

# Liability Insurance

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The background of the slide is a solid teal color. In the lower right quadrant, there are several faint, concentric circular ripples, resembling water droplets, in a slightly lighter shade of teal.

# RCRA Liability Insurance

What we'll cover:

- Requirements for Liability Financial Responsibility
- Insurance
- Things to look for in reviews
- What Region 10 has seen doing compliance and enforcement

# RCRA Financial Responsibility

- Closure
- Post-closure
- Clean-up/corrective action
- **Liability**
- UST – combines liability and clean-up
- CERCLA and UIC also have liability requirements

# Liability Requirements

40 CFR 264/265.147(a) - coverage for sudden accidental occurrences.

- An owner or operator of a hazardous waste treatment, storage, or disposal facility, or a group of such facilities,
- must demonstrate financial responsibility for bodily injury and property damage to third parties
- caused by sudden accidental occurrences arising from operations of the facility or group of facilities.
- The owner or operator must have and maintain liability coverage for sudden accidental occurrences in the amount of at least \$1 million per occurrence with an annual aggregate of at least \$2 million,
- exclusive of legal defense costs.
- This liability coverage may be demonstrated as specified in paragraphs (a) (1), (2), (3), (4), (5), or (6) of this section



# Sudden Accidental Occurrences

- “Occurrence” is not defined in RCRA
- ISO: Occurrence is “an accident, including continuous or repeated exposure to substantially the same general harmful conditions”.
- “Sudden accidental occurrence means an occurrence which is not continuous or repeated in nature.”
- Sudden: intended to differentiate between this and non-sudden occurrences.
- Sudden occurrence is not wear and tear

# Non-Sudden Occurrences

- **264.147(b): “Nonsudden accidental occurrence means an occurrence which takes place over time and involves continuous or repeated exposure.”**
- Required for surface impoundment, landfill, land treatment facility, or disposal miscellaneous unit that is used to manage hazardous waste, or a group of such facilities
- They already have releases to the environment
- Ongoing releases are not “sudden”

# Who – TSD Owner/operator

- **An owner or operator of a hazardous waste treatment, storage, or disposal facility, or a group of such facilities,**
- Could be owner or operator
- Not Federal facilities
- Self-implementing during interim status, or incorporated into permit
- Can be a group of “such” facilities
- Coverage is on a “per firm” basis - coverage is normally for a group of facilities
- Must be maintained thru closure of facility and all units

# What – Third-Party Liability

- **...must demonstrate financial responsibility for bodily injury and property damage to third parties**
- Bodily injury and property damage (BIPD) not defined in RCRA regulations
- Subject to State law – can be variable
- Bodily injury: medical expenses, lost income, legal expenses
- Property damage: fence, building, equipment, computers, etc.
- Third parties – not company employees
- Neighbors, contractors, passers-by

# When – Facility Operations

- ...caused by sudden accidental occurrences arising from operations of the facility or group of facilities.
- Facility operations not defined
- Generally construed to mean a “pollution event”
- Inconsistent in rulemaking
- Facilities usually have general liability insurance to cover non-pollution events

# How Much?

- **The owner or operator must have and maintain liability coverage for sudden accidental occurrences in the amount of at least \$1 million per occurrence with an annual aggregate of at least \$2 million**
- Land disposal facilities: \$3 million per non-sudden occurrence with an annual aggregate of at least \$6 million
- Can be combined into \$4 million/\$8 million, provided coverages are separated
- Anniversary dates vary – not necessarily calendar year
- “Annual” is generally per policy period
- Anticipates no more than 2 occurrences per firm, per year

# Only Injury and Damage

- **...exclusive of legal defense costs.**
- Legal expenses can eat up most if not all of the coverage
- Averaged 40% in the 1980s
- Insurers have duty to defend
- Primary focus of compliance/enforcement

# A Variety of Options

- Insurance policy
- Financial test (self-insurance)
- Letter of credit
- Surety bond
- Trust fund
- Any combination of the above (except financial test)
- **Most use liability insurance policy**



# A Little History

- Rules proposed in early 1980s
- Not a statutory requirement for EPA
- CGL – commercial general liability policies prevailed
- 1990s: Clean-ups caused insurance industry to walk away
- General liability policies covered “damages”, which included clean-ups

# A Little History

- Modern PLL policies now distinguish between property damage and clean-up
- Some State courts still conflate the two

## **EE. Property Damage means:**

1. Physical injury to or destruction of tangible property of parties other than an **Insured**, including the resulting loss of use and, except with respect to tangible property located on an **Insured Property**, diminution in value thereof;
2. Loss of use, but not diminution in value, of tangible property of parties other than an **Insured** that has not been physically injured or destroyed; or
3. **Natural Resource Damage.**

**Property Damage** does not include **Clean-Up Costs**.

# Insurance Policies

- No such thing as a RCRA policy
- Endorsed/amended general policy
- Claims-made policies: occurrence and claim must be made during policy period
- Occurrence policies: don't specify when the accident must take place, as long as the injury or damage it causes occurs during the policy period.

# Insurance Policy Basics

- A written contract
- Includes all endorsements, riders, etc.
- Cover page which summarizes coverages
- Coverages will be defined
- Definitions, exclusions, etc.

**AIG SPECIALTY INSURANCE COMPANY**

(A Capital Stock Company, herein called the Company)

175 WATER STREET

NEW YORK, NY 10038

**POLLUTION LEGAL LIABILITY SELECT<sup>®</sup> POLICY****THIS IS A CLAIMS-MADE AND REPORTED POLICY. PLEASE READ CAREFULLY.****DECLARATIONS****POLICY NUMBER:** PLS 14784107**Item 1. NAMED INSURED:****ADDRESS:****Item 2. POLICY PERIOD:** FROM January 1, 2014 TO January 1, 2015  
12:01 AM STANDARD TIME AT THE ADDRESS OF THE NAMED INSURED SHOWN ABOVE**Item 3. COVERAGES AND COVERAGE SECTION LIMITS AND DEDUCTIBLES:**

This Policy includes only those Coverages as stated in Section I of the Policy for which deductibles and limits of liability appear below. If no deductible or limits of liability appears for a Coverage, that Coverage has not been purchased.

Coverage	Deductible-Each Incident	Each Incident Limit	Coverage Section Aggregate Limit
A			
B			
C	\$5,000,000	\$5,000,000	\$66,000,000
D	\$5,000,000	\$5,000,000	\$66,000,000
E	\$5,000,000	\$5,000,000	\$66,000,000
F			
G			
H			
I			

#### **COVERAGE C – THIRD-PARTY CLAIMS FOR OFF-SITE CLEAN-UP RESULTING FROM PRE-EXISTING CONDITIONS**

To pay on behalf of the Insured, Loss that the Insured becomes legally obligated to pay as a result of a Claim for Clean-Up Costs resulting from a Pollution Condition, beyond the boundaries of the Insured Property, that first commenced prior to the Continuity Date, and migrated from or through the Insured Property, provided such Claim is first made against the Insured and reported to the Company in writing during the Policy Period in accordance with Section III. of the Policy, or during the Extended Reporting Period if applicable.

#### **COVERAGE D – THIRD-PARTY CLAIMS FOR OFF-SITE CLEAN-UP RESULTING FROM NEW CONDITIONS**

To pay on behalf of the Insured, Loss that the Insured becomes legally obligated to pay as a result of a Claim for Clean-Up Costs resulting from a Pollution Condition, beyond the boundaries of the Insured Property, that first commenced on or after the Continuity Date, and migrated from or through the Insured Property, provided such Claim is first made against the Insured and reported to the Company in writing during the Policy Period in accordance with Section III. of the Policy, or during the Extended Reporting Period if applicable.

#### **COVERAGE E – THIRD-PARTY CLAIMS FOR BODILY INJURY AND PROPERTY DAMAGE**

To pay on behalf of the Insured, Loss that the Insured becomes legally obligated to pay as a result of a Claim for Bodily Injury or Property Damage resulting from a Pollution Condition on, under or migrating from or through the Insured Property, provided such Claim is first made against the Insured and reported to the Company in writing during the Policy Period in accordance with Section III. of the Policy, or during the Extended Reporting Period if applicable.

#### **COVERAGE F – EMERGENCY RESPONSE COSTS**

1. The Company will pay Emergency Response Costs resulting from a Pollution Condition on, under or migrating from the Insured Property. Emergency Response Costs must be first incurred by the Insured and reported to the Company during the Policy Period.

For this Coverage to apply, all of the following conditions must be satisfied:

(a) The Insured must report the Emergency Response Costs to the Company in accordance with Section III. of the Policy.

(b) COVERAGE B – ON-SITE CLEAN UP OF NEW CONDITIONS is purchased.

2. The Company will pay Emergency Response Costs resulting from a Pollution Condition caused by Transportation or Covered Operations. Emergency Response Costs must be first incurred by the Insured and reported to the Company during the Policy Period.

For this Coverage to apply, all of the following conditions must be satisfied:

(a) The Insured must report the Emergency Response Costs to the Company in accordance with Section III. of the Policy.

(b) With respect to Covered Operations, COVERAGE H – THIRD-PARTY CLAIMS FOR COVERED OPERATIONS is purchased and with respect to Transportation, COVERAGE I – THIRD-PARTY CLAIMS RESULTING FROM THE TRANSPORTATION OF CARGO is purchased.

#### **COVERAGE G – THIRD-PARTY CLAIMS FOR NON-OWNED LOCATIONS**

To pay on behalf of the Insured, Loss that the Insured becomes legally obligated to pay as a result of a Claim for Bodily Injury or Property Damage of parties other than the owners, operators or contractors of the Non-Owned Location, or their employees, or Clean-Up Costs resulting from a Pollution Condition on, under or migrating from the Non-Owned Location, provided such Claim is first made against the Insured and reported to the Company in writing during the Policy Period in accordance with Section III. of the Policy, or during the Extended Reporting Period if applicable.

# Other Coverages

- Clean-up
- Mold
- Legionella
- Legal expenses
- Emergency response
- Fines and penalties
- First-party BIPD
- **Allowable, provided they don't impinge upon what RCRA requires**

# Fronting Policies

- Deductible equals coverage limit
- TSD “rents” the letterhead of the insurer
- Insurer doesn’t intend to even pay any claim
- TSD must generally be very solvent
- RCRA regulations don’t place a limit on the amount of the deductible
- Not precluded, though States/Regions can decide for themselves if they will accept it
- State case law may preclude accepting it (California court case)



# Captive Insurance

- TSD sets up its own insurance company
- Not always apparent
- Essentially self-insurance
- Protects TSD's main assets
- Ensures they will be able to obtain insurance
- State law may preclude acceptance

# Endorsement and Certificate

- No such things as a RCRA policy *per se*
- RCRA Endorsement or Certificate “makes” it a RCRA policy
- Each policy must have one or the other
- Technically, could have both

# Endorsement and Certificate

- Must be verbatim – no changes allowed
- Fill in facility-specific information only
- Signed by insurer
- Intended to make inspector's job easier
- Auto insurance analogy – makes trooper's job easier

# RCRA Endorsement

## Paragraph 1

This endorsement certifies that **the policy** to which the endorsement is attached provides liability insurance covering bodily injury and property damage **in connection with** the insured's obligation to demonstrate financial responsibility under 40 CFR 264.147 or 265.147.

The coverage applies at [list EPA Identification Number, name, and address for each facility] for [insert “sudden accidental occurrences,” “nonsudden accidental occurrences,” or “sudden and nonsudden accidental occurrences”]; if coverage is for multiple facilities and the coverage is different for different facilities, indicate which facilities are insured for sudden accidental occurrences, which are insured for nonsudden accidental occurrences, and which are insured for both].

The limits of liability are [insert the dollar amount of the “each occurrence” and “annual aggregate” limits of the Insurer's liability], **exclusive of legal defense costs.**

# RCRA Endorsement

- The Endorsement is part of the policy
- Paragraph 1 is informational
- Paragraph 1 makes no changes to the policy – the information is either true or false
- Insurance industry balked at certifying that the policy provides coverage “to the extent” RCRA requires
- The Agency did not intend to modify the contractual obligations arising from the insurance policies used to satisfy the liability requirement. (47 FR 16548)
- Insurance is only “in connection with”

# RCRA Endorsement

## Paragraph 2 – Changes the Policy

“...any provisions of the policy inconsistent with subsections (a) through (e) of this Paragraph 2 are hereby amended to conform with subsections (a) through (e):

- Bankruptcy or insolvency doesn't affect coverage
- First-dollar coverage: insurer pays deductible (not SIR)
- Must furnish State or Region with full policy is requested
- 60-day notification prior to cancellation
- 30-day notification for other termination
- Signed by insurer
- **Doesn't necessarily make the policy compliant with RCRA**

# RCRA Certificate

- Very similar to Endorsement
- Not part of the Policy – makes no changes
- Most TSDs use the Certificate
- Same Paragraph 1, Paragraph 2 is also informational
- Paragraph 2 items not in regulations
- The Policy stands alone and must provide coverage
- If there is a question, the Policy controls
- **What if the Certificate is incorrect?**

# Compliance Review

- Policies can be daunting at first
- Ask for or create a word-searchable PDF
- Don't have to read everything in the policy
- Start with front pages, then read endorsements
- Often one substantial endorsement for all RCRA-specific items



# Compliance Review

- **Most RCRA requirements will be found in an Endorsement**
- Check what facilities are covered
- Make sure there is a deductible, and who pays it
- Search for bankruptcy/insolvency provision
- Termination and cancellation provisions
- Mark up policy with endorsement changes or references

# Legal Expenses

- Insurers want them covered – duty to defend
- TSDs can also hire attorneys – more expense
- 1980: insurers were fine with no legal expense coverage
- Legal expense coverage has crept back in
- Coverage is usually included in the boilerplate
- Must be amended in an Endorsement

## I. INSURING AGREEMENT

### A. Coverage A - POLLUTION LEGAL LIABILITY

The Company will pay on behalf of the INSURED for LOSS and related LEGAL EXPENSE resulting from any POLLUTION CONDITION on, at, under or migrating from any COVERED LOCATION, which the INSURED has or will become legally obligated to pay as a result of a CLAIM first made against the INSURED during the POLICY PERIOD and reported to the Company, in writing, by the INSURED, during the POLICY PERIOD or, where applicable, the EXTENDED REPORTING PERIOD.

# Legal Expenses

- May be a separate coverage, which is fine
- 25% of main coverage limit is typical
- Can't impinge on main coverage
- This includes not impinging on deductible, which reduces (deducts from) overall coverage

## E. Defense Costs

In addition to the applicable limit of liability, the Company shall pay on behalf of the **Insured** costs, charges and expenses incurred in the defense, investigation or adjustment of a **Claim** covered hereunder. The total liability of the Company for such costs, charges and expenses associated with all **Loss(s)** shall not exceed 25% (twenty-five percent) of the highest Total Combined limit set forth in Item 3. of the Declarations, as amended by this Endorsement. Subject to Paragraph V. C. above, costs, charges, and expenses incurred in the defense, investigation or adjustment of a **Claim** shall be included in the Deductible.

# Legal Expenses

- Separate legal expense coverages can still impinge on main BIPD sublimit as well
- This example has three problems that need fixing: inclusion of legal expenses, inclusion in deductible, erosion of limit once the special limit is exhausted

PEL MANUS (06 16)

7. SECTION VI. LIMIT OF LIABILITY AND SELF-INSURED RETENTION is amended by the addition of the following:

The Limits of Liability shown in Item 3. of the Declarations are inclusive of LEGAL EXPENSE.

An additional Limit for LEGAL EXPENSE in the amount of 25% of the Limits of Liability shown in Item 3. of the Declarations shall apply to all Coverages. This additional Limit is exclusively for LEGAL EXPENSE and applies to both the Each POLLUTION CONDITION Limit and the Coverage Aggregate Limit. This additional Limit for LEGAL EXPENSE is subject to the Deductible shown in Item 3. of the Declarations.

In the event a CLAIM is made against the INSURED for LOSS or CLEAN-UP COSTS, this additional Limit shall be applied to LEGAL EXPENSE before the applicable Limits of Liability shown in Item 3. of the Declarations. After the additional Limit for LEGAL EXPENSE has been fully eroded, any other covered LEGAL EXPENSE shall erode the applicable Limits of Liability shown in Item 3. of the Declarations.

# Covered Facilities

- Usually listed in an Endorsement
- Each TSD may have its own sublimit
- Some policies cover every facility a TSD's parent owns, including offices, old clean-up sites, etc.
- Regulations state that policies must only cover “such” TSD facilities that need RCRA coverage

# Clean-up Coverage

- Very common to conflate with BIPD coverage
- Property Damage and Clean-up Costs are always kept separate in the definitions of the policy
- However, both coverages same sublimit, competing for same pot of money
- TSDs want clean-up coverage, and it may be in the interest of the public as well
- Not discouraged, but can exhaust coverage
- Insurers can set premiums based on separate coverages

# Clean-up Coverage

## **A. Policy Aggregate Limit**

The Company's total liability for all **Loss**, shall not exceed the "Policy Aggregate" stated in Item 4. of the Declarations as amended by this Endorsement. The Company's internal expenses do not erode the limit of liability available for any **Loss**.

## **B. Each Incident Limit - Coverages C, D and E**

Subject to Paragraph V.A. above, the most the Company will pay for all **Loss** arising from **Each Incident** under any or all of Coverages C, D and E is the amount stated in Item 3. of the Declarations as amended by this Endorsement.



# First-Dollar Coverage

- Insurer must pay the deductible
- RCRA applies to the TSD, not the Insurance Company
- Prefer Certificate language: “The Insurer is liable for the payment of amounts within any deductible applicable to the policy, with a right of reimbursement”
- Uncertain how ambiguous or conditional language would be interpreted by a Court.

The Insured shall pay the Deductible amount prior to the Company having any obligation to pay **Loss** otherwise covered under this Policy, provided however, if the Company is required by applicable statute or regulation or chooses to pay **Loss** before the Insured has paid the Deductible amounts, the amounts paid by the Company shall be included within **Loss** and shall erode the Total Combined limit set forth in Item 3. and the Policy Aggregate set forth in Item 4. of the Declarations, as amended by this Endorsement. Further, the Insured shall promptly reimburse the Company for advancing any element of **Loss** falling within the Deductible.



# Case Experience

- Inspected all commercial TSDs under Air Emissions initiative, and asked for proof of insurance.
- Issued Information Request letters for 5 years of policies
- Did all TSDs in Region (~10)
- Federal TSDs don't require liability coverage
- Requested policies, plus and endorsements, certificates and other documents
- Very few policies were actually compliant

# Typical Deficiencies

- Legal expenses included
- Non-TSD facilities covered
- Clean-up or other coverage impinges on BIPD coverage
- Vague first-dollar language
- No 30-day and/or 60-day notice to State/EPA
- Coverage not through closure, only ceasing of business.

# Engaging the TSD

- Initiated “show cause” meetings with TSDs
- Often new technical subject for them
- Confused with closure financial assurance
- Often retain outside counsel
- Usually unfamiliar with RCRA requirements
- Learning curve in first few meetings/discussions
- Insurance company might be involved

# Common Defenses

- The Certificate controls
- The insurance company assured us we had a compliant policy (even with legal expenses included)
- The insurer should be deferred to as the expert
- Not all possible scenarios would exhaust coverage
- A court might decide in favor of the claimant third party
- Courts tend to decide in favor of the insured rather than the insurer

# Common Defenses

- RCRA-specific policy inherently meets all RCRA requirements

PEL MANUS (06 16)

3. SECTION IX. CONDITIONS is amended by the addition of the following:

**FINANCIAL ASSURANCE COVERAGE ONLY** - Coverage pursuant to this Policy is effective for any CLAIM or POLLUTION CONDITION that is associated with a COVERED LOCATION(S) listed below, but only if the INSURED is required to demonstrate financial assurance for such CLAIM or POLLUTION CONDITION pursuant to the associated regulation(s) listed below:

# Considerations

- Inclusion of legal expenses typically black-and-white
- Exclusion of other coverages (clean-up, mold, etc.) not explicitly precluded
- State general insurance law may control
- Only pollution events covered, versus “facility operations”
- EPA can’t always enforce higher coverage limits that States adopt (Washington doubled them)
- State law may recognize the Certificate in certain contexts (see *Fittro v. Lincoln National Life*)
- **Certificate is wrong: false statement?**

# Settlements

- Region 10 took 5 cases, States took 2 cases
- EPA settlements averaged ~\$90,000
- Current policy must be amended
- **Often only for Region 10 facility**
- TSD and insurer propose revisions
- No environmental projects included
- Premiums generally don't change
- Side letter opening on current policy is possible

# Contact

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