Underwriting Environmental Professional Liability

Environmental engineering firms can be profitably insured through a process that integrates proven underwriting principles with timely environmental expertise.

The insurance industry has demonstrated that traditional architectural and engineering (A&E) firms can be profitably insured by employing proper methods of risk quantification. Professional liability insurance programs are routinely structured for such firms based upon proven, well-established underwriting criteria and claims history. Though not the case, there is often an assumption that these same proven underwriting principles cannot be applied successfully to the comparatively new field of environmental consulting. However, firms facing environmental exposures can be underwritten profitably by integrating proven principles with environmental expertise. This is accomplished when the environmental firm, insurance broker and underwriter possess a thorough understanding of the exposures and liabilities inherent in the environmental services profession.

Successful underwriting depends on successful risk quantification. When environmental firms are familiar with the criteria underwriters use to assess their risk, they can take a proactive approach to addressing their insurance and risk management needs. This article examines the process of underwriting environmental firms by reviewing the information which insurers typically request, which comprises the insurance application or “submission;” how this information is used to quantify risk; and the liability issues associated with environmental professions which have the potential to incur devastating financial losses.

The Application And Supporting Documents

The application provides the underwriter with a comprehensive review of the firm's practice including areas of service, personnel, ownership, corporate structure, client base, historical and current professional liability coverage in effect, and claims history. The claims history should elaborate on the description of all claims over a period of five years including the claimant, circumstances surrounding the claim, status, reserve and final payment, if applicable.

Other important items include a company brochure and statement of qualifications, a history of projects completed over the last two years and a copy of the firm's corporate safety and health manual. The brochure and statement of qualifications give the underwriter insight into the firm's corporate philosophy and history, qualifications of key personnel and the types of professional services rendered. Resumes assist the underwriter in determining if the staff has sufficient experience and applicable technical degrees to accomplish those services outlined in the corporate brochure. This is important considering the many new and innovative environmental technologies in use today.

A list of projects completed over the past few years allows the underwriter to determine the firm's experience in delivering services listed in the brochure. For example, has the firm performed numerous property transfer assessments with little involvement in remedial investigation/feasibility studies? In most cases, varying degrees of risk are associated with different types of professional services rendered, the level of analysis or investigation in the assessment, the type of clients and the amount of experience the firm displays in each respective service area.

An underwriter also looks for the implementation of a comprehensive safety and health program. These programs are crucial for almost all environmental consultants, especially when rendering turnkey services that present unique project site exposures. The corporate program can be very complex and voluminous as it must address the wide array of OSHA regulations, employee training, medical examinations, site-specific procedures (emergency situations) and various contaminants at each project site. Given the unique risks of environmental firms, the underwriting process examines their safety and health programs; they are not usually a consideration when underwriting a traditional civil engineering firm.

Present Policy, Audited Financials And Client/Subcontract Agreements
Present policy terms and conditions, audited financials and client/subcontract agreements are also important components in an underwriting submission. Copies of the current policy assist the underwriter in determining applicable retroactive coverage. Audited financials are necessary to determine the firm's long-term financial stability and ability to handle applicable deductibles or self-insured retentions. The following items are important to an underwriter in reviewing standard coverages:

- standard of care;
- indemnification/hold harmless provisions;
- limitation of liability clause;
- work scope definition;
- hazardous waste disclaimer;
- change order provisions; and
- insurance requirements.

**Liability Issues**

In addition to reviewing standard contracts, it is important for the underwriter to understand how the firm handles nonstandard contracts. For instance, are there established procedures in place to ensure that either in-house or outside legal counsel review nonstandard contracts prior to execution? Frequently, project managers sign contracts that place a disproportionate amount of responsibility or liability upon their company.

**Civil & Criminal Liability For Violation Of Environmental Laws**

The environmental industry is dynamic in terms of growth, complexity and consolidation. Spurred by billions of government dollars and new innovative technologies, the industry is undergoing continuous transformations. To assist in controlling these changes and guide in the establishment of industry standards, regulations are developed, adopted and stringently enforced. The potential liabilities that may be imposed on environmental professionals are substantially greater than for traditional A/E professionals—environmental professionals face civil or criminal liability for violation of environmental laws.

**The Comprehensive Environmental Response, Compensation and Liability Act**

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), commonly referred to as "Superfund", and its succor, the Superfund Amendment and Reauthorization Act (SARA) of 1986, allow the application of strict, joint and several, and retroactive liability upon those parties responsible for the release of hazardous substances. Under strict liability, the defendant can be held liable without regard to fault. Retroactive liability permits the imposition of liability prior to the enactment of the law itself. The doctrine of "joint and several" allows the enforcement of an entire judgment against any defendant involved in the litigation.

A consultant may be subject to CERCLA liability depending upon the types of services rendered with respect to "management" of remediation efforts and control or direction of the activities of the remediation contractor.

**The Resource Conservation and Recovery Act**

The Resource Conservation and Recovery Act (RCRA) was enacted in 1976 to regulate the management of hazardous waste, ensure the safe disposal of wastes and provide for resource recovery from the environment by strictly controlling hazardous waste from "cradle to grave." RCRA carries civil and criminal penalties for noncompliance.

As a result of fierce competition and high clientele expectation, consultants are forced to offer a wider array of services. In many cases, this involves offering project management or "turnkey" services. As part of these services, consultants are required to act as "agents" on behalf of their clients when signing manifests for purposes of tracking waste from the project site through transportation to the site of final treatment, storage or disposal. Signing or preparing such documents exposes a consultant to legal liability under RCRA legislation.

**The Clean Air Act**

The goal of the Clean Air Act (CAA) is to protect and enhance the quality of the nation's air resources and promote and maintain public health and welfare. The CAA achieves this objective by regulating emissions into the air and
establishing air quality standards designed to protect health without respect to cost or technological feasibility. Mobile sources, such as incinerators designed by consultants for remedial activities, are controlled by combined federal, state, and local programs. As with RCRA, the CAA contains provisions for civil and criminal penalties and enforcement through citizen suits.

**Loss Prevention Surveys**

Loss prevention surveys, performed by qualified professionals with technical degrees, are integral to the underwriting process for environmental consultants. The loss prevention survey is the “eyes and ears” of the underwriter. Performed at least annually and after binding coverage, the survey effectively supplements the account underwriter’s technical review and further assists in evaluating the potential for professional liability from the consultant's (insured's) services. The written survey is essential to the underwriter because it:

- clarifies and confirms data presented in the underwriting submission;
- addresses minor data gaps identified during underwriting;
- develops loss prevention recommendations.

In order to attain the above objectives, the report should resemble the sample TABLE OF CONTENTS (attached). The survey is part of a proactive risk minimization philosophy, which benefits the insured and the insurance company. The greater the underwriter’s understanding of your risks, the more comfortable and confident he or she is insuring them and structuring a cost-effective, comprehensive program.

**Handling Claims**

To round out the underwriting picture, environmental risk assessment requires an understanding of the types of claims that could develop and establishing claims-handling procedures to avoid escalating costs through effective response. Although many potential claims will be similar to the professional liability claims associated with standard or traditional architectural and engineering firms, others will involve pollution exposures which require the assistance of legal professionals with environmental expertise. In the event of an environmental incident, these professionals contain costs by implementing an appropriate remediation strategy, hiring and monitoring environmental consultants or contractors to perform remediation, and negotiating with government agencies that oversee cleanup.

**A Proactive Approach**

The environmental services industry will continue to be affected by the threat of liability and litigation. It is imperative that all parties involved (insured, insurer, broker) understand potential exposures and liabilities. All it takes is one unprotected exposure to destroy years of profitability and reputation. By taking a proactive approach to understanding their unique exposures and how the underwriting process examines them, environmental firms can reduce their potential for catastrophic loss and protect their profitability by obtaining appropriate and comprehensive insurance coverage.