

### Three Key Items for the Environmental Checklist

By David Orleans  
Account Executive/Assistant Vice President  
Willis Environmental Practice

As is the case with most coverages, Environmental insurance placements focus not only on the three basic factors of premium, term and self-insured retention, but also issues specific to the class of risks. For Environmental perils, that usually means, for example, the issues of whether some degree of coverage can be offered for a known condition and whether mold coverage is obtainable. We suggest that buyers of Environmental insurance consider three other issues when they are placing or renewing coverage: non-owned disposal sites (NODS), transportation and natural resource damages. These ancillary coverage areas address significant exposures and are essential to making an Environmental insurance program truly comprehensive.

#### Non-Owned Disposal Sites (NODS)

Most manufacturers, distributors and developers – as well as any organizations responsible for remediation of pollution conditions – send waste matter to designated disposal sites such as landfills, incinerators and recycling centers. These facilities have systems that can fail and if they do, the disposal facility owners may subrogate against the parties that use them. The average business owner may

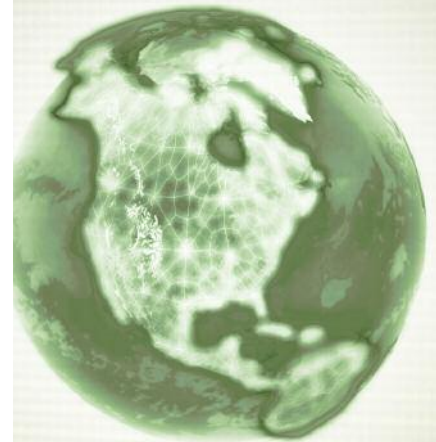
not be aware of the potential liability associated with their waste matter after it has left their premises.

NODS liability became a widespread issue in the Superfund era. In the aftermath of the 1980 Superfund law, it was established that an organization with even a loose affiliation with some waste disposed at a Superfund site can be held jointly and severally liable. NODS coverage emerged in response. While responsible parties in such situations can usually negotiate settlements that keep them from bankruptcy, NODS coverage can potentially help defray much of the costs associated with such liabilities.

NODS coverage is a concern not only at Superfund sites. Landfills breach and hazardous waste facilities of all sizes fail, and without NODS coverage, business owners can face liability for situations where their waste contributed to these breaches or failures. NODS coverage should always be explored by any organization disposing of pollutants of any kind.

#### Transportation – Pollution Liability

Standard auto policies typically exclude coverage for pollution conditions caused by accidents and overturns, leaving auto fleets carrying chemical products, wastes and hazardous cargo with significant pollution liability exposures. The overturn of an oil truck can release oil product into a body of water adjacent to the road where the accident occurred; vehicles on their way to hazardous waste facilities



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can get into accidents where pollutants are released into soil and groundwater. These are substantial risks, but they can be covered by transportation pollution liability products.

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The transportation coverage offered by most Environmental carriers is broad enough to cover a client's owned vehicles and hired third-party haulers. Any business that transports waste to landfills and incinerators will face this exposure. Most waste haulers, chemical distributors and gas and oil companies know this already – due to the seriousness of pollution-transportation exposures, these companies must often obtain this coverage as a prerequisite to doing business. Whatever end of the pollution-transportation spectrum you are on, it is important to explore pollution-transportation coverage options.

### Natural Resource Damages

A client recently presented us with an unusual Environmental exposure: one of their oil trucks overturned in a national forest on a route that ran adjacent to rivers with protected endangered species. The route was unavoidable – the client delivers gas and oil to service stations in mountain towns and to national parks. The accident created an oil slick that threatened a protected area of the river and its protected species, and the client faced liabilities they never knew they had. We immediately began discussing coverage for natural resource damages.



These products address the liabilities created by government environmental rules at the federal, state and local levels. These rules are often very broad and include drinking water, ground water, air and wildlife, so that a single incident can have wide repercussions. Fortunately, carriers' definitions are generally broad as well, and policies cover the costs of recovery and the loss of value of the land affected. The coverage is appropriate for entities as large as lumber mills operating near national parks and as small as a modest redeveloped commercial space adjacent to a city park.

The most important point is that any organization involved in the transport or disposal of possible pollutants should consider the widest possible ramifications and plan a risk management strategy accordingly.

### FIN 47 Update

By Mike Balmer  
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Willis Environmental Practice

Rules issued in 2005 governing the disclosure and accounting treatment of environmental liabilities are finally starting to have an impact. One key new provision, FIN 47, is effective for fiscal years ending after December 15, 2005, and as we enter the latter half of 2006, we are seeing what companies are doing – and perhaps not doing – to comply.

The Financial Accounting Standards Board (FASB) interpretation of FAS 143 (Accounting for Conditional Asset Retirement Obligations), issued as Financial Interpretation Number (FIN) 47 in March 2005 changed the way companies must report their environmental liabilities, and made it clear that companies must reserve for asset retirement obligations even if there is uncertainty as to the time or method of eventual settlement.

The new rules were designed to reduce the potential variation in the reporting of asset retirement liabilities. However, the FIN 47 provisions are quite complex and in some areas they are ambiguous. As a consequence, many details of FIN 47 implementation have yet to be worked through by auditors and professional advisors.

One thing is clear, however: companies are interpreting the requirements differently. A Controllers' Leadership Roundtable first quarter 2006 review of some 166 SEC filings (for companies with annual revenues over \$500 million) reportedly found that the aggregate financial statement impact of FIN 47 for the sampled companies was in excess of \$2.2 billion. However,

across industry and revenue categories, the financial statement impact varied enormously. For some, there was no effect; for others, substantial restatements.

Up until the implementation of FIN 47, the accounting treatment of environmental investigation and remediation costs were prescribed by the Statement of Financial Accounting Standards No. 5, Accounting for Contingent Liabilities (FAS 5). FAS 5 requires that an environmental cost arising from a contingent liability should be accrued only if it is "probable" that a liability would be incurred and only if the scope of that liability is "reasonably estimable."

In contrast, FIN 47 unequivocally states that retirement obligations should be recognized even when associated environmental costs would not be considered probable under FAS 5. FIN 47 requirements are triggered when there is expected to be a "legal obligation" to incur environmental costs once an asset is retired. Thus the question is no longer restricted to whether there is a probable future environmental cost; rather it is now necessary to determine whether there are any anticipated legal obligations for incurring environmental costs at the end of the facility's useful life. If a legal obligation is found but is unlikely to be triggered, it is still necessary to report it and explain the uncertainty.

FIN 47 clarifies that a reasonable estimate of the obligation should be calculable where the retirement cost is included in the cost of acquiring the asset, or where an active market exists for the transfer of the obligation. In other cases, the retirement obligation should be estimated using probability analysis to estimate the reasonable life-span and retirement costs of the asset. These approaches may be difficult in regard to some environmental liabilities.

In recognition of these difficulties, FIN 47 does allow that in certain circumstances there may not be sufficient information to estimate the fair value of an obligation. However, it requires an explanation of why the retirement obligation cannot be reasonably estimated. In addition, FAS 143 (and FIN 47) does not apply to retirement obligations that are "immaterial." This materiality threshold has not been determined and, consequently, is open for interpretation.

Interestingly, FAS 143 specifically exempts cleanup obligations that result from "improper" operation of an asset. Hence, contamination or damage resulting from spills or accidental releases that, by definition, were not an intended or a "proper" part of a facility's activities would not be covered by FIN 47. However, there are other disclosure rules and accounting principles that apply to remediation liabilities, e.g., SFAS 5 and SOP 96-1.

Remediation obligations are usually triggered by the discovery of contamination exceeding relevant regulatory thresholds, not by the retirement of an asset. Hence, it seems that FIN 47 will only apply to historic contamination liabilities when the facility is subject to some regulatory closure requirement (such as the Industrial Site Recovery Act in New Jersey) or a contractual commitment such as a lease exit provision.

On the basis of financial reports issued so far this year, it is apparent that not all companies are estimating the value of the retirement obligations that they identify. It does appear that the majority of companies have either complied with FIN 47's strong preference for estimating the fair value of identified obligations or side-stepped the issue by determining that the fair value is immaterial. However, a small percentage of companies have identified conditional asset retirement obligations, but claimed that they could not reasonably estimate their fair value and, therefore, have not reserved for them. Whether these organizations will be found to be in violation and face repercussions remains to be seen.

The application of FIN 47 will inevitably evolve over time as greater consensus is achieved within the accounting industry and the SEC's enforcement strategy becomes clearer. Despite the early inconsistencies in interpretation, which are substantial, there is already evidence that FIN 47 is having an impact on corporate financial performance. As a consequence, we have started to see companies actively seeking out ways to mitigate the impact of FIN 47 by actively addressing remediation obligations, transferring remediation obligations to third parties or even selling properties with significant retirement obligations.

*This article is intended only as a general overview on the topic and not as regulatory compliance guidance. Specialist advice should be sought about your specific circumstances.*



# Tug of War: Six Responses to a Reservation of Rights Letter

By **Scott D. MacDonald**  
Senior Claim Specialist  
Willis\ Environmental Practice

There is nothing more daunting in an insured's interaction with an insurer than receiving a 14-page reservation of rights letter following the submission of a claim.

Numerous references to complicated policy language are often followed by heavy-handed warnings to the client about the prospect of limited coverage or no coverage at all.

Environmental insurers are no exception. In fact, given the complexity of coverages provided, Environmental claim adjusters often enlist their own in-house attorneys to draft reservation of rights letters to ensure they have made a comprehensive reference to all of the nuances of the policies' coverage exclusions.

Small wonder that an insured's first reaction is often to take a deer-in-headlights stance and do nothing. This is frankly the response most insurers anticipate, as it allows them an advantage in the tug of war that is the claim management process. For insureds wanting the best possible outcome in claim settlements, simply doing nothing is the biggest mistake they can make.

We offer insureds a review of some basic strategies they can employ to help hold their ground when faced with a reservation of rights letter.

## Background

Contrary to the impression many insureds may have, insurers do not have a corporate mandate to repel any and all claims submitted by their insureds. By law, upon receipt of any claim from its policyholder, a carrier is obligated to notify the insured within a reasonable timeframe of all potential coverage in the policy based upon the claim scenario presented. If the insurer believes a policy exclusion applies, this must be communicated as well. Failure to do so raises the possibility of an *estoppel* (i.e., statutory block), which prevents the insurer from applying the coverage exclusion. Hence the motivation for the insurer to send a reservation of rights letter.

Claims adjusting quite naturally has an adversarial aspect – bottom-line incentives being what they are – and reservation of rights letters set the tone. Overworked adjusters and in-house attorneys have been known to utilize complicated legal terms and quote entire pages of policies, leaving clients searching for specific

policy references that apply to their claim scenario. Reservation of rights letters are not the only tool insurers have. Adjusters may demand laundry lists of questionable documents that must be provided before any coverage commitment will be considered.

## Choosing a Response

The following six responses should be considered in replying to a reservation of rights letter. Your broker can be useful at this stage in choosing the response that will achieve the maximum leverage in your game of tug of war.

There is nothing more daunting in an insured's interaction with an insurer than receiving a 14-page reservation of rights letter following the submission of a claim.

### 1) "I'm Rubber, You're Glue"

When faced with a generic reservations of rights that is not specific to any of the policy terms, it may be helpful to recall the old playground comeback, "Whatever you say bounces off me and sticks to you." By this we mean that you can reply with a statement reserving *your* rights – to assert your claim and challenge any application of an exclusion. Such a statement could begin, "In response to your reservation of rights, please be advised that all of ABC Company's rights are likewise hereby reserved, including the right to amend or modify this statement in the future."

### 2) The Spotlight

An alternative to the first response when dealing with a boilerplate reservation of rights letter is to spotlight the specific grounds cited by the adjuster at the outset. Oftentimes, clients can be successful in exposing an unsubstantiated or hastily drafted reservation by asking the question "Why?" Through a simple request for specific policy citations applicable to the actual claim components, you may well trigger a response that quickly narrows the scope of exclusions the carrier will ultimately rely upon.



### 3) “Make My Day!”

If your claim occurs in Arkansas, Illinois, Louisiana, Maryland, Mississippi, New Jersey, New York or Utah, the carrier’s decision to issue a reservation of rights letter may help make your day. The above-mentioned jurisdictions grant the insured sole discretion on the selection of counsel (in the event the carrier has reserved its rights), without consideration of the insurer’s preferences. The general rationale in these states is that it is patently unfair for the insured to be tethered to a law firm not of its own choosing if the insurer has reserved its rights to withdraw its defense of the insured at any point in the future of the claim. Other states permit the insurer and the insured to partner in the selection of counsel (Rhode Island) or define each party’s role in the selection process (Alaska and California). Clients should confirm applicable laws in their state before initiating a claim.

### 4) The Periodic Pest

Undoubtedly, the most overlooked aspect of the reservation of rights is the concept that the insurer’s coverage reservation is, except in its most generic form, a time-limited right. As claims adjustment moves forward, the insurer’s original position may no longer apply. Insurers often will be reluctant to modify their positions accordingly. Stale coverage stances are particularly rampant in Environmental claims, where the assigned adjusters often change numerous times throughout the long life of the claim. Upon transfer, the new adjuster often simply adopts the coverage posture of their predecessor. However, as new documents are received, and discovery performed, the applicability of the carrier’s initial reservation can quickly expire. A prudent insured should periodically challenge the current status of the insurer’s coverage stance and inquire as to what, if any, barriers prevent the carrier from a full committal to coverage.

### 5) “See You in Court!”

In the event an insurer simply refuses to modify or remove their coverage reservation within a reasonable time period, many insureds have successfully sought declaratory judgment (DJ) actions through the court system. Given the inherent risks and costs involved with presenting arguments before a court of law, this is an option that must be considered only after seeking the advice of a lawyer. However, there is no doubt that DJ actions can be utilized effectively by attorneys who see a situation and a jurisdiction favorable to the insured.

### 6) The Last Resort

The response of last resort involves filing a bad faith suit directly against the insurer. A complex legal process is involved, so it is a response that should be reserved for only the most egregious conduct by the insurer. If successful, however, a policyholder can

not only obtain coverage for the original claim it sought, but can also be awarded compensatory and punitive damages (including reimbursement of all legal fees). Once again, this is an option that should only be considered after careful examination by a competent attorney.

Situations that may justify a bad faith suit in response to a reservation of rights letter include:

- Ongoing refusal by the carrier to reference specific policy language in a reasonable time period
- Failure by the carrier to conduct an investigation or to apply the results of an investigation to the coverage interpretation
- Rejection of an insured’s right to counsel of its own choosing (where allowed by jurisdiction)

An advantage of a bad faith allegation is that it will almost automatically get the attention and involvement of upper management in the carriers’ organization. If the adjuster’s original stance was indeed egregious, the carrier’s claims management personnel may voluntarily revisit their coverage position rather than face precarious litigation.

Mistakenly, some insureds have half-heartedly threatened to pursue bad faith claims simply to bypass the frontline adjuster. The danger in this strategy is that if the carrier has not done anything to justify the allegation, the integrity of the insured’s arguments will not sustain a technical review, and the insured will be in turn accused of crying wolf. This damages not only their relationship with the frontline handler but the entire corporate entity of the carrier. Especially in limited underwriting markets, pursuing a bad faith claim can have political and legal repercussions that may not be helpful at policy renewal time.

Should you receive a reservation of rights letter after submitting a claim, you should immediately contact your broker and plan a response. The worst choice is to take no action and let the carrier’s assertion of coverage limitations overwhelm the claim recovery process. Delivering a firm (and periodic) tug on the carrier’s commitment to coverage will help ensure that your policy rights – which you purchased well in advance of any claim – are adequately respected.



## Events

**Brian McBride**, our Southeast Environmental Team Leader, will deliver a presentation September 21 at the NC/SC Environmental Information Association meeting in Myrtle Beach, SC. His topic is "The Application of Environmental Insurance to Brownfield Redevelopment." For more information, call Brian at 404 224 5126 or email [brian.mcbride@willis.com](mailto:brian.mcbride@willis.com).

The **Willis Environmental Practice** will serve as a primary sponsor of the Environmental Financial Consulting Group (EFCG)'s CEO Conference for Engineering & Consulting (E/C) firms to be held in New York October 18-20. **David Grigg** of the **Willis National Construction Practice** will make a presentation on professional risks faced by E/C firms. This popular conference has been held each October for the last 15 years; Willis has sponsored the conference the last three years. The conference is attended by CEOs and executives from E/C firms throughout the world, and participation is limited to 200 by invitation only. For more information, call Gary Rodrigues at 617 351 7405 or email [gary.rodrigues@willis.com](mailto:gary.rodrigues@willis.com).

**Michael Balmer** of our National Practice and **Jeffrey Clarke** from our San Francisco office will give a presentation at RTM Communications' annual conference on brownfield redevelopment in San Francisco, also October 18-20. We are a sponsor of the event, called "Contaminated Property Transactions: Navigating the Complex Deals." Mike and Jeff have named their presentation "Environmental Insurance for Brownfield Transactions – Strategies for Getting Best Value from a Changing Market." For more information, call Mike Balmer at 617 351 7530 or email [michael.balmer@willis.com](mailto:michael.balmer@willis.com).

The **Willis Environmental Practice** will be exhibiting at the US EPA's annual National Brownfields Conference November 13-15 in Boston. This year's conference is titled "Brownfields 2006: A Revolution in Redevelopment & Revitalization." For more information, call Gary Rodrigues at 617 351 7405 or email [gary.rodrigues@willis.com](mailto:gary.rodrigues@willis.com).

## New Faces in the Willis Environmental Practice

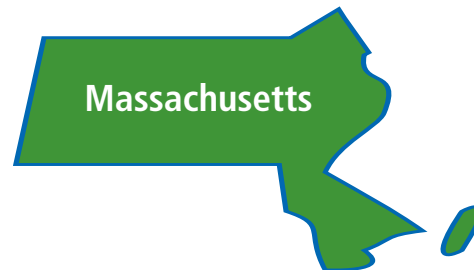
### Corporate

#### **Scott MacDonald**

#### **Vice President/Senior Claims Specialist**

Scott MacDonald is a Vice President and Senior Claims Specialist in the Boston office of Willis' Environmental Practice. As a resource on the National Practice team, he is responsible for providing clients with guidance and advocacy in several key areas: initial carrier submission of complex claims, claims coverage disputes, stewardship of client claims expense submissions, and emerging Environmental claims issues.

Scott came to Willis with more than 13 years of experience handling Environmental claims. Prior to joining Willis, he spent six years as Marsh's practice leader for Environmental and Construction claims in their New England region. While at Marsh, Scott negotiated multimillion dollar claims settlements in disputed coverage battles with Environmental carriers in construction and aviation claims venues.



Before working at Marsh, Scott held numerous senior positions handling complex Environmental claims in eight years with AIG's Construction division. He was one of the founding members of AIG's Wrap-up Claim Service team for Boston's Central Artery/Tunnel Project.

Scott holds a Bachelor's Degree from Bridgewater State College and has been a licensed Property and Casualty broker since 2000.

### Midwest Region

#### **Stephen Bucheleres**

#### **Assistant Vice President/Market Specialist**

Steve Bucheleres is an Assistant Vice President with the Willis Environmental Practice in Chicago, providing Environmental risk management solutions for Midwest Region clients.

Before joining Willis, Steve was an Environmental insurance broker for a major brokerage firm, where he placed several million dollars in Environmental insurance premiums in under two years for Pollution Legal Liability, Contractors' Pollution and Remediation Cost Cap policies.

Prior to his insurance brokerage work, Steve spent over five years as a commercial real estate broker with a leading commercial real estate firm, where he formed the Environmental Properties Group, a practice that assisted owners of environmentally impacted real estate in maximizing the value and minimizing the risks associated with their properties.

Before his tenure in commercial real estate, Steve was an environmental project manager and business development manager for five years with the nation's largest industrial demolition contractor.

Steve received his BA from the University of Iowa.



### **Max West** **Senior Vice President**

Max West is a Senior Vice President with the Willis Environmental Practice in Chicago. His expertise includes customizing, negotiating and placing Environmental insurance for real estate transactions, mergers and acquisitions, manufacturers, environmental service providers and landfills.

In addition to his deep technical expertise in matching environmental exposures with appropriate insurance programs, Max has wide-ranging experience in the broader business issues surrounding such applications of insurance. He has been involved in dozens of transactions involving transfers of businesses or real estate, ranging from single asset sales to portfolios of over a thousand properties. Through this experience he has developed a critical appreciation for the key commercial drivers behind such transactions and the flexibility, creativity and speed needed to close deals.

Max started his career underwriting Environmental insurance with AIG. He has over nine years of Environmental risk management experience.

Max holds a BS Honors Degree in Environmental Management from Southampton – England.

### **South Central Region** **Beverly McCoy** **Senior Vice President** **Environmental Marketing Specialist**

Beverly McCoy, a Senior Vice President and Environmental Marketing Specialist based in Houston, works with many insurance markets in structuring Environmental liability coverage for owners, contractors, engineers, consultants, governmental agencies and energy-related firms who encounter environmental issues such as asbestos, lead, underground storage tanks, PCB and site remediation.

Since 1990, Beverly has worked exclusively with Environmental risks, structuring various risk transfer programs. Previously, she was with major brokerage firms, working with commercial accounts (including construction accounts and remediation contractors, consultants and testing labs) and various types of risk transfer and risk financing programs. She has arranged placements in both the domestic and foreign markets.

Beverly worked on the carrier side for 10 years in commercial lines and surety divisions, and for six years, was employed in risk management and administrative capacities for an oil and gas exploration company and a marine service contractor. She began her insurance career in 1967 with a major insurance company.



Beverly has attended various insurance courses conducted by the University of Houston, Insurance Institute of America, Independent Insurance Agents of Houston and Texas, Professional Insurance Agents of Texas, the American Management Association, and is completing the requirements for the Associate in Risk Management professional designation. She has received certifications in Supervision of Asbestos Abatement

Projects from the University of Houston and Lead Abatement for Contractors and Supervisors from Texas A & M University and has obtained the Environmental Risk Management designation from Southwest Texas State University. She has also participated in the Steel Structures Painting Council's tutorial on Industrial Lead Paint Removal and Abatement.

## Western Region

### David Orleans

#### Account Executive/Assistant Vice President

David Orleans is an Account Executive with the Willis Environmental Practice San Francisco. His experience in underwriting and law offer insights into the complexities of client exposures to Environmental risk and coverage issues in a wide variety of insurance products.

David has more than six years' experience in commercial and Environmental underwriting with Fireman's Fund and Kemper Environmental. His area of expertise was providing insurance products for real estate portfolios and related real estate transactions.

Prior to underwriting, David practiced law as Assistant General Counsel to the New Mexico Environment Department (NMED). He worked on hearings related to the permitting of hazardous waste disposal sites and on matters of jurisdiction between state agencies, the federal government and Indian tribes.

David is a member of the state bar of New Mexico. He holds a BS in Biology and Environmental Studies from Indiana University at Bloomington. He is also a member of the Environmental Restoration Advisory Board for Treasure Island and Yerba Buena Island.



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Disclaimer: This update is intended to provide US readers with general information regarding developments on environmental insurance and risk management issues. Please consult your attorney for legal advice on these issues.