

ENVIRONMENTAL – GOING GLOBAL

Around the world, the United States is known as one of the first countries to develop an elaborate web of environmental laws and regulations that protect human health and the environment. The current regulatory, enforcement and legal framework has been in the works for the last four decades and has been evolving since the first “Earth Day” was celebrated in 1970. However, the U.S. no longer corners the market on environmental issues affecting public health, soil, waterways, biodiversity and air. Strong environmental laws, regulations and statutes are already in place around the globe, and more than 3,460 new environmental regulations await the attention of legislators and regulators, according to **ENHESA**. Environmental protection and regulatory compliance have gone global and, by most accounts, will only intensify.

SOME EXAMPLES FROM AROUND THE WORLD

- **EUROPEAN UNION/EUROPE** – The Environmental Liability Directive (which addresses pollution and remediation focusing on biodiversity issues utilizing the “Polluter Pays” principle) has been transposed into law in all 27 EU member nations and is undergoing a country-by-country implementation. The United Kingdom enacted the Environmental Damage (Prevention & Remediation) Regulations in 2009. Europe’s “REACH” initiative (a program aimed at **R**egistration, **E**valuation, **A**uthorization and **R**estoration of **C**hemical Substances) is gaining momentum.
- **ASIA** – In general, there’s been a drive to both update environmental regulations and more strictly enforce rules already in place (particularly in China, where new tort liability laws represent a shift towards a tougher western-style tort system). China’s Ministry of Environmental Protection recently disclosed that it will spend over CNY 100 billion in coping with air pollution in key regions along with implementation of new and much stricter standards.
- **INDIA** – Proposed developing a National Environmental Protection Authority and has recently pursued global companies operating in India for environmental damages.
- **RUSSIA** – A new “Hazardous Materials” law requires insurance for businesses dealing with hazardous materials, with penalties for violations beginning April 1, 2012.



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- **UNITED STATES** –The *Washington Post* recently reported that the amount of toxic chemicals released into the environment nationwide in 2010 “increased over 16%” over the year before according to the Environmental Protection Agency (EPA).¹ The EPA has the largest budget in decades with a focus on enforcement.
- **SOUTH AMERICA** – Stricter environmental regulations in Brazil (Federal Environmental Law of Residuos Solidos n.12.305 article 40 and Law

6938/1981, which pulls from the “Polluter Pays” principle inciting sanctions and fines). Heightened environmental awareness of new environmental exposures from major construction and infrastructure work associated with the 2014 FIFA World Cup and the 2016 Olympics. Public outcry in Brazil and Chile is bringing greater pressure on the government to not only improve the current environment regulations but, more importantly, to enforce them. In Argentina, companies performing certain activities posing a threat to the environment are required to carry environmental insurance (primarily for funding remediation and cleanup) strengthened by the passage of the Argentine Environmental Framework Law (EFL) in 2002.

HELPING CLIENTS PREPARE

Proper environmental insurance coverage and structure are critical as clients strategically expand into new countries while facing rising environmental protection initiatives, more stringent regulations and stricter enforcement. In addition to identifying environmental exposures and creating risk transfer solutions, it is important to structure a program that contemplates potential tax implications/consequences, claim management/payment issues, central administration and program coordination. Willis has a sophisticated, experienced and well positioned global environmental broking network.



TO FRACK OR NOT TO FRACK?

That is the question many are asking these days as hydraulic fracturing (more commonly referred to as fracking) brings with it not only a large energy supply and tremendous business opportunity but also a myriad of environmental concerns. The Energy Information Administration predicts U.S. natural gas production will nearly triple by 2035, and President Obama declared the United States the “Saudi Arabia of natural gas.”² While the gas-drilling boom has been around for several years now and has produced thousands of new wells, the potential environmental issues and toxic tort liabilities surrounding it are becoming contentious among regulatory agencies, energy exploration and drilling companies, politicians, environmental activists, land owners and the insurance industry.

ENVIRONMENTAL CONCERNS

From an environmental risk perspective, much debate and concern surrounds the fracking process and how it may impact the environment due to:

- The chemicals used (e.g., acids used to dissolve minerals and create cracks and surfactants used to make fluids more slippery)
- Fears of pollutants finding their way into water supplies
- Surface spills of pollutants around the well itself
- The massive amounts of water used during the fracking process which requires subsequent treatment and/or disposal

INSURANCE CONSIDERATIONS

While general liability and umbrella carriers in the energy sector are still providing a certain degree of “sudden & accidental” pollution coverage, environmental insurance carriers have been a lot more selective when underwriting fracking risks on a “gradual” basis (particularly in the Marcellus shale formation, which has received most of the recent negative media attention). In essence, two different coverages are pursued in the environmental impairment

liability market by those who have a pollution exposure as a result of fracking operations. The first, Contractors Pollution Liability, is sought by those drilling contractors and/or subcontractors who are actually performing the work. Short of any indemnifications offered by the owners to the rights or lease operators, it has generally been the contractors who can be responsible for any pollution conditions caused or exacerbated by their work or resulting from their operations (such as disturbing or remobilizing existing contaminants, discharges, releases, spillages, etc.). The second is a Site Pollution Legal Liability policy for the drilling site itself, which is typically purchased by the owner of the property and can address historical/“pre-existing” and gradual pollution conditions (coverage for any newly created/operational pollution conditions can be added as well).

While some environmental insurance markets are being very selective when it comes to underwriting and employing their capacity for fracking risks, we are not seeing carriers universally attaching exclusions or declining fracturing risks across the board. Some markets have a more robust appetite than others. When carriers contemplate fracking risks, they focus on the insured’s risk profile, experience and track record as well as their adherence to best industry practices and factor in the specific geographic area of operation.

Whether or not there is scientific merit in the environmental concerns, or efforts to ban shale gas exploration or production continue in certain parts of the world, fracking doesn’t appear to be going away any time soon. Willis will continue to identify the exposures, help to manage the risks and provide environmental risk transfer solutions to our clients accordingly. *Be on the lookout for our forthcoming **Energy Market Review** slated for release on April 17, which focuses on various insurance issues.*

ELECTROMAGNETIC FIELDS

Public health and toxic tort liabilities concerns surrounding electromagnetic fields (EMFs) have become a contentious issue among utility companies, regulatory agencies, property owners and other affected stakeholders. While many studies have produced varying (and sometimes contradictory) results, many epidemiological studies suggest a possible human carcinogenic link in a classification group similar to formaldehyde, DDT, dioxins and PCBs.

TWO MAIN EXPOSURES/ POTENTIAL LIABILITIES

Two of the more predominant exposures from an ownership and insurance perspective appear to be:

1. Defending against any bodily injury claims brought by third parties (e.g., tenants)
2. Third-party property damage claims vis-à-vis “diminution in property value” by a neighboring property owner alleging EMF emissions from a potential source property (e.g., the property is worth less now because of the nearby presence of EMFs, because the general public believes the exposure to be dangerous and the property is therefore devalued)

Numerous lawsuits and much litigation activity have involved the second exposure above. Some examples: *San Diego Gas & Elec. Co v. Daley*, 205 Cal. App. 3d 1334 (1988); *Florida Power & Light Co. v. Jennings*, 518 So.2d 895 (1987) and *Dunlap v. Loup River Public Power District*, 284 N.W. 742 Neb (1939). In the case of *San Diego Gas & Elec. Co v. Daley*, the jury awarded the property owner \$190,000 for condemned property and \$1,035,000 for the diminished value to the remaining property.

EMFs are areas of energy that surround any electrical device (i.e., electric fields are produced by voltage and magnetic fields are produced by current), meaning, EMFs are essentially produced wherever electricity is used. Many risk managers are asking themselves if they have any properties near power lines, substations or transformers and are wondering “how close is too close?” And, while EMFs can come from a variety of sources, there are some smaller and less obvious sources, such as electrical wiring, computers, electric blankets and clocks, appliances and cell phones.



THE HEALTH IMPACT

Actual bodily injury lawsuits to date have had limited success because scientific evidence has not established a definitive link between exposure and health problems, such as cancer. However, a 2007 Swiss Re³ study concluded that plaintiffs will likely win suits dealing with the EMF issue (particularly since science and epidemiological studies continue to advance and suggest a direct health link) in which the legal defense costs could be staggering.

The health impact of EMFs, of course, can vary based on the different levels of exposure and can be tempered by distance from the source and any shielding in the area. From a public health perspective, complete avoidance would be ideal and appears to be the best risk management measure; however, it is not a realistic option considering that the potential sources are all around us, every day.

WHAT INSURANCE IS AVAILABLE?

From an insurance perspective, when considering the potential legal and toxic tort implications, a layer of defense against EMF liabilities and exposures could be found through an environmental insurance product. Among other coverage grants being provided, these environmental policies can cover third-party bodily injury and property damage claims and legal defense associated with EMFs.

Many carriers have EMF coverage built directly into their form via their definition of “pollutants” (e.g., “...any solid, liquid, gaseous or thermal pollutant, irritant or contaminant including but not limited to...smoke, vapors, toxic chemicals, hazardous substances...electromagnetic fields...”). And, most environmental policies include “diminished third-party property value” in their definition of property damage.

Environmental exposures are just one of the challenges facing risk managers in the real estate industry. Fortunately, various insurance solutions are available to help transfer the risk.



RECENT AND UPCOMING EVENTS

The Environmental Practice continues to participate in many regional and national events:

- Cliff Yeckes spoke at the Annual SME Conference in Seattle, February 19-22, 2012.
- Brian McBride and Cliff Yeckes attended the Association of Defense Communities Winter Forum in Miami, February 27-29, 2012.
- Kelley George attended the Environmental Business Journal's Environmental Industry Summit, March 14-16 in San Diego.
- Robin Kelliher facilitated an Industry Outreach Presentation with the N.J. Department of Environmental Protection to review the new "Site Remediation Reform Act (SRRA)" on March 30 at 10:00 AM ET via webinar.
- Rich Sheldon will represent the Environmental Practice at RIMS, April 15-18 in Philadelphia.
- Anthony Wagar will be moderating a "Mergers & Acquisitions Roundtable" panel session at RTM, May 1-3 in Boston.

If you would like additional information on any of the events or topics mentioned above, please reach out to your local environmental team contact.

KEY APPOINTMENTS AND CONGRATULATIONS

- **Rich Sheldon** was appointed the WNA Environmental Practice Leader in January of this year. He previously held the position of National Placement Leader for the Environmental Practice. Rich replaces **Rick Hawkinberry** who was appointed CEO of the WNA Construction Practice in September 2011.
- **Robin Kelliher** was appointed the National Environmental Claim Director on March 1. Previously she was a Regional Team Resource with the Northeast & Atlantic Regions of the Environmental Practice.
- **Brian McBride** was appointed the WNA National Environmental Placement Leader on March 13, replacing **Rich Sheldon**. Brian will also continue to manage the South Region Team for the Environmental Practice.

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We also invite you to visit our [website](#) for past publications or other information about environmental issues.

The observations, comments and suggestions we have made in this publication are advisory and are not intended nor should they be taken as legal advice. Please contact your own legal adviser for an analysis of your specific facts and circumstances.

¹ 1/16/12 Washington Post (D.C.)

² According to a January report in Engineering News-Record (ENR.com) and the 1/17/12 Los Angeles Times article

³ “EMF Radiation Poses Significant Emerging Risk for Insurers” – 3/3/10, Seeking Alpha