for which the architect had subcontracted with an **interior design professional**. The architect brought claims for indemnification against the interior **design** firm, alleging defects in the interior **design** drawings and specifications. The litigation with the owner settled for $2.8M, of which the architect was responsible for $1.35M and sought from the designer.
- **Potential implications**: In the context of design and construction flaws, the Court examined how an indemnification provision would operate to compensate the other party for errors and omissions found within another's professional work. Ultimately, it found that Kovacs, a subcontractor, was responsible for a total of $560,982.00 in damages that encompassed cost delays and the direct costs incurred here.

TARGET CLASSES

- Architects
- Engineers
- Construction managers
- Designers
- Inspectors

KEY FEATURES & COVERAGE

- Covers bodily injuries, property damage and pollution coverage
- Punitive damages coverage where insurable
- Copyright & Trademark coverage
- Final adjudication
- Deducible credit for voluntary mediation
- Unlimited risk management services available to insured
- Personal injury
- Choice of counsel with insurers consent
- Waiver of subrogation rights when insured agrees to prospectively waive via written contract

LIMIT RANGE

- Individual carrier limits ranging from $1M to $25M (Depending on the insured's operations and insurance product needed)
- Towers with limits of $100M available using multiple carriers

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Reps and Warranties Coverage

- Representations and warranties (R&W) insurance is a contract between a buyer or seller and an insurance company that protects the buyer from losses due to breaches of representations and warranties.
- It's designed to replace the seller as the liable party for breaches, which can reduce the seller's post-close risks.
- R&W insurance can also help M&A deals close by shifting the financial risk for breaches of representation and warranties to an insurance firm. This can enable sellers to receive all the purchase price proceeds at closing.

LEGAL

Best Practices for Risk Management In Transaction-Related Contracts

- Build a professional integrated project team with adequate insurance coverage.
- Identify and discuss potential risks and liabilities early in the transaction.
- Determine how best to mitigate those risks and liabilities in consultation with the project team.
- Consider timing and coordination of investigation, remediation, and construction.
- Understand the terms of applicable insurance coverage.
- Properly document those mitigation strategies in consistent contracts – purchase and sale agreements, insurance policies and regulatory filings.

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Scope and Timing of Due Diligence

- Consultant and Contractor Selection
  - Reputation, Fit, Reps & Warranties, Contractors Pollution Liability Coverage
- Phase 1/Preliminary Assessment
- Off-Site Sources and Impacts
- Federal and State Land Use Regulations (CAFRA, Wetlands, Flood Hazard, Stormwater Management, Local Land Use Restrictions)
- Historic and Cultural Resources
- Sewer Service Areas
- Access
- Open Public Records Act and Freedom of Information Act Requests
- Permit Readiness Checklist

Environmental Regulatory Considerations

- Regulatory Compliance Obligations (SRRA, ISRA and RCRA)
- Pre-Closing Liabilities
- Post-Closing Liabilities
- Remediation Funding Source/Financial Assurance Obligations
- Unknown or Undiscovered Contamination
- Emerging Contaminants
- Change in law

Environmental Regulatory Considerations (cont'd)

- Potential CERCLA, RCRA, Spill Act Liabilities
- Third Party Claims for Bodily Injury and Property Damage
- Natural Resource Damages
- Wetland and Riparian Zone Mitigation Requirements
- Tidelands
- Potential Public Access Requirements
- Sewer Service Area Requirements
- Public Opposition/Environmental Justice

Other Transactional Considerations

- Construction Risks:
  - Asbestos
  - Lead-based Paint
  - Indoor Air Quality – Vapor Intrusion
  - Drinking Water
  - Unknown/Undiscovered Contamination
- Deadlines for Milestones in Remediation and Construction
- Escrows outside of the Remediation Funding Source/Financial Assurance Obligations
- Insurance Policies – Historic CGL, Contractors Pollution Liability Coverage, Pollution Legal Liability, Excess over Indemnity
- Potential Cost Recovery

Contractual Environmental Indemnity and Insurance Provisions

- Match Indemnity & Release Language to Insurance Policy Terms
  - Coverage Type (PLL, Cost Cap)
  - Scope of Coverage (Covered Sites, Audit Period, NRD, etc.)
  - Policy Term
  - Coverage Limits
  - Named Insured
  - Covered Sites/Non-Owned Disposal Sites
  - Additional Named Insured v. Additional Insured
  - Timing for binding coverage
  - Allocation of Premiums

OPEN DISCUSSION

Let's Talk

THANK YOU!

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