

ENVIRONMENTAL LAW IN NEW YORK

ARNOLD & PORTER


MATTHEW
BENDER

Volume 9, No. 12

December 1998

The New Environmental Insurance Products: When Does it Make Sense to Buy Them?

By Susan Neuman
(Part Two of a Two-Part Article)

AUTHOR'S NOTE: Part One of this article (Sections I through IV) addressed the question, "What are the new environmental insurance products?" by contrasting them with those previously available. The old products, issued mainly by AIG, Zurich and Reliance until about 1996, consisted basically of a site-specific pollution liability policy (PLL) and coverages for the environmental services industry: the contractors' pollution liability policy (CPL) and the consultants' errors and omissions liability policy (E&O). Coverage under these older policies was restrictive, and the premiums were steep; these limitations are typical of new and emerging insurance markets. Since 1996, however, two new companies, Kemper and United Capitol, have entered the market, and all carriers are offering significantly broadened coverage under the new versions of the PLL policy and the entirely new cleanup cost cap policy. In addition, premiums for all policies have declined precipitously. Some carriers offer broader coverage under their pre-printed policies, while others have the advantage of being more flexible and willing to change their wording. For the most part, now, affordable policies are available which actually cover the liabilities that need to be covered in the typical contaminated property transaction. Part Two of this article will now answer the question: how does one decide whether or not to buy these policies?

V. DECIDING ABOUT INSURANCE IN GENERAL

There is a well-accepted method for deciding about insurance in general. It is based on what risk management experts describe

as the five-step risk management decision making process. There are also well-accepted maxims which contrast insurance with other methods of risk financing. The thesis of this article is that decisions about environmental insurance should follow the same, well-trodden path and should apply the same maxims and truisms to the choice between insurance and other risk-financing options.

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Marla B. Rubin, "The Minefield: Ethical Issues in Brownfields Developments," *The New York Environmental Lawyer*, Vol. 18, No. 3 (Summer 1998), at 26.

New York State Assembly, Legislative Commission on Solid Waste Management, "What's In It For Us: A Summary of Host Community Benefits and Policies" (Jan. 1998).

Joel H. Sachs, "Notes From the Chair: Environmental Attorneys: Too Many or Too Few?" *The New York Environmental Lawyer*, Vol. 18, No. 3 (Summer 1998), at 1.

John C. Yang, "Meaningful Limits on the Duty to Defend and the Duty to Indemnify Through Reimbursement, Allocation and Characterization," 10 *Environmental Claims Journal* 123 (Winter 1998).

The New Environmental Insurance Products: When Does it Make Sense to Buy Them?

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A. The Risk Management Decision-Making Process

According to risk management theory, choosing any risk management technique, including insurance, should be part of a five-step decision-making process for minimizing the adverse effects of loss.⁵

1. Identify and Analyze Loss Exposures

The first step is to identify and analyze loss exposures, i.e., the "possibility of financial loss that a particular entity (organization or individual) faces as the result of a particular peril striking a particular thing of value."⁶ Financial losses that concern risk management are categorized as property losses, net income losses, liability losses (including environmental liability losses), and personnel losses (resulting from the death, disability, retirement, resignation, or layoff of an individual important to the company).

2. Examine the Feasibility of Alternative Risk Management Techniques

Risk management involves either preventing losses from happening (risk control) or paying for those losses that do occur (risk financing). As part of the second step, risk managers are advised to examine all feasible risk control and risk financing techniques that might apply to a loss.

a. Risk Control Techniques

There are five risk control techniques that can be used to prevent losses from happening: (1) exposure avoidance, which eliminates entirely any possibility of loss by abandoning or never undertaking an activity or asset; (2) loss prevention, which aims to reduce the frequency (or likelihood) of a particular loss; (3) loss reduction, which aims to reduce the severity of a particular loss; (4) segregation of loss exposures, which involves arranging an organization's activities and resources so that no single event can cause simultaneous losses to all of them; and (5) contractual transfer of an asset or activity for risk control, which is a transfer of both the legal and financial responsibility for a loss, including incorporation, leasing, contracting for services, suretyship and guaranty agreements, and waivers.

b. Risk Financing Techniques

Risk financing techniques fall into two classes, retention and transfer.

i. Retention

Retention includes all means of generating funds from within a corporation to pay for losses. Risk management experts distinguish between active and passive retention, or planned and unplanned retention. "Passive or unplanned retention occurs when an organization retains any exposure of which it is unaware or for which it has chosen to make no plan for financing potential losses."⁷ Planned or active retention requires thorough recognition and careful analysis of a given exposure and the conscious choice to retain a given amount of the potential loss from that exposure.

A risk manager may plan to use any one of the following specific retention techniques: (a) current expensing; (b) loss reserving (funded and unfunded); (c) borrowing; and (d) insuring with an affiliated "captive" insurer.

ii. Transfer

Transfer involves generating funds from outside the corporation. There are three forms of risk transfer: (1) commercial insurance (i.e., purchased through an outside, unaffiliated insurer); (2) contractual transfer for risk financing (i.e., non-insurance transfers, to a transferee other than an insurance company, through a hold harmless or indemnity agreement); and (3) contractual transfer for risk control (usually considered a risk control technique and discussed above under risk control).

c. Important to Examine All Feasible Alternatives

Risk management scholars particularly stress the importance of systematically examining all feasible, alternative risk management techniques.⁸ Alternatives should not be restricted to the traditional options that management has always accepted, e.g., insurance. Instead, risk managers are advised to brainstorm to creatively identify as many risk control and risk financing

options as possible and try to imagine how each option may apply to a specific loss exposure.

3. Selecting What Appear to Be the Best Risk Management Techniques

After systematically considering how various risk control and risk financing options might apply to a particular loss exposure, the second step is to establish and apply criteria to determine what combination of risk control and risk financing techniques is best. This activity consists of (1) forecasting the effects the available risk management options are likely to have on the organization's ability to fulfill its objectives; and (2) defining and applying criteria, usually financial, that measure how well each alternative contributes to each objective in a cost-effective way. Probability, trend analysis and cash flow analysis techniques are used to accomplish this two-step activity.

4. Implementing the Chosen Risk Management Techniques

In the implementation stage, risk managers devote attention to both the technical risk management decisions that they must make to put a chosen technique into practice and the decisions that must be made in cooperation with other managers throughout the organization. For example, if insurance is chosen as a risk financing technique, the appropriate insurer must be selected, proper limits and deductibles set and the purchase negotiated. In implementing risk control measures, the risk management department must often seek cooperation from managers on the front line, not subject to the risk manager's particular authority.

5. Monitor Results

Once implemented, a risk management program must be monitored to ensure that it is achieving the expected results. There must be opportunity to adjust the program for alterations in loss exposures and for the availability or costs of other alternative techniques. This process requires establishing standards of acceptable performance, comparison of actual results with these standards and correction of substandard performance.

B. Insurance Versus Other Risk Financing Alternatives

Insurance is inevitably (except in the environmental area) one of the risk financing options considered as part of the second step, examining the alternatives, discussed above. But neither insurance nor any other risk financing option should be chosen heedlessly. There should be a risk financing plan, for, without it, a significant exposure may end up being retained unawares. This plan should consider, as applied to the particular exposure, insurance versus retention, insurance versus non-insurance contractual transfers, and insurance as used in combination with other techniques.

1. Insurance Versus Retention

The choice of insurance versus retention depends on the characteristics of the loss exposures, the organizations, and the markets.⁹ Characteristics of loss exposures include loss frequency, loss severity, and loss claim and loss estimation patterns (loss estimation patterns are based on forecasting the timing and amounts of payments that will need to be made for a particular type of accidental loss). Exposures with high loss frequency and low loss severity are typically the most attractive for retention. "Exposures generating high-severity losses, with a low frequency, are the least desirable to retain. Insurance is best suited for financing the often catastrophic losses from high-severity, low-frequency exposures."¹⁰

Insurance is also more appropriate for large, unpredictable losses, because, for all but such types of losses, it is a relatively costly source of funds.¹¹ Insurers properly charge their operating expenses and profits for those essential services, especially loss control and claims management, that they provide in connection with catastrophe protection. Thus, "for any loss exposures that might generate large losses, insurance should be a part of almost every organization's risk financing program."¹²

Another characteristic of a particular risk is whether it is a liability, property, net income or personnel risk. "With relatively rare exceptions, liability exposures do not lend themselves to full retention for two reasons. First, most liability losses are not self-limiting and can reach or exceed an organization's net worth, thus bankrupting it. Second, beyond payments to claimants, liability exposures also entail outlays for a legal defense, which is something most organizations can only acquire through insurance."¹³

It is relevant at this point to note the four characteristics of an ideally insurable exposure:¹⁴ (1) a large number of similar independent units should be exposed to the risk and controlled by persons interested in insurance protection; (2) the loss—and thus the insurer's liability—should be definite or determinate in time, place, cause, and amount; (3) the aggregate insured loss expected over some reasonable operating period should be calculable; and (4) the loss should be accidental from the insured's viewpoint.

Few currently insured exposures actually meet all four requirements. Most that are considered insurable come close to the ideal either inherently, or because certain safeguards have been introduced. Such safeguards involve the importance to the public of providing protection against the peril, social pressures or the expectation that the exposure will become insurable in the near future.¹⁵ A case in point is the aviation risk, a questionable exposure at first, but one that was expected to become insurable and did.

An important characteristic of organizations is management's tolerance for uncertainty. The traditionally cautious or risk-averse senior executive tends to sleep better with lower levels of retention and higher limits of insurance. The executive who can endure more uncertainty will tolerate higher aggregate retention levels and less insurance.¹⁶

One characteristic of property-casualty insurance markets is that insurance premium rates tend to move in cycles. When the market is "soft," the rates fall and coverage is added as insurers compete for new insureds. Insurance is more attractive as a risk financing technique, and retention becomes correspondingly less cost-effective. In a "hard" market, the opposite is true. When rates rise in the opposite phase of the underwriting cycle, organizations tend to adjust retention levels upward and to narrow coverage.¹⁷

2. Insurance Versus Non-Insurance Contractual Transfers

Insurance transfers are generally considered more reliable than non-insurance contractual transfers, which are subject to the following two uncertainties:¹⁸ (1) that the transferee/indemnitor may not have insurance or other financial resources to meet its obligations; (2) that a court may not enforce the agreement, either because the agreement does not adequately define the transferred exposure as intended or because it is held to be unduly harsh or unconscionable.

Insurance companies, on the other hand, are thought to be more reliable than indemnitors because they are in the business of assuming risk, while indemnity agreements are only as good as the transferee's ability and willingness to pay. In addition, an insurance contract contains certain collateral benefits not typically found in an indemnity agreement. These include loss control services, claims handling services, and the defense obligation.

On the other hand, a risk financing transfer to a noninsurer can be highly reliable and can provide dependable protection for the transferor when the following conditions exist:¹⁹ (1) some loss characteristic puts it outside the scope of typical insurance contracts, for example, when the typical insurance agreement might exclude the peril causing the loss; (2) the transferee's commitment to fulfilling its business contract terms with the transferor motivates the transferee to provide full indemnity in situations where the insurer might question the indemnitee's right to payment; and (3) the transferee is specially equipped to evaluate the transferred risk, for example in maintenance agreements and guarantees for services.

Non-insurance contractual transfers, in short, may be appropriate, but only when a party wishing to transfer the financial burden of a potential loss can find an "appropriate, financially responsible and willing transferee."²⁰

3. Insurance in Combination With Other Techniques

Insurance, while perhaps the most evident and widely used of all risk management techniques, is said to be best when used in combination with other techniques. In fact, it is often called the "last resort" in a sound risk management program, the alternative used when no other technique or combination of techniques will suffice.²¹

a. Insurance Combined With Retention

Risk managers commonly attempt to balance retention with transfer, including insurance transfer. One of the chief benefits of insurance, and other reliable risk financing transfers, is to replace the uncertain cost of retained losses with the more predictable outlay for insurance premiums.²² One of the chief disadvantages of insurance is that it increases the long-term cost of paying for losses, since premiums include protection not only for losses but also for the insurer's operating expenses and anticipated profit.²³ As a result of these mutual advantages and disadvantages, risk managers frequently balance insurance with retention for different types of exposures. They do so in particular for liability exposures, which, as noted above, do not lend themselves to full retention.

b. Insurance Combined With Non-Insurance Contractual Transfers

It is extremely common to combine insurance with non-insurance contractual transfers. Many contracts in which the indemnity provisions cover (non-environmental) liabilities also include provisions requiring liability insurance to support the indemnity. Risk managers of the parties to such contracts are instructed to follow basic guidelines, three of which apply specifically to insurance:²⁴ (1) make sure the indemnitor can fulfill its commitment financially—in view of some court decisions, it is almost imperative that the commitment be backed by insurance of at least \$1 million per occurrence;²⁵ (2) require a certificate of insurance for contractual liability coverage before contract operations begin; and (3) have the party not paying for the insurance be named as an additional insured in addition to obtaining a subrogation waiver.

C. Reasons Not to Buy Particular Policies

While commercial insurance is generally the most reliable form of risk financing, there are significant uncertainties that can face an insured under a particular insurance contract. First, the insurer may become insolvent or refuse to meet its policy obligations for some other reason. Second, the insurer and the insured may disagree as to whether a loss is insured or as to the amount of the loss. Third, the amount of the loss may be so large that some portion of it exceeds the applicable limit of insurance. Fourth, the insurer may have a policy of not paying claims.

Of course, precautions can be taken to reduce these sources of uncertainty²⁷ such as (1) careful selection of financially sound insurers, in addition to the availability of state guaranty funds for meeting the obligations of insolvent insurers; (2) insurer/insured discussion (documented in writing) of the meaning of the insurance contract in particular situations; (3) proper selection of coverage limits; and (4) careful selection of insurers with a good claims-paying record. If, however, these precautions do not suffice, the insured can always decide not to buy the policy.

VI. DECIDING ABOUT ENVIRONMENTAL INSURANCE

A. Insurance is Suitable for Environmental Risk

Based on the characteristics of the exposure and the characteristics of the market, insurance is suitable and, in many ways, preferable to retention for use with environmental risk.

As a liability risk, environmental risk is one that should be transferred, not fully retained as an environmental liability risk. It is also a particularly large and unpredictable—a low frequency/ high severity, or catastrophic, risk. CERCLA liability helps to make it particularly large and unpredictable. Superfund cleanups average \$30 million, which is catastrophic by any standard. CERCLA retroactive and joint and several liability, together with the fact that we usually cannot tell what is happening under ground, both contribute to the unpredictability of the risk. It is the archetypal high severity/ low frequency, or catastrophic, risk.

In the past, environmental liability has been considered ill suited for insurance. Several articles were written to that effect in the late 1980s and early 1990s.²⁸ CERCLA liability, especially retroactive and joint and several, was said to make such risk overly unpredictable to insure. However, the key problem involved risk estimation. At the time, many insurers required environmental audits for site-specific insurance. Inspection costs raised the already exorbitant costs of premiums. Secondly, environmental risk was not considered determinable in amount or calculable in the aggregate sufficient to set premiums accurately. Currently, however, insurers rely on existing Phase I's rather than requiring new site assessments as part of the premium. The ability to estimate cleanup costs has greatly improved, and, as discussed in Part One, the industry, like the aviation industry, also once viewed as uninsurable, has acquired sufficient experience to calculate premiums and predict the magnitude of probable losses.

Favorable changes in the environmental insurance market make now a particularly good time to buy environmental insurance. As noted in Part One, there are now five companies writing site-specific insurance, and more will be entering the market. Environmental insurance capacity has increased greatly. Environmental insurance coverage is much broader and more flexible than in the past, and premiums are strikingly lower due to a combination of increased experience and the softness of the market. The estimated premiums for this market have grown from \$75 million in 1985 to several billion dollars in 1998.

B. Who Needs to Buy Environmental Insurance?

Who has this exposure, who should buy, and who is already buying environmental insurance? The market for the environmental insurance industry include: (a) transporters of hazardous waste who carry auto liability coverage, including pollution; (b) facilities that carry pollution liability coverage and/or on-site

cleanup cost cap coverage; and (c) contractors and consultants who carry pollution liability and professional liability (including pollution) coverage. Increasingly, the parties to contaminated property transactions, including brownfields redevelopment projects, are also buying PLL and cost cap coverage.

Originally, treatment, storage and disposal facilities (TSDFs) were the only types of facilities that purchased pollution coverage. Today, however, facilities of all types are recognizing their environmental exposures and buying pollution coverage. These may include environmental facilities such as landfills and TSDFs, manufacturing facilities, colleges/universities, dry cleaners, golf courses, and warehouses.

These facilities face both known and unknown environmental exposures arising out of current operations or historical practices from air emissions, aboveground and underground storage tanks, hazardous waste materials, raw materials and waste waters. Pollution claims typically involve cleanup costs and third-party bodily injury for fume inhalation or contaminant ingestion, and property damage for trespass of pollutants and soil and groundwater contamination. To the extent that these are older facilities, pre-dating 1980, the exposures resulting from historical practices are all the graver and the need for environmental insurance all the greater. Owners of these facilities are purchasing PLL and cost cap policies to transfer these liabilities to insurers.

Environmental contractors and consultants continue to need and buy coverage for pollution and professional liabilities arising from operations performed at these facilities. General and specialty trade contractors also have considerable environmental exposures from their operations (bringing products onto the job site, hitting pre-existing contamination or sewer lines), owned premises, transportation liability for refueling vehicles and Superfund liability for past disposal practices. These general and specialty contractors need to buy environmental insurance but are not in general doing so.

Beginning about two years ago, parties to transactions involving contaminated or potentially contaminated property have increasingly purchased environmental insurance. Such transactions include (but are not limited to) real estate sales, leases, mergers and acquisitions, and brownfields redevelopment projects. In addition, parties involved in Superfund and environmental coverage litigation have recently been purchasing environmental insurance in order to settle the litigation.

Parties to these transactions and law suits face all the liabilities mentioned above. To the extent residential housing is involved, they also face "green building" liabilities such as asbestos, lead paint, radon, and lead in the drinking water. These transactions in the past have failed because of difficulties in attempting to transfer such liabilities by indemnities or hold harmless agreements. Now, PLL and cost cap policies are being purchased in the context of transactions to deal with these costs and liabilities in addition to CPL and E&O policies for contractors and consultants, asbestos and lead in place policies and asbestos and lead abatement liability policies.

C. How to Decide About Environmental Insurance—The Environmental Risk Management Process

It follows necessarily that for those facilities, industries and transactions with environmental exposure, environmental insurance should be part of an environmental risk management process. As a particularly significant exposure, it is one that needs to be managed and to which the five-step environmental risk management process, discussed above, should be applied. Corporations would not ordinarily want to retain such a risk entirely. Certainly, they should not want to retain it passively. Therefore, they need an environmental risk financing plan as part of an environmental risk management plan. As discussed below, making environmental insurance part of such a plan can also save a transaction which would otherwise founder in the face of environmental concerns.

However, for many facilities, industries and transactions with environmental exposures, there is neither an environmental risk management plan nor the awareness that insurance should be part of such a plan. Certainly, most corporations do not adhere to the five-step risk management process with respect to environmental risk. The environmental departments of larger corporations deal mostly with risk control and may ignore risk financing. Their risk management departments concentrate on risk financing and may ignore environmental risk. Thus, any risk management plan that exists will focus on risk control and will not include plans for financing a possible loss.

Smaller corporations may simply ignore the fact that they have environmental exposures, with no plan at all for managing environmental risk. Only a small fraction of the industrial facilities discussed above are currently buying environmental insurance. An even smaller fraction, next to none, of the general and specialty contractors with environmental exposures are buying environmental insurance. These corporations either think that they do not have the exposure or that their general liability policies will cover the risk. They are mistaken in both regards. These corporations are retaining the risk passively and unawares, and they may be in for an unpleasant surprise. Similarly, their brokers and other advisers may be held accountable for not alerting them to their risk and its proper management.

Environmental lawyers, in managing transactions, usually follow what amounts to an environmental risk management process or procedure. Such a process may include consideration of both risk control and risk financing alternatives, since remediation is a risk control technique, and non-insurance contractual transfers (indemnifications) are often the focal point of such transactions. However, contaminated property transactions are sometimes managed by real estate lawyers, real estate brokers or other non-environmental professionals. In these cases, there is often no environmental risk management plan at all. Those in charge may even fail to require due diligence or risk assessment as a necessary first step or may omit it altogether. The results are not always pretty.²⁹

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D. When to Buy Environmental Insurance

It is devoutly to be wished that an environmental risk management process will always be in place. If it is, environmental insurance can come into play at two points in the process: at the beginning, during the risk identification and analysis stage, and at step three, as one of the risk financing options selected in combination with other techniques such as retention. If a transaction is involved, environmental insurance can be combined, during step three, with other risk allocation methods as one of the environmental provisions in the transactional document.

1. Risk Analysis and Quantification

After site assessments have been performed, environmental risk often needs to be analyzed and quantified for purposes of property valuation. If a transaction is involved, such analysis and quantification can also alert the buyer or lender to any present or future problems, allowing financial risk to be managed and allocated as part of the deal. Since this is also what environmental underwriters do, that is, analyze and quantify risk, they can do it once for a number of purposes, thus saving time and money and avoiding unnecessary duplication.

2. Selection of Environmental Insurance With Other Techniques

For those entities and transactions with environmental exposures, environmental insurance should often be used in combination with other risk management techniques, just as ordinary insurance combines with other techniques for other types of exposures. If remediation, a risk control measure, is required, a cleanup cost cap policy may be selected to cover cost overruns, with amounts up to the estimate being retained. For environmental liability exposures, the corporation will also want to balance retention and transfer in the context of a PLL policy.

If a transaction is involved, the corporation will need to combine contractual risk transfer with transfer through environmental insurance. The transaction may not succeed if too much reliance is placed on contractual risk transfer to the other party. Problems and uncertainties about ordinary indemnities are magnified for environmental indemnities. Such indemnities raise questions about the ability to shift CERCLA liability, and drafting them can be difficult and complex. Environmental insurers may be even more reliable, in relation to indemnitors, than are ordinary insurers, since environmental underwriters usually understand this complex and technical risk a lot better than indemnitors do.

The transaction is an optimum time for the corporation with environmental exposures to select environmental insurance as a risk management option and make it part of an environmental risk management plan. At other times, the insurance may be seen as an unnecessary expense. At this time, it is seen as vital to the success of the transaction by removing environmental liability from the equation, or by providing support to other methods of risk allocation.

Environmental insurance is applied in contaminated property transactions in exactly the same manner as ordinary insurance in ordinary transactions. An environmental insurance covenant becomes one of the risk allocation provisions of the purchase and sale agreement, along with the representations and warranties, the other covenants, and the indemnities. In particular, the environmental insurance covenant is tied to the terms of the environmental indemnities. This provision can be used as a bargaining chip in the deal and, as in other types of transactions, as a way of ensuring that the indemnitor will be able to meet its financial obligations.

E. When Not to Buy a Particular Environmental Insurance Policy

The caveats about buying particular insurance policies apply with even more force to buying particular environmental coverages. Most environmental policies are written by the carriers' excess and surplus lines, or non-admitted, companies. Excess and surplus lines companies are not regulated to the same degree as admitted companies. Their rates and forms are not filed with the state insurance departments, and there is no guaranty fund protection other than in the state of New Jersey. Consequently, it is even more imperative to consider the financial stability of the company offering environmental insurance than otherwise.

It is also doubly important that the meaning of the environmental insurance contract in particular situations be discussed and verified, because the forms are generally not filed with state insurance departments. Additionally, the technical nature of the risk and the complexity of the regulations create drafting difficulties that may make the policies difficult for the lay person

to understand. While, as discussed in Part One, the policies have broadened markedly and glaring holes in coverage have been filled, there are some differences between the pre-printed forms of the various carriers, and the oddities of some state statutes and regulations often necessitate some tweaking of the policy language. Some carriers are much more flexible than others about modifying their language in order to inspire confidence that the risk is fully covered. For example, insurance was recently required for a contaminated property to which a statute that allowed risk based cleanups, applied policy language requiring governmental claims. Four carriers quoted on the risk. Two were rigid and two were flexible about the language. It should be no surprise that the risk was ultimately bound with one of the more flexible carriers (which was also the one with the lowest premium quotation).

VII. CONCLUSION

Those facilities, industries and transactions with environmental exposures should use environmental insurance much more pervasively, in combination with other risk management techniques, and as part of an environmental risk-management decision-making process. Environmental risk is the type of catastrophic liability risk to which insurance is ideally suited. It is not the type of risk to be fully retained, and, used in combination with non-insurance contractual transfer, environmental insurance can save many a deal from extinction. There are affordable products available now that actually cover this exposure. Assuming these products are scrutinized carefully before purchase, good coverage can be procured, so there is no longer any reason to exclude these products from the process.

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⁵ Head, G.L. and Horn, S. *Essentials of Risk Management*. Insurance Institute of America (June 1991), 3rd ed., vol. I, ch. 1.

⁶ *Essentials of Risk Management*, vol. I, p. 10.

⁷ Head, G.L., Elliott, M.W. and Blinn, J.D. *Essentials of Risk Financing*. Insurance Institute of America (July 1996), 3rd ed., vol. I, p. 94.

⁸ *Essentials of Risk Management*, vol. II, p. 1.

⁹ *Essentials of Risk Financing*, vol. I, pp. 110-126.

¹⁰ *Essentials of Risk Financing*, vol. I, p. 111.

¹¹ *Essentials of Risk Financing*, vol. I, p. 43.

¹² *Essentials of Risk Financing*, vol. I, p. 44.

¹³ *Essentials of Risk Management*, vol. II, p. 37.

¹⁴ *Essentials of Risk Financing*, vol. I, pp. 235-236.

¹⁵ *Essentials of Risk Financing*, vol. I, pp. 237-238.

¹⁶ *Essentials of Risk Financing*, vol. I, pp. 122-123.

¹⁷ *Essentials of Risk Financing*, vol. I, p. 125.

¹⁸ *Essentials of Risk Management*, vol. II, pp. 39-40.

¹⁹ *Essentials of Risk Financing*, vol. I, p. 366.

²⁰ *Essentials of Risk Management*, vol. II, p. 40.

²¹ *Essentials of Risk Management*, vol. II, p. 41.

²² *Essentials of Risk Financing*, vol. I, p. 37.

²³ *Essentials of Risk Financing*, vol. I, p. 37.

²⁴ *Essentials of Risk Financing*, vol. I, pp. 398-399.

²⁵ *Essentials of Risk Financing*, vol. I, p. 398.

²⁵ *Essentials of Risk Management*, vol. II, p. 41.

²⁷ *Essentials of Risk Management*, vol. II, p. 41.

²⁸ Abraham, K.S. "Environmental Liability and the Limits of Insurance," 88 Colum. L. Rev. 942, 1988; Nash, J.R., "Environmental Law: An Economic Approach to the Availability of Hazardous Waste Insurance." 1991 Ann. Surv. Am. L. 455, 1992.

²⁹ Landow-Esser, J. M. and Ferren, A.J., "Environmental Due Diligence," Real Estate/Environmental Liability News, March 6, 1998 and March 20, 1998, vol. 9, numbers 9 and 10.

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As Required by 39 U.S.C. Sec. 3685

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