

# Introduction to Resources in Environmental Law & Insurance

Where there is an issue of potential environmental liability, there is usually a gap between a buyer and seller, borrower and lender, or tenant and landlord trying to close a deal. Environmental insurance can provide the ideal means of eliminating the gap and finalizing a deal.

**WHEN SOMEONE HEARS THE WORD “INSURANCE,” THEIR MIND LIKELY WANDERS TO SOME FORM OF GENERAL LIABILITY INSURANCE FOR PROPERTY.** However, few people are aware of the benefits (or even the existence) of environmental insurance, which can be vital in getting a deal involving a potentially contaminated property to closing while minimizing future liability.

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## *What is Environmental Insurance?*

Environmental insurance provides coverage for loss and/or damages resulting from the discovery or release of unexpected pollutants. This coverage is often excluded from or severely limited within standard commercial general liability and property insurance policies, thus the need for a standalone product. Perhaps contrary to belief, the term “pollutant” is broadly defined within coverage and can mean everything from contaminants in the ground, mold from leaking windows, or noise pollution at an airport.

Environmental policies can be tailored to provide coverage for specific risks, such as bodily injury, property damage, cleanup costs, or business interruption related to contamination, hazardous materials, and the like. While most policies focus on operational (new conditions) exposures like mold, legionella, or active releases, with proper diligence and information a well-structured policy can provide coverage for risks connected to historic (pre-existing) contamination. This means that, for example, if Joe is negotiating to sell his property to Sally, the disclosure of known pollutants in the soil would not allow Sally to insure against the soil contamination, but insurance could be used to protect Sally against potential liability for contamination of the groundwater. Coverage can be tailored for specific contaminants, locations (on-site versus off-site ... or both), concerns (bodily injury and/or property damage), etc., and this “a la carte” nature of environmental insurance provides a unique opportunity for Sally to purchase the property knowing the environmental issues she must address, while also providing comfort for unknown risks is covered and limited.



## *How to Obtain Environmental Insurance*

When potential environmental liability concerns are present during a real estate transaction, environmental consultants, attorneys, and brokers each have a role in bringing a deal to closing. Environmental consultants are pivotal to the technical side of a deal, and most experienced purchasers or lenders will require a Phase I Environmental Site Assessment in order to gain a better understanding of the current state of the property and any Recognized Environmental Conditions which may be present. The consultant's findings and conclusions are then used by the environmental attorney to advise the client on the various liabilities which may be present due to the environmental conditions identified by the environmental consultant.

An environmental attorney helps identify areas of potential liability and offers creative solutions for addressing and/or minimizing the liability. The attorney will assist in structuring the deal through indemnification, escrow, participation in state or federal programs, or other means, including the purchase of environmental insurance, when appropriate. In some situations, the amount of contamination may not be enough to create a liability issue of concern for a party to the deal. In this case, indemnification or escrow may be appropriate to help guide a deal to closing. However, in other situations, the contamination may create more substantial liability concerns, which could result in discussions with an environmental insurance broker to explore potential solutions to limit liability. Environmental insurance brokers evaluate exposures to liability by identifying available insurance coverage to address specific elements of risk. They also work with the environmental attorney and the policy purchaser to determine how much risk the purchaser is willing to retain. [Click here](#) for a more in-depth discussion of the process of purchasing environmental insurance coverage by lenders.

## *When to Consider Environmental Insurance?*

An Environmental attorneys should be retained early on in any property transaction. The right environmental attorney can limit liability for the client from the point of engaging environmental consultants to conduct Phase I Environmental Site Assessments all the way through working with an environmental insurance broker to secure environmental insurance coverage. If a client waits too long to seek advice from counsel (e.g., after the scope of liability has been determined in any detail), insurance coverage to assist with specific contamination will not be available.

Additionally, it is equally important to engage with an insurance broker who specializes in providing environmental coverage. While general insurance brokers may be able to offer general information about environmental coverage, an environmental broker has expertise in environmental insurance coverage, how it can be used to limit liability, and likely has relationships with specific environmental insurance carriers well beyond those of a general broker. Using a specialized insurance broker is crucial to get a client the best available coverage.

## *Why Should You Purchase Environmental Insurance?*

Environmental insurance can help bring a deal the final mile to closing in many situations. A few examples include:

- The seller does not wish to remain “on the hook” for future potential liability and wishes to “cash out” now. Rather than place funds in an escrow or reserve funds for an indemnification claim, the seller can pay all or half of the premium for environmental insurance and be done at closing.
- The lender is concerned about its own liability and is (therefore) seeking detailed environmental studies to determine the potential scope/amount of liability. Such studies could show significant liability, causing the lender to flee the deal and the property owner to be left with significant costs to address outstanding issues. Instead, a policy can be put in place which covers the lender's liability and offers enough comfort to bring the lender to the closing table.
- No party is interested in acquiring the property, due to its history. A seller could offer a potential buyer the assignment of an environmental insurance policy and an indemnification which covers the deductible. This limits the exposure for both parties and could make the difference.