



Managing Changing Environmental Risk

By Barbara Deas and William P. Hazelton

This is the final installment of a four-part series taken from the article, "Contractors and Consultants Face Increasingly Strict Environmental Laws," by the ACE Group, a global leader in insurance and reinsurance, and its ACE Progress ReportSM.

Broadly speaking, the risk mitigation measures that contractors and consultants should consider include: contractual issues, subcontractor selection, programs and procedures, environmental regulations, changes in regulations, waste disposal, and adequate insurance protection. First under consideration are the contractual liabilities assumed in securing the project. The contracts should spell out the liabilities, as well as the insurance requirements. The contract may specify the terms of indemnification and hold harmless provisions regarding environmental liabilities. A general contractor or subcontractor taking on a job may find themselves the first line of monetary and legal defense, should an environmental issue arise. By the same token, general contractors relying on subcontractors to perform critical functions should take the time to do the proper due diligence to make sure the subcontractor is qualified to perform the work, and confirm that they have proper insurance in force.

Of course, contractors need to be aware of all relevant environmental regulations, obtain all the needed permits, and

then comply with mandates. In addition to current regulations, contractors also need to be concerned with any regulatory changes that may arise in the course of a project. Environmental laws and regulations are constantly being updated, especially in response to a headline-generating environmental event. Contractors need to make sure that their procedures stay current. Finally, waste disposal and waste handling remain critical. The potential liability in this area will extend from cradle to grave—from the company generating the waste, to those removing or containing it, transporting it and, finally, to those disposing of it. In addition to performing the proper due diligence for subcontractors involved in waste handling, contractors and consultants also need to prequalify waste disposal sites, to make sure they conform to all legal and regulatory mandates. If the waste disposal site is not properly permitted, is leaching into the surrounding ground or water, or is in violation of other environmental laws, the contractor could be held liable for very expensive remediation measures at the disposal site, as well as fines.

PROTECTION AGAINST POLLUTION RISKS

Because of the legal and regulatory risks discussed above, contractors and environmental consultants should carefully

ABOUT THE AUTHORS

Barbara Deas is division president, ACE Westchester Environmental, the U.S.-based wholesale focused property & casualty operation of the ACE Group. Based in Atlanta, Georgia, Ms. Deas has overall management responsibility for the strategic direction and implementation of underwriting strategy, product development, and producer management responsibility for all environmental liability products and services for the wholesale.

William P. Hazelton is executive vice president, ACE Environmental Risk, a unit of ACE USA, the U.S.-based retail operation of the ACE Group. Based in New York, Mr. Hazelton has national responsibility for the development, underwriting, and delivery of environmental risk solutions for retail brokers and their clients, from small or mid-size to large multinationals.

evaluate their exposures, and identify any gaps in environmental coverage. While contractors might assume that they would be covered by their commercial general liability policies, such policies may contain absolute or total pollution exclusions or exclusions with very limited exceptions. For environmental risks at a jobsite owned by another entity, a contractor should look for a contractor's pollution liability policy that provides coverage against financial loss resulting from a pollution incident, including legal defense costs. This coverage also provides an upfront sales tool to use in the bidding process, and enables a contractor to qualify where such coverage is required. In addition, the contractor should make sure the environmental policy he or she chooses provides protection against exposures due to the actions of subcontractors.

Contractors' pollution liability coverage is designed for general contractors, as well as for environmental contractors and consultants. For general contractors, work that poses environmental and pollution risks include such common trades as carpentry, painting, masonry, roofing, plumbing, electrical, central air installation, and janitorial services. In addition, excavation, grading and fencing, water and sewer, and street and road projects also carry environmental risks. Contractors' pollution liability coverage can protect these contractors if they unknowingly cause contamination or contribute to existing contamination in the course of their operations.

Environmental contractors and consultants should work with their insurance broker to purchase contractors pollution liability coverage that extends to the professional services they provide as a part of, or in conjunction with, their operations. This coverage extension contemplates a wide spectrum of projects, from investigation and feasibility studies, to remediation and design, laboratory analysis, testing and monitoring, non-invasive geological surveys, training, permitting and compliance services. The policies can protect consultants against potential exposures from failing to assess contamination in the air, soil, or water; for errors in project management; for recommending the wrong course of action; or making mistakes in designing a remediation system.

In addition to the laws and regulations already being considered or in place,

there is the certainty that new rules and regulations will be imposed in the future, in the natural course of politics or as new environmental catastrophes arise. Contractors and consultants may find themselves dealing with new regulations in the middle of a project, or they may find themselves facing new liabilities arising from changes in environmental laws. For this reason, it is crucial for contractors and consultants to keep abreast of constantly evolving regulations, and to make sure that their insurance coverage also remains current in the face of changes to environmental laws and regulations.

MANAGING CHANGING ENVIRONMENTAL RISKS

A critical attribute of any successful enterprise is a thorough approach to risk management. While contractors may be thoroughly versed in the exposures they encounter in their ordinary course of business, such as personal injury or construction defect issues, too often they don't recognize the risks posed by evolving environmental laws. Environmental exposures, however, constitute a growing area of risk for

contractors and consultants. Failure to adequately protect against these risks can result in multi-million dollar legal expenses, and even higher fines or awards that could jeopardize the company's existence. Fortunately, coverage for environmental risks has evolved along with these changes in laws and regulations, offering contractors and consultants crucial protection against constantly changing environmental exposures.

It is a prudent part of any contractor's and consultant's risk management process to review their insurance program with their insurance professional on a regular basis, to understand the actual terms, coverages, and limitations. They can then make an informed decision as to how evolving environmental regulations may impact their coverage, allowing them to maximize the protection afforded by their policies. This is an additional tool that will allow contractors and consultants to adjust to new environmental laws and social strictures, while maintaining their success in a highly competitive and demanding arena. ■



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