



**CAMBRIDGE**  
PROPERTY & CASUALTY

## **LEASE AGREEMENTS AND ENVIRONMENTAL MATTERS**

Too often environmentalals are not given adequate thought in lease agreements. This is a mistake for leases with more than simple office exposures.

For other warehousing, contracting, light or heavy manufacturing risks, landlords need to be aware that the insurance coverage available under the typical landlord or tenant insurance policies is quite limited.

In the event of an environmental spill or other event that requires cleanup and/or causes injury to third parties, it is likely that without separate environmental cleanup and liability insurance, neither the landlord nor the tenant will have insurance to cover the event.

### **POLLUTION**

In the United States, pollution accidents occur about once an hour causing loss of life, damage to property and the environment, and creating millions of dollars in claims. One of the largest insurance claims on record involved a pollution incident.

Many businesses expose themselves to serious risk of financial loss because:

- 1) They have taken adequate precautions to prevent such an accident. Hopefully this is true. However, the pollution incidents that we see would suggest that this is not always the case.
- 2) They think that the small risk of loss from pollution related claims does not warrant the expense of additional insurance. Most businesses have hidden or apparent pollution exposures, and the risk of loss is not small. The cost to secure insurance is small in comparison to the risks involved.
- 3) They are under the impression that their existing general liability and property policies provide pollution coverage. In fact, these policies are very limited as respects pollution coverage.

Consider the following environmental exposures:

#### **I. You Are Exposed to Pollution Claims.**

##### **1. Exposures That Exist:**

- a. On-site cleanup of unknown pre-existing conditions.
- b. On-site cleanup of new conditions.
- c. Bodily injury or property damage to third parties caused by on-site pollution conditions.

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- d. Third party claims for cleanup costs or property damage beyond the boundaries of the insured's site resulting from pollution conditions.
- e. Off-site bodily injury, property damage or cleanup costs beyond the boundaries of a non-owned location resulting from pollution conditions originating from a non-owned location.
- f. Bodily injury, property damage or cleanup costs resulting from a pollution release from transported cargo carried by owned or hired automobiles.
- g. Third party claims from transportation of the business owner's product or waste by third party vendors that result in bodily injury, property damage or cleanup costs caused by a pollution condition.
- h. Loss of income sustained by the business owner resulting from the interruption of the injured business due to on site pollution conditions.

**2. Potential Causes of Claims: Environmental Exposure for Manufacturers and Other Industrial Risks:**

- a. Accidental spills with improper containment or during the internal movement of materials.
- b. Improper historical and current disposal practices for hazardous wastes.
- c. Air emissions from painting and plating lines, ovens, boilers and reactors.
- d. Inadequate housekeeping and preventive maintenance of machinery and equipment, including pollution control equipment.
- e. Improper storage of raw materials, including chemicals, compressed gases (such as cyanide and hydrogen chloride), fuels, flammable paints and solvents.
- f. Third party traffic through the facility, such as contractors, customers and vendors, causing environmental accidents.
- g. Inadequate underground and above ground tank management programs.
- h. Wastewater generated from cooling water, plating lines, drum cleaning, products cleaning and chemical treatments.
- i. Inadequate waste storage/handling practices.
- j. Generation of waste materials including solvents, acids and caustics, paints, heavy metal particulates from baghouses and electrostatic precipitators, sludges from wastewater treatment operations.
- k. Potentially contaminated soils around production and maintenance areas, cracked concrete surfaces in production areas and in secondary containment for tanks, raw materials and waste storage areas.

**3. Examples of Pollution Claims: Claim Scenarios for Manufacturers and Other Industrial Risks:**

- a. While transporting a large metal coil, a forklift operator hit a hydrofluoric above ground storage tank releasing dangerous fumes into the neighboring community. Area residents and businesses were evacuated, and several people were treated at a local hospital for fume inhalation. Claims for bodily injury and business interruption topped \$94,000.
- b. A manufacturer operated a machine which was used to punch holes in sheet metal. A portion of the machine was located beneath the floor. For more than 20 years, lubricating oil from the machine was released into the surrounding soils. When a nearby homeowner's drinking water well was tested, it contained petroleum hydrocarbons.

- They were determined to be from the leaking equipment. The homeowner was forced to hook up to municipal water. The homeowner submitted a claim totaling more than \$40,000 for the hook-up cost as well as a bodily injury claim for contaminant ingestion.
- c. A manufacturer had above ground storage tanks that contained fuels with connections to below ground piping. Fuel contamination to soils on and off-site was discovered. The source of the pollutants was identified as emanating from the below ground piping, which had been leaking for an unknown period of time.
  - d. Coverage was granted for cleanup costs and defense expenses. The extent of the damage includes three contaminated plumes emanating off-site, groundwater contamination and damage to a neighboring petroleum site. \$3.4 million in indemnity was paid for remediation costs and attorney fees.
  - e. A manufacturer began expansion of a production line area. During excavation, oily soils with a petroleum odor were discovered. Further investigation uncovered an old, undocumented sludge-drying pit that the previous owner used back in the 1940s. The manufacturer had to remove and remediate the soils at his expense. Cleanup costs exceeded \$400,000.
  - f. A manufacturer stored a drum of caustic chemicals next to a drum of highly reactive acid. When a forklift disturbed the drums, their contents were released causing a violent reaction. Fumes spread over neighboring properties and damaged plants at the nursery next door. The nursery owner submitted a claim totaling more than \$35,000 for business interruption and loss of goods.
  - g. The concrete secondary containment of a 10,000-gallon diesel above ground storage tank was cracked and crumbling. A release from the tank spewed 8,000 gallons into the containment area. The diesel seeped into the underground soil and required costly excavation and removal. The total cost for investigation, removal and disposal exceeded \$320,000.
  - h. Since 1965, a metal toy manufacturer had been using trichloroethylene (TCE), a common solvent, to remove oil and grease from toys prior to painting them. This process generated a liquid waste mixture of TCE and oil. In 1994, an engineering study revealed that the groundwater surrounding the plant contained significant concentrations of TCE and other solvents. The cleanup of the site was estimated to exceed \$900,000.
  - i. An aerosol packaging plant located on a 17-acre site manufactured hair spray, spot remover and oven cleaner. The facility is near a river that runs through a neighboring town. The town discovered contamination in their municipal water supplies and was forced to close their wells. The town sued the packaging plant and settled for \$780,000.
  - j. During Midwest floods, manufacturers paid to cleanup contamination caused when chemical tanks floated down river.
  - k. A truck owned by a manufacturer struck a utility pole causing a transformer explosion that released carcinogens and smoke into homes in the area.
  - l. A cloud of chlorine was released during a fire.
  - m. Tenants of a manufacturing building complained of headaches, nausea and fatigue. Twenty individuals had to be hospitalized.
  - n. Carbon monoxide from a defective hi-lo caused injury to employees and third parties.
  - o. An employee mistakenly opens a valve controlling the hot water flow to an ammonia vaporizer causing 3,800 pounds of ammonia to escape causing hundreds of nearby residents to be hospitalized.

## II. Securing the Appropriate Coverage for Pollution / Environmental Liability:

Coverage under standard property and liability policies is quite limited.

### 1. Standard Property Insurance Policies:

Property insurance policies will cover cleanup of some types of pollution conditions that occur, but only if as a result of specified causes of loss. This means that if the pollution event is caused by fire, lightning, explosion, windstorm or hail, smoke, aircraft, self-propelled missiles or vehicles, riot or civil commotion, vandalism, leakage from fire protective equipment, sinkhole collapse or volcanic action that damages the building or personal property, coverage would be provided up to the respective limits on many property insurance policies. If, however, as a result of those events your land or water at the described premises is affected because of the dispersal, seepage, migration, release or escape of pollutants, you would typically only have \$10,000 in cleanup coverage under a standard insurance policy.

### 2. Standard General Liability Insurance:

General liability policies also have pollution exclusions that exclude claims by third parties for injury or property damage arising out of a pollution event.

Pollution is very broadly defined as including any solid, liquid, gaseous or thermal irritant or contaminate including smoke, vapor, soot, fumes, acids, alkalis, chemicals and wastes. Coverage is excluded whether or not the pollution event is gradual or sudden and accidental.

The standard commercial general liability policy does make certain exceptions. Typically, pollution arising from your products would be covered. Also, pollution from a hostile fire, and pollution such as fumes from heating systems within a building are covered under many policies. All other events would not be covered. For example, there is no coverage in most cases for fumes from cooling systems, mechanical equipment, mobile equipment or any other event that causes injury to third parties.

**III. Supplemental pollution policies are available to cover a variety of pollution incidents. These policies are generally inexpensive for commercial enterprises that do not have an obvious pollution exposure. The following is a summary of the many available insurance policies covering environmental type claims:**

### 1. Pollution Legal Liability:

Site-specific, third-party liability insurance for claims (and defense costs) resulting from gradual or sudden releases of pollutants from an insured site. These policies can include coverage for releases from underground storage tanks, thereby satisfying financial responsibility requirements of the Resource Conservation and Recovery Act (RCRA) and for cleanup of the insured site.

### 2. Contractors Pollution Liability:

Third-party liability insurance written for environmental remediation, general or trade contractors covering claims, including cleanup expenses, arising from a release caused by

their work. This type of policy is intended to fill the gap in the CGL policy created by the Absolute Pollution Exclusion.<sup>1</sup> The contractor must still purchase a CGL policy to insure non-environmental risks. While contractors' pollution liability policies have been available only on a claims-made basis, occurrence coverage is now available.

3. First-Party Environmental Remediation:

Reimburses the property owner for the cost of cleanup and remediation of the insured's property when required to do so by order of a governmental agency with jurisdiction over environmental regulations.

4. Property Transfer Insurance:

First-party cleanup coverage of contamination that is discovered subsequent to the sale of property when the cleanup is ordered by a governmental authority. Policies also can be written for financial institutions to cover the loss in asset value of the property or the outstanding balance of the real-estate loan. Third-party bodily injury, property damage and cleanup claims may also be covered.

5. Asbestos and Lead Paint Abatement Liability:

Third-party liability protection for bodily injury, property damage and cleanup cost claims arising out of or following asbestos or lead paint abatement activities. Insurance can be written for property owners and/or the contractors working on their behalf, and may cover the removal or encapsulation of asbestos.

6. Underground and Aboveground Storage Tank Insurance:

Third-party liability coverage for bodily injury, property damage and cleanup expense claims arising from the release of hazardous materials from underground or above ground tanks (meets financial responsibility requirements of the EPA). Onsite cleanup also may be insured by these policies.

7. Automobile Coverage for Hazardous Materials Transporters:

Third-party liability coverage for bodily injury, property damage and cleanup cost claims arising from a release of hazardous materials resulting from transportation activities including loading and unloading of vehicles.

8. Remediation Cost Overrun Coverage:

Coverage for property owners against cost overruns for onsite remediation expenses. Coverage is often written in conjunction with pollution legal liability insurance and may require a self-insured retention or co-payment feature. This coverage has been useful to firms involved in brownfield<sup>2</sup> remediation projects since they can "cap" the costs of remediation.

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<sup>1</sup> Since 1986, ISO Commercial General Liability policies have included an absolute pollution exclusion that removes most coverage for claims arising from gradual and sudden releases of contaminants. Insureds with significant environmental exposures have had to purchase separate pollution liability coverage to fill the gap created by these exclusions.

<sup>2</sup> Brownfield properties are typically abandoned or underutilized inner-city industrial sites contaminated (or thought to be) due to historic operations using hazardous materials and/or onsite disposal of hazardous wastes.

## **POSSIBLE LEASE LANGUAGE:**

### **Hazardous Materials**

Except as herein expressly permitted, Tenant agrees that it will not use, handle, generate, treat, store or dispose of, or permit the use, handling, generation, treatment, storage or disposal of any Hazardous Materials (as hereinafter defined) in, on, under, around or above the Premises now or at any future time and will indemnify, defend and save Landlord harmless from any and all actions, proceedings, claims, costs, expenses and losses of any kind, including, but not limited to, those arising from injury to any person, including death, damage to or loss of use or value of real or personal property, and costs of investigation and cleanup or other environmental remedial work, which may arise in connection with the existence of Hazardous Materials on the Premises occurring or caused in whole or in part during the Term hereof and not caused by Landlord or its agents. The term "Hazardous Materials," when used herein, shall include, but shall not be limited to, any substances, materials or waste that are regulated by any local governmental authority, the state where the Premises is located, or the United States of America because of toxic, flammable, explosive, corrosive, reactive, radioactive or other properties that may be hazardous to human health or the environment, including without limitation, above or underground storage tanks, flammables, explosives, radioactive materials, radon, petroleum and petroleum products, asbestos, urea formaldehyde foam insulation, methane, lead-based paint, polychlorinated biphenyl compounds, hydrocarbons or like substances and their additives or constituents, pesticides and toxic or hazardous substances on materials of any kind, including without limitation, substances now or hereafter defined as "hazardous substances," "hazardous materials," "toxic substances" or "hazardous wastes" in the following statutes, as amended: the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. §9601, et seq., "CERCLA"); the Hazardous Materials Transportation Act (49 U.S.C. §1801, et seq., "HMTA"); the Toxic Substances Control Act (15 U.S.C. §2601, et seq., "TSCA"); the Resource Conservation and Recovery Act (42 U.S.C. 6901, et seq., "RCRA"); the Clean Air Act (42 U.S.C. 7401 et seq., "CAA") the Clean Water Act (33 U.S.C. §1251, et seq., "CWA"); the Rivers and Harbors Act (33 U.S.C. §401 et seq., "RHA"); the Emergency Planning and Community Right-to-Know Act of 1986 (41 U.S.C. §11001 et seq., "EPCRA"); THE Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 136 to 136y, "FIFRA"); the Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq., "OPA"); and the Occupational Safety and Health Act (29 U.S.C. 651 et seq., "OSHA") and any so-called "Superlien law"; and in the regulations promulgated pursuant thereto, and any other applicable federal, state or local law, common law, code, rule, regulation, order, policy or ordinance, presently in effect or hereafter enacted, promulgated or implemented, or any other applicable governmental regulation imposing liability or standards of conduct concerning any hazardous, toxic or dangerous substances, waste or material, now or hereafter in effect. Notwithstanding the terms of this Section, Tenant may use the Hazardous Materials described on Exhibit \_\_\_\_\_, but only in full compliance with all applicable laws and only for such uses and in such quantities as may be described in Exhibit \_\_\_\_.

### **Conduct of Tenant**

If Tenant, with the prior written authorization of Landlord, which authorization may be granted or denied by Landlord in its sole and absolute discretion generates, uses, transports, stores, treats or disposes of any Hazardous Materials:

- A. Tenant shall, at its own cost and expense, comply with all environmental laws relating to hazardous or toxic materials;
- B. Tenant shall
  - 1. not dispose of any Hazardous Materials in dumpsters or other containers;
  - 2. not discharge any Hazardous Materials into drains or sewers;
  - 3. not cause or allow the release, discharge, emission or run-off of any Hazardous Materials to air, to surface waters, to the land, to ground water, whether directly or indirectly;
  - 4. at Tenant's own cost and expense arrange for the lawful transportation and off-site disposal of all Hazardous Materials generated by Tenant;
  - 5. except as expressly permitted in Exhibit \_\_\_\_\_, provide secondary containment around all Hazardous Materials storage containers, storage facilities and above ground storage tanks;
  - 6. conduct all necessary environmental inspections, such as, but not limited to, asbestos inspections prior to any renovation or demolition, as required by 40 CFR Part 61 and provide copies of all such reports to the Landlord;
  - 7. comply with all reporting requirements under any local, state or federal ordinance, statute or regulation, the provisions under 40 CFR Part 61, or various regulations controlling the emissions into the atmosphere of volatile organic compounds and provide copies of all such reports and notifications to Landlord;
  - 8. use only highly skilled people to address all environmental issues associated with the leasehold, that such people and all employees of the Tenant shall receive all required training or certification under any local, state or federal law specifically mentioned or alluded to in this Lease;
- C. Tenant shall promptly provide Landlord with copies of all communications, permits or agreements with any governmental authority or agency (federal, state or local) or any private entity relating in any way to the violation or alleged violation of any Environmental Laws or to any violation of Tenant's obligations under subparagraph (B) above;
- D. Landlord and Landlord's agents and employees shall have the right to enter the Premises and/or conduct appropriate tests for the purpose of ascertaining that Tenant complies with all applicable laws, rules or permits relating in any way to the presence of Hazardous Materials on the Premises, provided, however, if Landlord or Landlord's agents or employees intend to conduct or perform any non-emergency testing which may interfere with Tenant conducting its business, Landlord shall provide Tenant with no less than five (5) days prior written notice before commencing such testing; and
- E. Upon the written request of Landlord no more frequently than once every year, or on any other occasion in the event that Landlord has reason to believe an environmental problem exists at the

Premises, Tenant shall provide Landlord the results of appropriate tests of air, water and soil to demonstrate that

1. the Tenant is in compliance with all applicable laws, rules or permits relating in any way to the presence of any Hazardous Materials on the Premises or the Building; and
2. the lack of any releases, discharges or emissions, in which event Landlord shall reimburse Tenant for the reasonable out-of-pocket costs incurred by Tenant in performing such tests. If such tests do not demonstrate items (1) and (2) above, Tenant shall bear the cost of such tests.

If in the presence, release, threat of release, placement on or in the Premises and/or the Building occurs or is caused in whole or in part during the Term of this Lease, or the generation, transportation, storage, treatment, or disposal at the Premises and/or the Building occurs or is caused in whole or in part during the Term of this Lease of any Hazardous Materials gives rise to liability (including but not limited to, a response action, remedial action, or removal action) under any environmental laws or common law theory, including, but not limited to nuisance, strict liability, negligence and trespass, then unless and only to the extent Landlord or its agents caused any of the foregoing, Tenant shall promptly take any and all remedial and removal action necessary to clean up the Premises containing such Hazardous Materials and mitigate exposure to liability arising from the Hazardous Materials whether or not required by Law.

### **Tenant's Environmental Indemnity**

Tenant does hereby indemnify, defend and hold harmless Landlord and its agents and their respective officers, directors, beneficiaries, lenders, shareholders, partners, agents and employees and their respective successors and assigns from all fines, suits, procedures, claims liabilities, damages (including consequential damages) and actions of every kind, and all costs associated therewith (including reasonable attorneys', experts' and consultants' fees and costs of testing) arising out of or in any way connected with any deposit, spill, discharge or other release of Hazardous Materials that occurs or is caused in whole or in part during the Term of this Lease, at or from the Premises as a result (directly or indirectly) of Tenant's and/or any agent, employee, invitee, independent contractor, or member of Tenant's (collectively, the "Tenant Parties") activities in connection with the Premises, or which arises at any time from:

- A. Tenant's failure to provide all information, make all submissions, and take all steps required by all applicable governmental authorities;
- B. any Hazardous Materials on, in, under or affecting all or any portion of the Premises or the groundwater as a result of events that took place during the Term of this Lease;
- C. any violation by Tenant or claim of a violation by Tenant of any governmental law, statute, rule, regulation, ordinance, requirement, decree, order or judgment now or hereafter in effect relating to public health, safety, protection of the environment or any Hazardous Material;
- D. the imposition of any lien for damages caused by, or the recovery of any costs for, the remediation cleanup of Hazardous Material as a result of events that took place during the Term of this Lease and which were caused, directly or indirectly, by Tenant or any Tenant Party;

- E. costs of removal of any and all Hazardous Material from all or any portion of the Premises, which hazardous Material were placed on the Premises and during the Term of this Lease by Tenant or any Tenant Party;
- F. costs incurred to comply, in connection with all or any portion of the Premises, with all governmental regulations with respect to Hazardous Materials on, in, under or affecting the Premises, which Hazardous Materials were placed on the Premises during the Term of this Lease by Tenant or any Tenant Party; or
- G. any spills, discharges, leaks, escapes, releases, dumping, transportation, storage, treatment or disposal of any Hazardous Substances which occur during the Term of this Lease and were caused, directly or indirectly, by a Tenant Party, but only to the extent that such Hazardous Materials originated from or were or are located on the Premises. Tenant's obligations and liabilities under this Lease shall survive the expiration of this Lease.

#### **Landlord's Right to Enter Premises**

Landlord shall have the right and privilege (but not the obligation) to enter the Premises to make inspections and other tests (including, but not limited to, drilling) of its condition, including, but not limited to, air, soil and groundwater sampling and other inspections for Hazardous Materials provided; however, if Landlord or Landlord's agents or employees intend to conduct or perform any non-emergency testing which may interfere with Tenant conducting its business, Landlord shall provide Tenant with no less than five (5) days prior written notice before commencing such testing. In the event any unpermitted Hazardous Materials first introduced by Tenant are discovered during the inspections, Tenant shall reimburse Landlord for the cost of all inspections and tests in addition to its liability under this Lease.

#### **Tenant's Notification Requirements**

Notwithstanding anything to the contrary contained in this Lease, Tenant agrees to provide immediate telephonic notification to Landlord in the event of any release of Hazardous Material in any manner within or outside of the Premises. Tenant shall further utilize its reasonable efforts to report to Landlord any other release of Hazardous Materials within or outside of the Premises by any party other than Tenant.