



# Environmental Liabilities and Sustainability for Educational Institutions

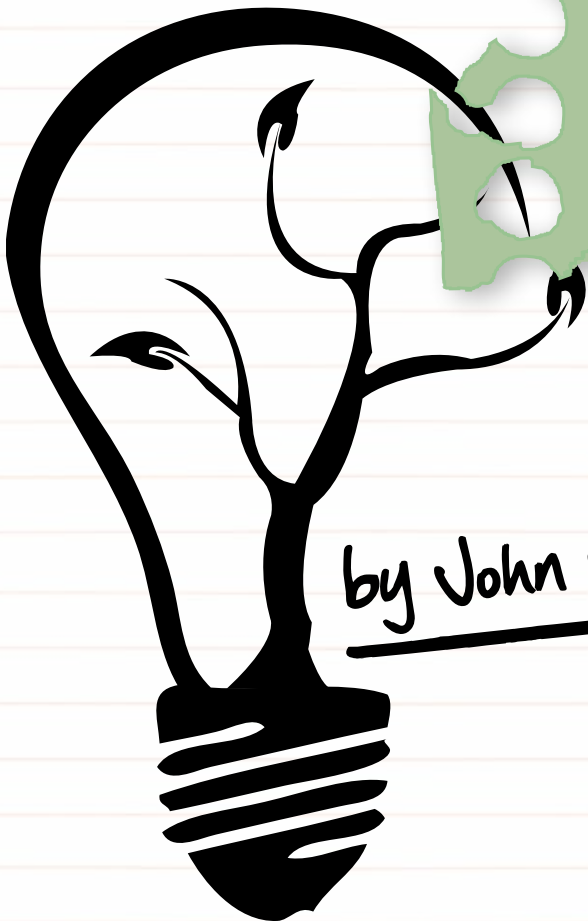
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“Green” is the new mantra for many institutions. School districts as well as colleges and universities across the country are constantly searching for new ways to reduce energy use, waste and the harmful greenhouse gas emissions emitted into the environment.

In fact long before “carbon footprint” became a common phrase, educational institutions nationwide have been concerned about the possible environmental impact and/or liabilities produced by their activities. This includes the growing emphasis on sustainability and the impact these practices can have on environmental insurance as well as the numerous environmental exposures that can be encountered during nearly any phase of construction and operation.

For example, a school district based in the Northeast encountered two separate instances of mold impacts during the construction of two new institutions. As a result, the front of a new building had to be demolished to remove mold that infested gypsum used during construction. The repair work was expected to add between \$5 million and \$10 million to the cost of the three-story elementary school that was initially budgeted at \$42 million. In the second instance, the discovery of contaminated soil on the construction site of another new school led to its partial demolition and additional re-construction costs, which were not included in the original planning. In both cases, the district was in the process of pursuing legal claims against the contractors to recover massive repair costs.

In another example, a small school located in Madison, Wisconsin was closed, partially demolished, cleaned and reconstructed to rid the mold found in many of its classrooms. A subsequent investigation found that the facility’s damp interior walls were the result of builder negligence that allowed moisture problems to go unchecked along ceiling tiles and baseboards, among other areas of the building. The final settlement included a \$650,000 pay out by the builder to the school district.



by John V. Heft



Furthermore, several college students in a university dorm room were sickened from mercury contamination found in the basement. The dormitory had formerly served as the college's science building, which also stored mercury and other toxic chemicals used in laboratory experiments. When investigated, "balls of mercury" were actually discovered in and around a floor drain in the basement. The resulting remediation and third party bodily injury claims exceeded \$1 million.

As the above-mentioned claim scenarios show, educational facility owners should have significant environmental concerns regarding new construction activities as well as the operation of existing premises. That's because property contamination can result from numerous sources that include historical usage. The fact is that many educational facilities in the United States have operated on the same sites for more than 100 years and past practices, including the improper disposal of waste material, over this time may have caused adverse soil and groundwater conditions that can create present liability issues.

#### **RISKS AND RECORD KEEPING**

Another concern involves poor or inadequate record keeping related to historical activities or endowed properties. Therefore, many times problems are only identified as the property is developed. In addition, even if environmental assessments are performed, especially Phase I, they often only include cursory reviews of the property obtained through property "walk-throughs."

In other instances, numerous other issues can develop related to the illegal or "midnight" dumping of waste, inadequate containment or improper disposal of hazardous chemicals, existence of carcinogenic materials like lead or asbestos and poor underground or aboveground tank management programs. Claims of "Sick Building Syndrome" must also be taken seriously since its symptoms can result from the occurrence of fungal or mold growth in ventilation systems and the build up of bacteria (*legionella*) in air conditioning drip pans.

In addition, if the educational facility is associated with a hospital, medical school, laboratory and/or biology department, other commonly reported environmental risks can include:

- Incinerators that cause air emissions of pathogens if the burn rate or temperature is not properly controlled
- Laser smoke, which contains toxic gases such as benzene, hydrogen cyanide, formaldehyde, bio-aerosols, dead/live cellular material (i.e., bone fragments, viruses).
- Improper disposal or improper use of sterilization unit waste, disinfectants, antiseptics, reagents
- Biological and infectious waste (bandages, needle tips, specimen containers, blood bags).
- The release of radioactive materials and wastes
- The spill of contents (e.g., fuel, cleaning products, sealants, solvents, acids, lab waste, various gas cylinders, etc.) during their transport

#### **MANAGING THE RISKS**

Environmental liabilities need not provide obstacles to educational institutions if they are proactively identified, managed and mitigated. Several of these methods include the utilization of risk management techniques, contractually, or via environmental insurance. Over the past five years, environmental insurance has become very competitive within the soft insurance marketplace and readily available with new providers continually entering the market.

At the top of the (\$2.5B annual premium) environmental insurance spectrum are the five leading environmental liability insurers of AIG, XL Capital, Zurich, ACE USA, and Chubb, which account for approximately 90 percent of the total premiums written. However, the remaining 10 percent of the environmental liability insurance market is growing with a number of very solid insurers providing at least some form of environmental liability insurance. These include Great American, Liberty, Markel Underwriting Managers, American Safety, Freberg Environmental/Endurance and Everest. Other new entries are Navigators and Philadelphia Insurance Company.

#### **AVAILABLE COVERAGES**

Each environmental liability insurer offers its own manuscripted coverage forms. To complicate matters even more, each insurer offers a portfolio of environmental liability coverage, with the largest carrier offering up to 15 different coverages totaling over 100 forms in the marketplace. Among these are Contractors Pollution Liability (CPL), Premises Environmental Liability (PLL) and Professional Liability (PL).

#### **CPL AND PL**

Contractor's Pollution Legal Liability (CPL) is intended to provide pollution liability coverage for any type of contracting operations including general contractors and artisan contractors performing typical construction. All contractors face environmental liability in four major areas: job site operations, transportation of waste/materials, disposal activities and owned/leased properties. CPL can be structured to address each of these areas of environmental risk. The typical CPL policy provides coverage for third-party bodily injury, property damage, clean up costs and defense costs which arise from covered operations performed by or on behalf of the contractor or named insured. Furthermore, CPL provides coverage to the named insured for vicarious pollution liability from subcontractors.

Contractors Professional and Pollution Liability (CPL/PL) were also created to offer a cost-effective financing solution to those contracting firms that possess both professional liability and environmental liability exposures. Rather than purchasing two separate policies, they combine to provide both coverages without the need for two separate premiums and retentions. Whether it's from design/build projects, in-house and sub-contracted design services or professional liability associated with "at-risk" construction management, professional liability

coverage can provide necessary protection against a construction firm's professional environmental activities. This includes the four major areas of job site operations, transportation of waste/materials, disposal activities and owned/leased properties.

In addition, CPL/PL coverage protects against direct and vicarious professional and pollution liability arising out of services performed by or on behalf of the named insured. It also covers damages, acts, errors, omissions and pollution conditions that occur from professional services and/or contracting operations. Some CPL/PL products also offer a first-party "protective" coverage. This coverage is a key enhancement to those construction firms that offer design/build services and subcontract other services to design professionals. The "protective" provides first-party indemnity for damages the named insured incurs in excess of the underlying design professional's professional liability policy. Typically, a minimum of \$1 million insurance requirement is placed upon the prime design professional for the protective to be offered. The CPL/PL product can be written on a project specific or practice/blanket basis.

At a minimum, educational institutions should require a certificate of insurance from the GC evidencing CPL coverage with a minimum Limit of Liability of \$1 million. For larger projects, a dedicated Project CPL Policy with the educational institution named as an Additional Insured is the recommended approach.

#### **PREMISES ENVIRONMENTAL LIABILITY/POLLUTION LEGAL LIABILITY (PLL) COVERAGE**

PLL provides coverage for pollution conditions or events on, at, under or migrating from a covered location(s). Coverage is afforded for third-party bodily injury, property damage, clean up costs and legal defense expense. A unique feature of many PLL policies is their ability to offer various and different coverage parts under one policy form. Such coverage parts include, but are not limited to:

- New pollution conditions
- Existing pollution conditions
- On site clean-up coverage
- Transportation coverage
- Non Owned Disposal Site (NODS) coverage
- Business interruption including Loss of Rental Income
- Mold liability coverage and clean-up
- Fines and Penalties and Punitive Damages where allowable by law
- Natural Resource Damages

PLL is an effective risk management tool for commercial real estate for a number of reasons. The coverage helps fill the "environmental gap" left in most general liability policies for property owners and facility operators. It, therefore, helps reduce the uncertainty about environmental liability associated with the property and provides simple asset protection from potentially catastrophic environmental events associated with day-to-day operations. In today's environmental insurance market, available

programs can be tailored to address the diverse needs of each property and then structured to meet a variety of requirements and objectives, including, but not limited to, regulatory obligations, contract requirements, lender requirements, landlord obligations, and business objectives. Another important aspect of coverage offered under PLL is that it can be structured to provide coverage if a known environmental condition exists on site.

#### **SUSTAINABILITY AND ENVIRONMENTAL INSURANCE**

Although the Commercial Insurance Marketplace is generally responding to Green Building trends, the environmental insurance marketplace is standing on the sidelines. In addition, in light of the fact that the American Institute of Architects recently supported the U.S. Green Building Council's LEED (Leadership in Energy and Environmental Design) Certification, insurers are presently trying to determine if the certification can be an effective risk differentiator for architects and engineers involved in green projects.

At the same time, professional liability insurers already have received claims brought against architects and engineers involved in green building for a range of issues. This includes failure for a building to achieve desired LEED certification, leaks associated with vegetative roofing as well as indoor air pollution.

Casualty underwriters reportedly have the most significant concerns about green building exposures with most viewing such projects as potentially riskier than traditional construction. These concerns range from the lack of appropriate qualifications and experience of contractors and subcontractors, which could result in faulty workmanship and construction defect claims, to the use of new and untested products, materials, and processes that could lead to an increase in products liability, structural and water damage, and completed operations claims.

Uncertainty also exists about new HVAC handling systems and their performance and air quality issues, as well as the possibility that inadequate maintenance could increase liability risk for construction contractors. As a result, the commercial and environmental insurance markets are continuing to gather more loss data on green project liability issues. Currently, the primary areas of concern relate to contractor and subcontractor qualifications and experience, in addition to the quality control programs instituted during the construction and maintenance phases.

Subsequently, with concerns continually on the rise about risk liabilities in environmental and sustainable construction, educational institutions nationwide are also beginning to take even greater advantage of the many benefits provided by the proper insurance coverage. Fortunately, it is a market that has continued to adapt and broaden in accordance with the specific needs of facility managers representing nearly every American industry. ☞

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