

LexNatura

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Welcome to LexNatura, the newsletter of the Marsh Environmental Practice. LexNatura is a quarterly publication which provides an in-depth analysis and commentary on the environmental insurance market, updates on requirements for environmental risk assessment and related environmental issues. Regular features include updates on environmental insurance market conditions and the development of new environmental insurance products, as well as special features such as case studies, updates on environmental legislation and emerging areas of environmental risk.

Market Update

LexNatura provides informed commentary on the environmental insurance market, including updates on market conditions and coverage issues. In this edition, we look at claims activity within the environmental insurance market, from information gained during interviews with UK environmental insurers.

The specialist environmental insurance market originated in the mid 1990s, following the curtailment or withdrawal of pollution coverage by general liability and property insurers. Given its relatively short history and the size of the environmental insurance market, claims activity has in general been limited to date. That said, certain environmental insurers have reported significant growth in claims activity over the past year, with claims being made by companies in a broad range of industry sectors such as waste management, chemicals, power and utilities, oil and gas, transport and construction.

Operational pollution claims

Environmental insurers generally agree that the majority of claims activity is currently being seen in respect of ongoing operations of businesses, rather than as a result of the existence or clean-up of historic contamination. This is particularly the case within continental Europe, where operational pollution insurance cover is more commonly taken up than is the case in the UK.

Not surprisingly, the nature of claims scenarios varies enormously, depending on the business activities of the insured. However, a common theme appears to be the involvement of human error in causing or at least contributing to pollution incidents, even where apparently robust environmental management procedures are in place. Whilst insurers report that the financial value of losses arising from operational pollution incidents can be relatively low, often falling below the policy deductible, it is apparent that, such incidents can, on occasion, lead to substantial losses.

Nuisance claims

Another area that has seen increasing claims activity recently, particularly within the UK waste and waste water sectors, is nuisance claims. In many areas of the UK, new house building activity has resulted in facilities such as landfills and waste water treatment works consequently being situated in close proximity to residential areas. Despite careful site management practices, fugitive dust, litter and odour emissions can occur, potentially leading to claims from surrounding residents for the nuisance caused. Defending against such claims can be very difficult and time consuming, even where the facility has been operating for many years prior to the construction of the new houses, potentially resulting in significant legal defence expenses being incurred in addition to the damages that may ultimately be payable. Claims of this nature are known to have resulted in a number of losses in excess of £1 million for environmental insurers, particularly where group actions have been taken against the insured.

Clean-up of historic contamination

Some environmental insurers commented that, although claims for the clean-up of historic contamination tend to be less frequent than for pollution incidents or nuisance issues caused by current site operations, such claims do have the potential to result in substantial losses. This 'low probability / high severity' risk profile makes it difficult to predict the likelihood and costs of future clean-up, particularly as this is also dependent on legislation and guidance in place at the time of the clean-up, as well as the attitude and enforcement procedures of the regulator. Furthermore, much environmental legislation applies on a strict liability basis (i.e. regardless of fault), making it very difficult to defend against statutory actions.

Future trends

Environmental insurers considered that the continuing growth of the environmental insurance market, the fact that pollution incidents do occur no matter how robust environmental management procedures are, and the increasingly stringent nature of environmental legislation and enforcement procedures, look set to further drive claims activity in the future.

The above is an extract of Marsh UK's Environmental Practice Market Update for Summer 2008. For a full copy please contact us at: marsh.environment@marsh.com.

Legislation/Case Review

Lambson Fine Chemicals Limited v Merlion Capital Housing Limited [2008] EWHC 168

This recent Technology and Construction court case demonstrates the need for purchasers to understand the potential limitations associated with vendor representations and warranties, and due diligence information relating to the environmental condition of a site.

The buyer purchased a site on the basis of the environmental site information provided and the representations made by the vendor under the sale and purchase agreement. Following purchase, the buyer discovered that contamination at the site covered a far wider area than was anticipated, and the buyer claimed that through past construction activities at the site the vendor must have been aware of the wider contamination concerns. The buyer therefore sought in excess of £400,000 from the vendor for the additional clean-up work that would be required.

These claims were rejected as the judge agreed that, although the vendor had made representations as to the accuracy of the environmental site information provided, the vendor could not be blamed for the buyer's failure to interpret the information.

This highlights the uncertainty that can exist with both environmental due diligence information and the prospect for making a valid claim against vendor representations.

The case also demonstrates that the contractual provisions, made as part of the sale & purchase agreement negotiations for transferring liability for contamination to the buyer, were effective.

Environmental insurance is a potential option for managing the direct, contingent and residual legal liability exposures that may exist, rather than relying on the liability apportionment and any recourse potentially available under a sale & purchase agreement.



UK Government issues draft Marine Bill

The draft Marine Bill was published by the UK Government on 3 April 2008 for public consultation. According to DEFRA, the Marine Bill is intended to ensure 'clean, healthy, safe, productive and biologically diverse oceans and seas', by introducing improved systems for delivering the sustainable development of marine and coastal environments.

The Marine Bill proposes the creation of the Marine Management Organisation (MMO), intended to be a centre of excellence in marine regulation and enforcement, providing a consistent approach to delivering improved data, providing advice, and licensing marine developments. The draft Bill creates a set of common enforcement powers for marine licensing, fisheries and nature conservation. It also introduces administrative penalties which will enable regulators to deal with offences in a proportionate manner.

Marine Conservation Zones will be designated within the UK Continental Shelf, being a key part of the marine protected area network. The zones will allow protection of habitats and species that are considered to be of national importance, more effectively and over wider areas than the existing network of Marine Nature Reserves.

The Bill is likely to be of particular importance to the fishing, aggregates, oil and gas industries, and is another example of the evolving nature of legislation relating to environmental risks.

Product News

Insurability of EU Environmental Liability Directive

Under the EU Environmental Liability Directive ('ELD'), which was enacted in April 2007, the scope of remedial measures which may be required following any environmental damage to water or protected species is broader than that required under other EU environmental legislation. This means that, if the environment cannot be fully restored to its original condition (for example if a habitat has been irreparably damaged), the polluter may be required to undertake alternative measures to compensate for the damage caused, potentially including interim measures whilst clean-up and rehabilitation is undertaken ('Complimentary Remediation'), or even creating an alternative habitat elsewhere ('Compensatory Remediation').

Cover for pollution liabilities inferred by the ELD (and other environmental legislation) can be obtained through the environmental insurance market. All environmental insurers now offer policy coverage that specifically includes liabilities for biodiversity damage as well as Complimentary and Compensatory Remediation that could be caused by a pollution incident, even though it is currently very difficult to understand the magnitude of costs that could be associated with such losses.

The ELD liabilities are not restricted to damage caused solely by pollution however, as a company could be liable for physical destruction of habitats, or even disruption to wildlife caused by light and noise emissions, if such activities result in 'environmental damage' as defined under the ELD. One environmental insurer has responded by developing a wording to cover any ELD losses arising from environmental damage.

In general, coverage for the ELD losses is not available under standard general liability and property insurance policies, in fact ELD losses may even be specifically excluded under such policies.

Additional information regarding the new liabilities inferred by the ELD is included in a Marsh briefing entitled 'New environmental liabilities affecting your business'. Please contact us at marsh.environment@marsh.com if you would like to receive a copy.



International Views

Focus on Spain

In 1998 a tailings dam failed at a mining site in Andalucía, Southern Spain, releasing a torrent of polluted water and sludge. The toxic waters flowed uncontrollably into the Guadiamar River and then downstream until it reached the Doñana National Park, characterised by its unique and highly sensitive ecology. The pollution caused severe ecological damage, with the ensuing clean-up operations reputed to have cost over Euro 200 million, much of which was aimed at restoring the 'unowned environment' of the affected areas.

Since October 2007, businesses in Spain have been liable for this type of damage caused to ecological resources, through national legislation which implements the EU Environmental Liability Directive ('ELD'). This legislation is however not retroactive and as such cannot be used to claim the clean-up costs for the damage caused in 1998. Any future damage, whether related to a pollution event or any other environmentally damaging event, could force an operator to 'restore' the environment back to its original condition under the 'polluter pays' principal.

The law in Spain establishes a joint and several liability regime, which could potentially make a parent company responsible for the actions of a subsidiary business and indeed responsibilities can extend to directors and officers, as well as trustees of a business in insolvency. Also, within the Spanish regime there is a commitment to making the requirement for insurance or financial security mandatory in the future, to ensure that adequate financial resources are available to remediate environmental damage. These guarantees be required to have various limits up to Euro 20 million, depending on the turnover of the business.

The Marsh Environmental Practice

The Marsh Environmental Practice provides a unique global resource of environmental specialists available to assist clients in the assessment and management of environmental risks and liabilities.

Cliff Warman



Cliff is the Environmental Practice Leader for the EMEA Region, consisting of Europe, the Middle East and Africa. Cliff has a technical background in environmental consultancy having been educated as an ecotoxicologist and specializing in the modeling of the fates and effects of pollutants in the natural environment. Cliff has spent a number of years in management consultancy delivering environmental due diligence on a number of large corporate transactions. At Marsh, Cliff provides advice to clients on issues such as environmental liability estimation, environmental risk management and climate change.

Marsh Events

Centres of Influence Seminar, 14th April 2008

Environmental Risks and Liabilities: Changing Times, Changing Needs

The Marsh Environmental Practice 'Centres of Influence' seminar on 14th April was well received, with informative presentations and a lively Q&A session. The theme of the seminar was the changing dynamics of environmental risk, and the need for new solutions to such emerging environmental issues. Presentations covered such topics as the management of environmental risk during mergers and acquisitions, new insurance solutions for operational environmental risks, managing environmental legacy issues as well as areas of emerging environmental risk.



Marsh Publications

Marsh Environmental Practice Capability Statement

The Marsh UK Environmental Practice publishes thought leadership publications on a range of environmental topics. The Practice has now also published a capability statement, summarising the range of services we provide and the environmental insurance products available. If you would like a copy of the Capability Statement then please contact Ann Barrett on 020 7357 5826, ann.barrett@marsh.com.



If you would like further information about any of the articles featured in this edition of LexNatura, please contact Ann Barrett on 020 7357 5826, ann.barrett@marsh.com.

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Statements concerning legal matters should be understood to be general observations based solely on our experience as insurance brokers and risk consultants and should not be relied upon as legal advice, which we are not authorised to provide. All such matters should be reviewed with the client's own qualified legal advisors in these areas.

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