ELIMINATING OBSTACLES TO BETTER ENVIRONMENTAL RISK MANAGEMENT FOR MUNICIPALITIES: A PROGRAM FOR IMLA

Presented by Clifford P. Case
Partner and Co-Director, Environmental Practice Group
Carter Ledyard & Milburn LLP
New York, New York

Health and Environment/Litigation and Risk Management Sections Joint Meeting
International Municipal Lawyers Association 69th Annual Conference
San Antonio, Texas – October 3, 2004

I. Introduction

Lawyers representing municipalities have a responsibility to help their clients first understand the environmental risks they face and then manage them intelligently. Because such risks can seem extremely daunting, and because they derive from a body of law with which many municipal attorneys are not fully familiar, the tendency often is either to ignore such risks entirely or to assume that they are unsolvable and thus block progress entirely. Both approaches are wrong, the first because it may leave the municipality exposed to significant environmental liability, and the second because it can lead to the unnecessary abandonment of important projects. Environmental insurance and contractual risk transfer can often provide solutions, and IMLA can help its members put these solutions to work, through both information sharing and development of programs specifically tailored to municipal needs.

II. Environmental Liabilities Affecting Municipalities

Environmental liabilities can become an issue for municipalities from sites they own or operate (or previously owned or operated), or from sites they may wish to see redeveloped. In the first instance, the liability is direct, based upon laws such as the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[1] which casts a wide net of legal responsibility for release of a broad range of hazardous substances. Included under CERCLA as "potentially responsible parties" or PRPs are persons who own or operate a "facility," or who owned or operated a facility when hazardous substances were disposed of; persons who arranged for the disposal of hazardous substances at a facility; and persons who transported hazardous substances to a facility.[2] As owners or operators of sites where a release is occurring or has occurred, municipalities can have CERCLA responsibility unless they qualify for exemptions or defenses. CERCLA liability for cleanup costs and damage to natural resources is strict, joint and several, and retroactive.[3] Examples of municipal sites for which liability can attach are landfills (operating or closed), wastewater treatment plants, utility facilities,

---

1 42 U.S.C. § 9601 et seq.

2 42 U.S.C. § 9607(a)(1)-(4).

3 United States v. Alcan Aluminum Corp., 990 F.2d 711 (2d Cir. 1993).

including especially former manufactured gas plants (if municipally owned or operated), and public parks on lands reclaimed from prior polluting industrial uses. Liability can also attach due to contamination from adjoining properties.

But environmental liability is not only a problem for municipalities with respect to sites that are (or once were) municipally owned or operated. CERCLA and its state analogues can also disrupt municipal redevelopment plans for unowned properties, either by causing a municipality to hesitate before acquiring a contaminated site to prepare it for redevelopment or by creating orphan sites that no one is willing to buy because of their contamination.

The degree of difficulty posed by environmental liability of course varies depending upon the amount of contamination present. Heavily contaminated sites that qualify for listing on the National Priorities List set up under CERCLA are a much greater problem than so-called "brownfields" sites, where the contamination may be minimal, or even by reputation only. The federal government and many states have adopted statutes intended to encourage the redevelopment of brownfields sites through exemptions for "innocent" or "bona fide" purchasers of such sites, limitations on successor liability and grants of financial incentives.[4]

But although such brownfields programs are helpful, they do not solve all problems. For example, the Federal Brownfields Act exempts purchasers from CERCLA liability if they undertake "all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices."[5] While U.S. EPA is in the process of defining by regulation the term "appropriate inquiries,"[6] there can in the nature of things be no bright line test for how much inquiry is "appropriate," and thus no absolute assurance in advance that the exemption is available. (Note also that the Federal Brownfields Act provides that the person seeking to be exempted from liability has the burden of proving entitlement to the defense "by a preponderance of the evidence."[7]) Other vague terms are also involved: after conducting "appropriate inquiries," a person seeking to be treated as a "bona fide prospective purchaser" must "exercise[] appropriate care. . . by taking reasonable steps" to prevent releases and limit exposure to hazardous substances.[8]

Ambiguities and gaps exist in state brownfields programs as well. For example, in New York's brownfields program, the certificate of completion issued by the New York

---

[4] For the amendments to CERCLA incorporating such provisions, see the Small Business Liability Relief and Brownfields Revitalization Act, Pub. Law No. 107-118, signed into law January 11, 2002 (the "Federal Brownfields Act"). An example of a state brownfields program is Chapter 1 of the Laws of 2003 in New York, which modifies the Environmental Conservation, Navigation, Tax, General Municipal and Public Health laws.

[5] 42 U.S.C. §§ 9601(40)(B)(i), 9601(35)(B)(i)(I), 9607(q)(1)(A)(viii)(I).

[6] 69 Fed. Reg. 52542 (Aug. 26, 2004).

[7] 42 U.S.C. §§ 9601(40), 9607(b)(3), 9607(q)(1)(B).

[8] 42 U.S.C. § 9601(40)(D).

State Department of Environmental Conservation following satisfactory completion of remediation work at a brownfields site can be modified or revoked, stripping away liability protection, for "good cause." Also, the protection granted does not in any case apply to personal injury or wrongful death claims.[9]

In short, while the new brownfields programs are helpful in reducing potential liability for municipalities and other persons undertaking brownfields redevelopment projects, they are far from perfect: cautious municipal and private redevelopers (and their funding sources) will in many cases want more protection than the bare language of the statutes provides.

III. Environmental Insurance

Broad form general liability insurance could previously be relied upon to cover environmental risks. However, starting some 30 years ago, the increasing if belated concern about the extent of harm to the environment in our industrialized society and the resulting proliferation of claims for environmental damage and pollution remediation by private citizens, public interest groups and government officials against insureds, and the consequent claims by insureds against their insurers, led those insurers first to restrict (by use of the "sudden and accidental" pollution exclusion) and then to eliminate (by use of the "absolute" pollution exclusion) coverage for environmental risks under newly issued general liability policies.

Only in relatively recent years have new insurance coverages for environmental risks been developed and marketed. These policies are generally written on a claims-made, rather than an occurrence, basis – that is, only claims made against the insured and reported to the insurer during the policy period (or an extended reporting period, if available) are covered. They are also far from standardized – many, if not most, of the terms of the policy can be and are adjusted to the specifics of the situation, rather than being "boilerplate," as with policies covering many other types of risk. Thus a municipality seeking to obtain such coverage must be educated as to what the issues are and what "play" exists in the insurer's positions, and prepared to negotiate terms tailored to its needs. Careful attention must be devoted to the descriptions of what is and is not covered, the policy definitions, exclusions and conditions.

While specialized coverages (such as for contractors carrying out remediation projects, or particular types of business) are available, the types of coverage most relevant to the needs of municipalities are two: pollution legal liability and cost cap. In general, pollution legal liability insurance covers losses (after taking into account a deductible or self-insured retention) of the insured, up to an agreed limit, arising from claims for bodily injury, property damage and clean-up costs from the release of pollutants at or from specified locations. Defense costs are typically covered, if reasonable and necessary and (in some cases) if the insurer's consent is obtained, but they count against the policy limits. Typical exclusions include pre-existing conditions known

[9] N.Y. Envtl. Conserv. Law §§ 27-1419(5)(C), 27-1421(6).

to the insured, contractually assumed liabilities (unless the contract is reviewed and approved by the insurer and listed on a schedule to the policy), underground storage tanks (unless the tank is similarly scheduled), criminal fines and penalties, employer liability, asbestos, lead paint, microbial matter, war and terrorism. A Phase I environmental site assessment is usually required; a Phase II ESA may be, depending on conditions.

Cost cap insurance provides coverage up to an agreed limit for increases in the costs of carrying out a remediation plan approved by a regulatory agency or by the insurer over the costs in an estimate satisfactory to the insurer. Coverage may be limited to costs arising from pollution not previously identified, pollution in amounts greater than originally estimated, or changes in regulatory standards. There is typically a deductible or self-insured retention equal to the estimated cost of the cleanup plus a buffer (usually not less than 10% of the cost estimate). Premiums are likewise based on a percentage of the estimated cost of the cleanup. Legal expenses (such as those incurred in negotiating the approved cleanup plan with regulatory officials) and post-cleanup monitoring costs are typically excluded from coverage, as are costs resulting from changes in the remedial plan that are not required and not consented to by the insurer. Other exclusions may include war, terrorism, faulty workmanship, bankruptcy, and professional negligence.

III. Environmental Risk Transfer

Contractual environmental risk transfer is a relatively new approach related to environmental insurance of which municipalities should also be aware. Under this arrangement, a party with environmental liabilities at a site contracts with another party to perform for a fixed price whatever cleanup is necessary to make the site useful once again and comply with all governmental requirements, and to assume environmental site risks. The contracting party's performance is assured through its purchase of remediation cost cap and legal liability insurance naming both parties. This arrangement permits a responsible party to effectively "cash out" of the environmental liabilities associated with a site all at once, simultaneously transferring any residual risks associated with the site to the entity that has assumed the cleanup obligation.

IV. Insurance and Risk Transfer Issues

Municipalities need to consider both general issues and issues specific to them when evaluating environmental insurance or environmental risk-transfer arrangements. Perhaps the most important general issue is that these policies and arrangements are relatively new and their terms are almost infinitely negotiable. There is thus a lack of experience as to how exactly key terms may be interpreted, what positions insurers may take in case of a disagreement with insureds, and how disputes over coverage may be resolved. Differences of opinion may be expected to arise over the extent of cleanup required in a cost cap policy, whether various conditions were or were not "known" and properly disclosed to the insurer in the policy application, and what constitutes bodily injury and property damage in certain situations. The appropriateness of certain standard exclusions, for items such as asbestos, lead paint and radon, or for contractually assumed obligations or intentional acts, may also be general issues. Where there are multiple

possible insureds, it is important to determine (and limit) the responsibility of one insured for the acts, representations or misrepresentations of another.

In addition to these general issues, municipalities often have special concerns. These may include policy limitations on a change in use for the property covered, where redevelopment plans have not yet progressed to a point where site uses are fixed, or where plans may change due to redevelopment needs; the ability to extend the coverages afforded to a purchaser of property intended for redevelopment without affecting the municipality's coverages; the ability to obtain coverages not limited by special legal protections available to governments, so that full coverage is ultimately made available to private purchasers of a site for redevelopment; subrogation provisions that would allow insurers to sue in the municipality's name; reluctance by the insurer to consent to suit in local state or federal courts; and any requirements that the municipality consent to settlements containing other than monetary terms (such as land-use restrictions).

V. Why Municipalities Underuse Environmental Insurance and Risk Transfer

It would appear that few municipalities today use environmental insurance and risk-transfer arrangements to any significant degree.[10] The reason may well be that they (understandably) find the environmental insurance and risk-transfer field to be too complicated and insufficiently standardized to deal with comfortably: there are too many kinds of coverage available, and the terms and conditions of coverage are constantly evolving and not easily understood by a non-specialist. As the attached summary of a typical insurance policy issued in 2003 to provide coverage of environmental risks for several properties being transferred from one owner to another demonstrates, the perception of complexity is not wrong: the welter of definitions, exclusions and conditions – often generally present in insurance policies but worse in the custom-crafted area of environmental coverage – presents a real obstacle to entry.

Yet municipalities often need or can benefit from environmental insurance and contractual risk transfer, whether to limit liabilities from ownership or operation of contaminated properties, or to cover the gaps noted above in statutes intended to encourage brownfields redevelopment and reuse. IMLA may be well positioned to provide a solution to this dilemma.

VI. IMLA's Role in Environmental Insurance and Risk Transfer

Through its Health and Environment and Litigation and Risk Management Sections, IMLA has the resources to address the problem of municipal underuse of

---

[10] See Peter B. Meyer and Kenneth M. Chilton, "Environmental Insurance for Brownfields Redevelopment: A Feasibility Study," prepared by the E.P. Systems Group, Inc. for the Office of Policy Development and Research, U.S. Department of Housing and Urban Development (1997). New York's new brownfields program encourages environmental insurance by providing a credit of up to 50% of the cost of premiums paid for environmental remediation insurance. The credit cannot exceed $30,000. N.Y. Tax Law § 22(a), (c).

environmental insurance and contractual risk transfer. Among the tasks that IMLA could undertake are serving as an information source for municipal lawyers through regular articles in Municipal Lawyer magazine, presentations at IMLA conferences and seminars, and IMLA-sponsored teleconferences. IMLA could also collaborate with public risk pools, and work either on its own or with such risk pools (and other interested parties, like the National League of Cities) to develop policy specifications, standardized policy language and even model policies with the needs of municipalities and municipal projects in mind. IMLA could also establish liaisons with insurers to negotiate model policy terms or at least inform insurers of municipal needs. Follow-ups could note trends in coverages becoming available, costs and terms, as well as municipal experiences, both good and bad, with such coverages. In carrying out such a project, IMLA could build on the efforts of several states that have already developed programs to encourage use of environmental insurance in brownfields redevelopment.[11]

This interesting and constructive project can help IMLA to fulfill in the environmental area IMLA's overall mission "to serve local government lawyers and to advance the interests of local government law."

Attachment: Summary of Tail Environmental Insurance Policy

[11] States with such programs currently include California, Connecticut, Massachusetts and Wisconsin. See Ann M. Waeger, "Current Insurance Policies for Insuring Against Environmental Risks," Fifth Annual Advanced ALI-ABA Course of Study on Environmental Insurance, Chicago, Illinois, June 17-18, 2004.

SUMMARY OF [XXXXXXXX] TAIL ENVIRONMENTAL INSURANCE PROVISIONS IN ISSUED POLICY NO. [XXXXXX][1]

I. Coverages

Coverage	Description[2]	Retention[3]	Limits[4]	Sources
A. Third-Party Claims for On-Site Clean-Up of Pre-Existing Conditions	Pays **Loss** of **Insured** for **Claims** for **Clean-Up Costs** from **Pollution Conditions** on or under the **Insured Property** that commenced prior to the **Continuity Date**, if **Claims** are first made against **Insured** and reported to Company in writing during the **Policy Period** or **Extended Reporting Period** if applicable.[5]	$50,000	$20,000,000	Endorsement Nos. 1, 22, 26
B. On-Site Clean-Up of New Conditions	**COVERAGE NOT INCLUDED**	XXXXX	XXX	XXXX
C. Third-Party Claims for On-Site Bodily Injury and Property Damage Resulting from Pre-Existing Conditions	Pays **Loss** of **Insured** for **Claims** for **Bodily Injury** or **Property Damage** from **Pollution Conditions** on or under the **Insured Property** that commenced on or after the **Retroactive Date** but prior to the **Continuity Date**, if such **Bodily Injury** or **Property Damage** occurs while the person or property is on the **Insured Property**, and if **Claims** are first made against **Insured** and reported to Company in writing during the **Policy Period** or **Extended Reporting Period** if applicable.	$50,000	$20,000,000	Declarations Item 7 and Endorsement Nos. 17, 22, 26
D. Third-Party Claims for Off-Site Clean-Up Resulting from Pre-Existing Conditions	Pays **Loss** of **Insured** for **Claims** for **Clean-Up Costs** from **Pollution Conditions** beyond the boundaries of the **Insured Property** that commenced prior to the **Continuity Date** and migrated from the **Insured Property**, if **Claims** are first made against **Insured** and reported to the Company in writing during the **Policy Period** or **Extended Reporting Period** if applicable.	$50,000	$20,000,000	Section I.1 and Endorsement Nos. 22, 26
E. Third-Party Claims for Off-Site Clean-Up Resulting from New Conditions	**COVERAGE NOT INCLUDED**	XXXXX	XXX	XXXX
F. Third-Party Claims for Off-Site Bodily Injury and	Pays **Loss** of **Insured** for **Claims** for **Bodily Injury** or **Property Damage** from **Pollution Conditions** beyond the boundaries of the **Insured Property** that commenced on or after the	$50,000	$20,000,000	Declarations Item 7 and Endorsement Nos.

[1] All identifying information has been deleted.
[2] Defined terms are in bold.
[3] These amounts are not deductibles, but rather self-insured retention. Self-insured retention must be paid in full by insured before insurer is required to pay any amounts under policy. See Endorsement No. 4.
[4] These amounts are limits both for each incident and for each coverage type in the aggregate. The limit for the entire policy in the aggregate is also $20,000,000. See Declarations Items 3 and 4, Section V.A, B, C and Endorsement Nos. 21, 22, 25, 26 and 27. There is a separate limit for costs, charges and expenses incurred in the defense, investigation or adjustment of covered Claims equal to 25% of the highest limit for any coverage type, and since the highest limit is $20,000,000, the limit for defense costs would be $5,000,000. Defense costs are not included within the definition of Loss and do not reduce the limits of liability for any coverage. See Endorsement No. 2.
[5] Insured is entitled to an automatic Extended Reporting Period of 60 days following termination of coverage (assuming no replacement coverage has been purchased), and may purchase an optional Extended Reporting Period of up to 40 months if it is requested within 30 days following termination of coverage (except in the event of nonpayment of premium). See Section VII.

Property Damage Resulting from Pre-Existing Conditions	**Retroactive Date** but prior to the **Continuity Date** and migrated from the **Insured Property**, if **Claims** are first made against **Insured** and reported to Company in writing during the **Policy Period** or **Extended Reporting Period** if applicable.			17, 22, 26
G. Third-Party Claims for On-Site Bodily Injury, Property Damage or Clean-Up Costs – Non-Owned Locations	Pays **Loss** of **Insured** for **Claims** for **Bodily Injury** or **Property Damage** of parties other than the owners, operators or contractors of a **Non-Owned Location** or their employees, or **Clean-Up Costs** from **Pollution Conditions** on or under the **Non-Owned Location** that commenced prior to the **Continuity Date**, if **Claims** are first made against **Insured** and reported to Company in writing during the **Policy Period** or **Extended Reporting Period** if applicable.	$50,000	$20,000,000[6]	Endorsement Nos. 18, 21, 25, 27
H. Third-Party Claims for Off-Site Bodily Injury, Property Damage or Clean-Up Costs – Non-Owned Locations	Pays **Loss** of **Insured** for **Claims** for **Bodily Injury**, **Property Damage** or **Clean-Up Costs** from **Pollution Conditions** beyond the boundaries of the **Non-Owned Location** that commenced prior to the **Continuity Date** and migrated from the **Non-Owned Location**, if **Claims** are first made against **Insured** and reported to Company in writing during the **Policy Period** or **Extended Reporting Period** if applicable.	$50,000	$20,000,000[7]	Endorsement Nos. 18, 21, 25, 27
I. Pollution Conditions Resulting from Transported Cargo	Pays **Loss** of **Insured** for **Claims** for **Bodily Injury**, **Property Damage** or **Clean-Up Costs** from **Pollution Conditions** caused by **Transported Cargo** that commenced prior to the **Continuity Date**, if **Claims** are first made against **Insured** and reported to Company in writing during the **Policy Period** or **Extended Reporting Period** if applicable. Coverage cannot be used to evidence financial responsibility of any Insured.	$50,000	$20,000,000	Declarations Item 3 and Endorsement No. 19
J. Business Interruption	**COVERAGE NOT INCLUDED**	XXXXX	XXX	XXXX

II. Selected Defined Terms

Term	Definition	Sources
Additional Insured	See Endorsement No. 5 for schedule of Additional Insureds and limitations on coverage	Endorsement No. 5
Bodily Injury	Physical injury, sickness, disease, mental anguish or emotional distress, including death resulting therefrom	Endorsement No. 13
Claim	Written demand received by the Insured seeking a remedy or alleging responsibility on the part of the Insured for Loss (under Coverages A through I)	Section VIII.C
Clean-Up Costs	Reasonable and necessary expenses (including legal expenses incurred with Company's consent, which shall not be unreasonably withheld or delayed) for investigation, removal, remediation or disposal of soil, surface water, groundwater or other contamination to the extent required by Environmental Laws or that have been actually incurred by the United States or any state, Canada or any province, any political subdivision, or third parties. Costs incurred with Company's consent, which shall not be	Sections VIII.D, VIII.Z

[6] Coverage amount for generic locations remains at $5,000,000. See Endorsement No. 25.
[7] Coverage amount for generic locations remains at $5,000,000. See Endorsement No. 25.

	unreasonably withheld or delayed, to repair or restore property damaged during the conduct of a clean-up are included.	
Continuity Date	[XXXXXX], or in certain cases [XXXXXX] or [XXXXXX].	Declarations Item 8 and Endorsement Nos. 17, 18, 19, 22, 26
Extended Reporting Period	May be either automatic or optional. See Note 4 and Section VII	Section VIII.G
Inception Date	[XXXXXX]	Declarations Item 2 and Section VIII.I
Insured	The Named Insured and any past or present director, officer, partner or employee acting within the scope of his or her duties	Section VIII.J
Insured Contract	A contract submitted to and approved by the Company and listed in an endorsement to the policy	Section VIII.K
Insured Property	See Endorsement Nos. 22 and 26 for lists of Insured Properties	Declarations Item 5 and Endorsement Nos. 22, 26
Loss	Monetary awards or settlements of compensatory damages; punitive damages; fines, penalties and assessments for Bodily Injury or Property Damage; Clean-Up Costs; defense costs not included	Section VIII.N and Endorsement No. 2
Microbial Matter	Fungi, bacterial or viral matter that reproduces through the release of spores, the splitting of cells or other means, including mold, mildew or viruses, whether or not living	Endorsement No. 9
Named Insured	The entity named and all corporations, partnerships, companies or other entities that have existed or may now or hereafter exist during the Policy Period in which the Named Insured did or does have more than a 50% ownership interest; an entity acquired by the Named Insured will be considered a Named Insured for 90 days after acquisition, but must thereafter be endorsed on the policy (and required additional premium paid); also includes selling shareholders by name for liability resulting from Insured Properties, Non-Owned Locations or Transported Cargo	Endorsement Nos. 6, 24
Natural Resource Damage	Covered as part of Property Damage	Section VIII.P
Non-Owned Location	See Endorsement Nos. 21, 25, 27 for lists of Non-Owned Locations	Endorsement Nos. 21, 25, 27
Policy Period	[XXXXXX] to [XXXXXX], or, if earlier, cancellation of policy or deletion of location from policy	Declarations Item 2 and Section VIII.T
Pollution Conditions	The discharge, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant or contaminant into or upon land, or any structure on land, the atmosphere or any watercourse or body of water, including groundwater, provided such conditions are not naturally present; Microbial Matter is not included	Endorsement No. 9
Property Damage	Physical injury to or destruction of tangible property of parties other than the Insured, including the resulting loss of use and (except for Coverage C) diminution in value; loss of use, but not diminution in value, of tangible property of parties other than the Insured that has not been physically injured or destroyed; Natural Resource Damage; but not Clean-up Costs	Section VIII.W
Responsible Insured	The manager or supervisor of the Named Insured responsible for environmental matters, or any manager of the Insured Property, or any officer, director or partner of the Named Insured	Section VIII.Y

Retroactive Date	[XXXXXX], the date after which Pollution Conditions must commence for Coverages C and F	Declarations Item 7
Terrorism	Use or threatened use of force or violence against person or property, by any person or group, when the effect is to intimidate, coerce or harm a government, the civilian population or any segment thereof, or to disrupt any segment of the economy; includes any act verified by the United States or Canada as an act of terrorism	Endorsement No. 11
Transportation	Movement of Transported Cargo by a conveyance from the place where it is accepted by the carrier to the place where it is finally delivered (in the case of waste, a waste disposal facility); includes loading or unloading of Transported Cargo onto or from a conveyance if done by or on behalf of the Named Insured	Section VIII.AA
Transported Cargo	Goods, products or wastes transported by a properly licensed carrier	Section VIII.BB

III. Exclusions

Exclusion	Description	Source
Asbestos and Lead-Based Paint	No coverage for Clean-Up Costs, Loss or Claims arising from asbestos or asbestos-containing material or lead-based paint applied to any building or structure; exclusion does not apply to Coverages C, F and I or soil and groundwater Clean-Up Costs	Section II.1.G
Contractual Liability	No coverage for an assumed liability, but does not apply to liability that would attach in the absence of contract or to Insured Contract	Section II.1.B
Criminal Fines, Penalties and Assessments	No coverage for criminal fines, penalties or assessments	Section II.1.A
Employer Liability	No coverage for Loss or Claims arising from Bodily Injury to an Insured or its parent, subsidiary or affiliate	Section II.1.H
Identified Underground Storage Tank	Excludes Pollution Conditions from tank on Insured Property the existence of which was known to a Responsible Insured as of Inception Date, unless scheduled	Section II.1.J
Insured v. Insured	No coverage for Claims of one Insured against another	Section II.1.F
Intentional Noncompliance	No coverage for Pollution Conditions attributable to any Responsible Insured's intentional, willful or deliberate noncompliance with statute, regulation or governmental order	Section II.1.D
Internal Expenses	No coverage for Insured's own expenses for goods or services except in emergency or for expenses approved in advance by Company	Section II.1.E
Known Contaminant	No coverage under policy for known Pollution Conditions on, under or migrating from the [XXXXXX] location discussed in Environmental Risk Limited reports dated [XXXXXX], [XXXXXX], and [XXXXXX], or for Pollution Conditions at the [XXXXXX] location based upon [XXXXXX] enforcement actions in [XXXXXX] and [XXXXXX]	Endorsement Nos. 8, 23
Pollution Conditions Before or After Transport of Cargo	No coverage for Pollution Conditions commencing prior to the Transportation of Transported Cargo, after Transported Cargo reaches its final destination, or while Transported Cargo is in	Section II.2.B

	storage off-loaded from its conveyance; applies to Coverage I	
Prior Knowledge/Non-Disclosure	No coverage for Pollution Conditions existing prior to the Inception Date, known by a Responsible Insured and not disclosed in the application for the policy or any previous policy for which this policy is a renewal	Section II.1.I
Property Damage to Conveyances	No coverage for Property Damage to conveyance used during the Transportation of Transported Cargo; applies to Coverage I; does not apply to Claim by third-party Carrier of Insured for Property Damage due to Insured's negligence	Section II.2.A
Terrorism	No coverage for Clean-Up Costs, Loss or Claims arising from Terrorism	Endorsement No. 11
Third-Party Carrier Claims	Applies to Coverage I; does not apply to Claims due to Insured's negligence	Section II.2.C
Transportation	Transportation is not covered except under Coverage I	Section II.1.C
War	No coverage for Clean-Up Costs, Loss or Claims arising from war, act of foreign enemy, civil war, insurrection, civil commotion, rebellion or revolution	Endorsement No. 10

IV. Conditions

Condition	Description	Sources
Access to Information	Named Insured shall provide the Company access to any information discovered by the Insured concerning Loss covered under the policy	Section VI.J
Acknowledgment of Shared Limits	Policy aggregate limits will be shared by all Named Insureds and all other Insureds who are or may become insured	Section VI.O
Action Against Company	No third-party action against Company until Insured's obligation to pay has been determined by judgment after actual trial or by written agreement among Insured, claimant and Company; Company's obligation under the policy not relieved by Insured's bankruptcy or insolvency	Section VI.L
Arbitration	All disputes under the policy may be submitted to arbitration	Section VI.M
Assignment	Policy may be assigned with the prior written consent of Company, which shall not be unreasonably withheld or delayed	Section VI.A
Cancellation	There is apparent conflict between Endorsements Nos. 12 and 3. Endorsement No. 12 provides that (1) Insured may cancel policy, but there is no return premium: premium is 100% earned at the Inception Date; (2) if Company cancels, earned premium is calculated on a pro rata basis; (3) Company may cancel only for material misrepresentation by the Insured, Insured's failure to comply with the material terms of the policy, or a change in operations at an Insured Property during the Policy Period that materially increases a risk covered under the policy. Endorsement No. 3 (New York Amendatory Endorsement) provides for retention by the Company of only the customary short rate proportion of the premium if the Insured cancels, and allows the Company to cancel under somewhat different circumstances (some narrower and some broader than those specified in Endorsement No. 12).	Endorsement Nos. 3, 12
Changes	No changes to policy except by endorsement issued by Company	Section VI.D
Choice of Law	The law of the State of New York to apply	Section VI.N

Concealment or Fraud	Policy voided by Insured's willful concealment or misrepresentation of material fact or circumstance	Section VI.F
Cooperation	Insured to cooperate, including testifying, etc.	Section VI.C
Other Insurance	This insurance is primary; if other insurance is not primary, Company's obligations are not affected. If other insurance is primary, Company shall contribute by equal shares or by limits	Section VI.H
Representations	Named Insured agrees that the statements in the Declarations, the Application and the Report/Worksheet are their representations, that policy is issued in reliance thereon, and embodies all agreements with Company and its agents regarding the insurance	Section VI.K
Right of Access and Inspection	Company has same rights as Insured (but no obligation) to interview Insured's employees and to inspect Insured Property during or after the Policy Period	Section VI.I
Separation of Insureds	Except as to the Insured v. Insured exclusion and the rights and duties specifically assigned to the first Named Insured, insurance applies as if each Named Insured were the only Named Insured, and separately to each Named Insured against whom a claim is made; misrepresentation or violation of the policy by one Named Insured shall not prejudice another Named Insured, provided that this condition shall not apply to any Named Insured who is a parent, subsidiary or affiliate of the first Named Insured	Section VI.P
Subrogation	Company subrogated to Insured's rights of recovery in the event of a payment under the policy; Insured shall do nothing to prejudice Company's rights before or after Loss	Endorsement No. 7
Voluntary Payments	No voluntary settlements or payments without Company's consent unless in emergency, except at Insured's cost	Section VI.E
World-Wide Territory Limitations	No coverage except where Claims are brought in the United States, its territories and possessions, and Canada; Claims can be based on Pollution Conditions anywhere in the world (except Angola, Cuba, Haiti, Iran, Iraq, Libya, Afghanistan, the Democratic Republic of Sudan, North Korea, or the Federal Republic of Yugoslavia (Serbia and Montenegro)); for covered Claims based on Pollution Conditions outside of the United States, its territories and possessions, and Canada, Company has the right, but not the duty, to investigate, defend or settle such Claims, but if it does not do so, Insured shall do so under Company's supervision (with Company's written authorization required for settlement)	Endorsement No. 14

Dated: [XXXXXX], 2003