infobrief

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Environmental Insurance:
A Guide for BRAC Communities

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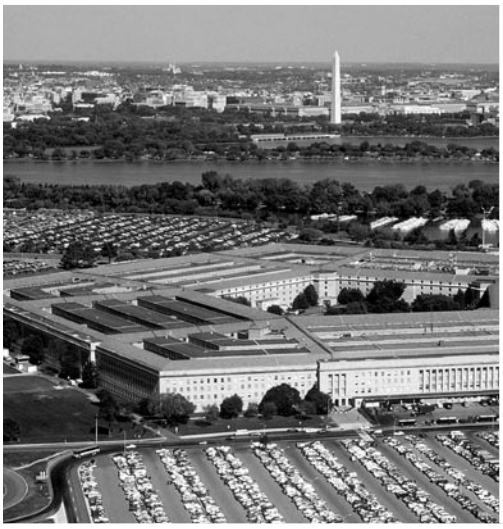

ASSOCIATION OF DEFENSE COMMUNITIES

FORMERLY NAID

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About the Association of Defense Communities

The Association of Defense Communities (ADC), formerly known as NAID, is the voice for communities and states with a significant military presence. As the nation's premier membership organization serving America's defense communities, ADC's 1,200 members unite the diverse interests of communities, state government, the private sector, and the military on issues of base closure, community-military partnerships, defense real estate, mission growth, mission sustainment, military privatization, and redevelopment/realignment.

734 15th Street, NW | Suite 900 | Washington, D.C. 20005
Tel: 202.822.5256 | Fax: 202.822.8819
www.defensecommunities.org

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Foreword

As the Department of Defense begins implementing the 182 recommendations of the 2005 Defense Base Closure & Realignment (BRAC) Commission, ADC presents this updated version of its 2001 report, *Environmental Insurance and BRAC Communities: Building A Successful Partnership*. The purpose of this Infobrief is to help communities better understand the environmental insurance products available and to illustrate generally how they are being applied to the BRAC redevelopment process. [A glossary of insurance terms is included at Appendix 1.]

Success stories in BRAC communities across the nation are mounting. The use of environmental insurance coverage by local redevelopment authorities (LRAs) has enabled many of these successes. ADC applauds these accomplishments and hopes that more communities will join the ranks of the successful.

Introduction

A successful environmental insurance program can help facilitate a successful transfer of BRAC property to an LRA by:

- Addressing the specific environmental risk exposures of the LRA and local communities by augmenting the DOD indemnification.
- Reassuring the LRA, developers and DOD that the costs associated with private sector cleanup programs are controlled.
- Providing liability protection to future tenants and owners and thereby become part of the site's redevelopment marketing plan.

CHAPTER 1 — Why Should Local Redevelopment Authorities Consider Obtaining Environmental Insurance?

In four rounds of BRAC conducted between 1988 and 1995, 387 domestic military installations were closed or realigned, with an estimated $6 billion being spent on the cleanup of these sites.[1] Local redevelopment authorities (LRAs) have developed some of these federal facilities into viable industrial, commercial or residential developments. But, as the U.S. Government Accountability Office has reported, "environmental cleanup constraints have and continue to delay the services from rapidly transferring unneeded BRAC property."[2]

Federal law mandates that the government is responsible for the cleanup of these facilities before transferring them to LRAs and, further, that the government shall indemnify developers against third party claims resulting from contamination due to Department of Defense (DOD) activities.

However, if previously unidentified contamination is discovered (not an uncommon situation) during the subsequent redevelopment process it can cause significant disruptions and project delays. Unfortunately it is not possible to rely on a timely or complete response from DOD. Further, if an LRA or developer becomes a potentially responsible party by contributing to the pre-existing contamination or even causing new contamination, the LRA or developer no longer will be able to benefit from some aspects of this protection.

Environmental insurance has been an important tool for LRAs to mitigate such environmental risks, attract developers and obtain financing. A successful environmental insurance program can help facilitate a successful transfer of BRAC property to an LRA by:

- Addressing the specific environmental risk exposures of the LRA and local communities by augmenting the DOD indemnification.
- Reassuring the LRA, developers and DOD that the costs associated with private sector cleanup programs are controlled.
- Providing liability protection to future tenants and owners and thereby become part of the site's redevelopment marketing plan.

THE DEFINITION OF GOVERNMENT RESPONSIBILITY

Congress amended the 1980 Comprehensive Environmental Response Compensation and Liability Act (CERCLA) to oblige the federal government to be responsible for any contamination it has caused.[3] The "CERCLA 120(h) Covenant" [see Appendix 2 for covenant deferral] requires that all remedial action necessary to protect health and the environment is, or will be, in place prior to transfer of base property, and that DOD will complete any additional cleanup necessary after transfer. Congress also added a provision (Section 330) to the 1993 National Defense Authorization Act that requires that the federal government will hold harmless, defend and indemnify developers of federal facilities and their tenants from claims by third parties resulting from contamination due to DOD activities [see Appendix 3].

When a property is transferred to an LRA and environmental remediation for which the federal government remains responsible has not been completed, the military can enter into a cooperative agreement with the LRA allowing for an "early transfer." Under such an agreement, the redevelopment authority would complete the remaining remedial work and the United States would transfer funds to the LRA to cover the cost of the cleanup. These funds typically include the cost of purchasing environmental insurance.

LIMITATIONS OF CERCLA 120(H) AND SECTION 330

The federal government is responsible for addressing contamination it has caused on DOD sites. LRAs have the ability to require that DOD address such contamination and also are entitled to indemnification by DOD for environmental contamination claims at sites transferred to an LRA. The reality is never that simple. There are several situations where an LRA's entitlement to indemnity is, or may be limited, including:

- The LRA or developer contributed to the existing contamination or caused new contamination; under CERCLA, it too will become a potentially responsible party, and the requirement for DOD to address contamination pursuant to the CERCLA warranty shall cease. Also, it can be extremely difficult after an LRA takes possession of a site to prove who caused the contamination. The process may result in excessive litigation costs for the LRA with no guarantee of a positive outcome.
- Once a remedial plan is selected and completed, the government has no obligation to further remediate solely because the LRA or developer's land use plans change and such change requires more extensive remediation.
- DOD is under no obligation to address the claim of an LRA within a specific time frame. The LRA or developer could face months or even years while waiting for DOD to address its obligations to clean up or to indemnify, which may stall or derail a project. There is no guarantee a claim against DOD will be fully satisfied.

To date, no claim against the federal government under Section 330 has completed the entire legal process and only a handful of claims have been settled out of court. There have been instances where the federal government has responded to a request under CERCLA 120(h) to return and remediate a property.

The CERCLA warranty is a first-party right, whereas the Section 330 indemnity is a third-party provision. The CERCLA warranty obligates the government to return and perform when pre-existing contamination requiring remediation is discovered. The Section 330 indemnity protection is limited to claims against a transferee by third parties and, unlike the performance requirement of the CERCLA warranty, the indemnity essentially provides money to reimburse for claims made against the current property holder.

ATTRACTING DEVELOPERS AND FINANCING

In today's high-valued real estate market, the redevelopment of federal facilities has tremendous potential for developers to turn a property around and make a lucrative profit. However, there are several significant concerns that can become stumbling blocks to managing this opportunity and cause developers and investors to shy away, such as: uncertainty in determining if or how much contamination was caused by a government entity or agency;

potential discovery of unknown pollution conditions or exacerbation of known pollution conditions during remediation or redevelopment activities; risk of future contamination; and long-term monitoring of cleanup projects.

LRAs are, essentially, thinly capitalized entities and therefore are unsuited to assume significant financial risk. Environmental insurance can help by providing cleanup cost certainty and insulating LRAs, investors and financiers from future liability and associated indirect financial impacts.

CHAPTER 2 — What is Environmental Insurance?

Over the past two decades, environmental insurance has developed from a niche product predominantly serving environmental contractors to an increasingly important aspect of an overall insurance and risk management portfolio for businesses worldwide.

Nowhere has the role of environmental insurance grown faster in its importance and effectiveness than as a tool in the redevelopment of closed and realigned military installations.

Environmental liability has long been a major impediment to the military base reuse process. But as activity in this market has increased, the insurance industry has responded by developing new insurance programs and products to meet the varied needs of LRAs and developers. Environmental insurance is used routinely to address exposures and break down potential obstacles to successful redevelopment.

The environmental insurance coverage available not only addresses exposure, risk transfer and potential liability, but it also helps LRAs and their partners to manage cash flow, save money, and complete remediation and redevelopment more efficiently.

WHAT DO ENVIRONMENTAL INSURANCE POLICIES COVER?

Even though DOD accepts its responsibility for remediating contamination on bases that are being closed or realigned, the uncertainty surrounding its ability to perform timely and adequate cleanups before transferring the property to LRAs has been a major obstacle. Similarly, the question of ongoing liability, even after a site has been put to another use, has slowed DOD from turning sites over to private hands, and often can hinder private firms and local communities from accepting ownership of former military properties. Additionally, DOD is concerned about its own business interruption risks and its potential liability for additional remediation, which may emerge because of previously unknown conditions or from a change in property use.

Many LRAs, communities and developers are anxious to take title to these sites without waiting for the government to complete its cleanups. Many LRAs would prefer to acquire title to their site even if contamination exists, because they are willing to assume the responsibility — but not the liability — for the cleanup, which they can complete more quickly and cheaply. Fortunately, many parties involved in redevelopment are successfully using environmental insurance to transfer risks, ease public concern, assist in the marketing of the site, and, most importantly, move forward with redevelopment.

One impediment to the transfer process has been a lack of understanding about the strategies available to transfer a property's environmental risk. This is the result of a lack of general knowledge about the availability of environmental insurance and other risk transfer mechanisms.

Environmental insurance addresses these issues in several ways, including:

- ***Liability Protection:*** One of the most important functions of environmental insurance in the context of a BRAC transfer is to complement and reinforce the indemnification provided by DOD. A properly designed environmental insurance program can address the gaps in both DOD indemnification and first- and third-party environmental exposures due to infrastructure upgrades, property development and leasing activities.

- ***Business Interruption:*** Lessees and developers are concerned about the potential effects of historic contamination on their operations. LRAs are concerned about rental income, while lenders are concerned about mortgage and lease payments. Environmental insurance can address all these issues.

- ***Remedial Project Cost Control:*** LRAs and developers can control unanticipated costs for those projects where they have taken over cleanup responsibility. Environmental insurance covers remedial project cost overruns due to: (1) new contamination discovered during implementation of the remedial project; (2) discovery of a significantly greater amount of known contamination; and (3) changes in required regulatory cleanup requirements and goals that modify the approved remedial action plan.

- ***Site Marketing:*** A properly designed environmental insurance policy not only provides a layer of liability protection, but also can become a part of the BRAC site's redevelopment marketing plan.

WHO CAN BE COVERED UNDER ENVIRONMENTAL INSURANCE POLICIES?

There are many parties involved in the remediation and redevelopment of BRAC sites. Similarly, there are many inherent environmental risks of such property transfers. Here is a brief look at the parties and their risks.

- ***The LRA:*** The spread of existing contamination during remediation; the discovery of new or unknown contamination; adjacent property value diminution; business interruption due to unanticipated contamination issues; or, third-party bodily injury and property damage. Additional, unanticipated cleanup costs following early transfer.

- ***A Municipality or DOD:*** An environmental incident, which may occur following redevelopment, that could trigger an investigation of the property, or contamination caused by improper cleanup during site ownership by the municipality or DOD.

- ***A Financial Company or Developer:*** The discovery of environmental issues that financially hinder redevelopment; contamination discovered during redevelopment; or, aggravation of existing contamination that may result in additional, unanticipated cleanup costs.

- ***A Purchaser:*** The discovery of residual contamination due to improper cleanup; future environmental problems that may result in additional cleanup costs; or, contamination that could affect an adjacent property or business, leading to third-party bodily injury and property damage claims.

- ***A Contractor, Consultant or Project Manager:*** Contracting or consulting activities that may aggravate or result in additional contamination, cleanup expenses or third-party bodily injury and property damage; or, failure of the remedial design during the remediation or during a period of performance that affects the timing of the entire project.

An environmental insurance policy can provide coverage for certain classes of entities and individuals, called insureds. There can be several classes of insureds, and depending on the type and configuration of the policy, certain insureds may have specific responsibilities. The following are the general classes of insureds:

- ***Insured(s):*** Generally, means the first named insured, any additional named insured(s), and any other additional insured(s) endorsed onto the policy.

- ***First Named Insured:*** This is the person or entity generally stated in the Declarations Page of the policy, and can include any director, officer, partner, employee, leased worker or temporary worker of this entity. The first named insured generally is responsible for the payment of the premium and any deductible, retention or co-payment requirements. The first named insured also may be responsible for communication between the insurance carrier and all other insureds.

- ***Additional Named Insured(s):*** Any additional person or entity entitled to full protection under the policy and can include any director, officer, partner, employee, leased worker or temporary worker of this entity. As with the first named insured, the additional named insured has responsibility for the payment of any deductible, retention or co-payment requirements. The first named insured and the additional named insured both have responsibility for notification of the insurance carrier of any claims.

- ***Additional Insured(s):*** Any additional person or entity entitled to protection under the policy. This also can be any director, officer, partner, employee, leased worker or temporary worker of this entity.

  Additional insureds also can be a tenant, a developer or purchaser of a portion of the site, a lender to the development of the site, or any entity that has an insurable interest in the site. An additional insured has coverage rights, so long as the loss or claim arises from the activities of any name insured. The ability to add additional insureds to a policy makes the policy very adaptable to changes in the site development plan.

  The decision of who to cover under an environmental insurance policy for a BRAC site is critical. The following issues should be considered in an LRA's coverage determination:

- ***Number and Types of Insureds:*** As the number of insureds increases, there can be a dilutive effect with respect to the policy limits of liability. In the event of a large claim and a large number of affected insureds, the limits of liability afforded under the policy may not be adequate to provide planned or required coverage limits.

- ***Policy Limits of Liability Available to Insureds:*** The LRA, as the first named insured, can have the insurance carrier assign different policy limits to each insured. This process, called "assigning sublimits," can help the LRA purchase the appropriate policy limits at policy inception, and manage the total coverage available for the covered site.

TYPES OF ENVIRONMENTAL INSURANCE COVERAGE

Realizing the challenges presented by unique liability concerns associated with BRAC sites, insurance carriers have responded by creating custom insurance packages designed to address remediation and redevelopment activities. As a risk transfer mechanism, environmental insurance has proven very successful in helping LRAs manage their known and unknown environmental liabilities and future remediation expenses. These exposures can be associated with historic operations, as well as future ongoing operations for covered sites.

As they developed appropriate insurance protection for BRAC sites, the carriers recognized that the risk management challenge has been to protect all participants by ensuring, first, that the known exposures are contained and limited; and, second, that the risk of unknown or future exposures is transferred to the carrier, thus allowing redevelopment to proceed in a timely way. The two main environmental insurance products for BRAC projects are:

- ***Pollution Liability*** policies provide coverage for claims or losses associated with:
  - Third-party legal liability claims, including on-site and off-site bodily injury and property damage.
  - Unanticipated remediation costs from pollution conditions on, at, under or emanating from the covered location(s).
  - Legal defense expense arising from on-site and off-site loss, or in connection with remediation expense.

The basic coverage outlined above can be augmented with optional program extensions including coverage for first-party business interruption and liabilities associated with off-site disposal sites.

- ***Remediation Stop Loss (RSL)*** coverage, also known as **Cost Cap**, is another coverage form available from environmental insurance providers. This coverage offers protection from unanticipated cost overruns associated with cleanup projects. Examples of the types of issues which typically cause cost overruns, and generally are covered by these policies would include:
  - A greater spread or higher concentrations of known contamination identified in the plan.
  - A change in regulatory conditions, associated with the plan, after the inception of the program.
  - Discovery of additional, unknown contamination during the implementation of the approved remedial plan.

Typically, this coverage is offered once the remedial action plan and detailed cost estimates have been completed by the retained remediation consultant or contractor and approved by the appropriate regulatory agency. However, insurance companies are willing to negotiate the regulatory approval requirement pending their understanding and comfort level with the regulatory environment associated with the remediation project.

The implementation of RSL coverage can be complex. The insurance carrier must analyze all of the available environmental documentation, along with the approved remedial action plan and the detailed cost estimate. The company also must understand the goals of the proposed remediation, the technology used, project management issues and the ability of the plan, when implemented by the retained consultant and/or contractor, to achieve the cleanup objectives. The ability of the plan to achieve the cleanup objectives is important because coverage includes any changes in regulatory conditions that may change the remedial plan and remedial costs.

RSL coverage can be purchased separately from liability coverage. Several insurance carriers also offer a policy form that combines environmental liability coverage and remediation stop loss in one policy form.

COVERAGE TERMS AND CONDITIONS FOR ENVIRONMENTAL INSURANCE POLICIES

Pollution Liability coverage generally is purchased in policy limits from $1 million to $50 million. Higher limits are available, either by special arrangements an individual insurer makes with its reinsurers, or by several insurers pooling their coverage. Strategies such as segmenting the site by covered location, or sublimiting additional insureds to address specific coverage needs with specific policies, may be more effective than one high-limit blanket policy, especially in terms of premium cost. Policy terms for liability coverage generally are available for periods of one to 10 years. Policy terms longer than 10 years generally are not available. Should additional years be required, a party may be able to secure a combination of policy renewal options and extended reporting periods (ERPs). However, the need for a blanket policy with a term greater than 10 years should be reviewed carefully. A BRAC site will undergo many changes during the development period, and a single policy approach may not be economically efficient.

Remediation Stop Loss limits are guided by the cost of the remedial work scope, the goal of the remedial work scope and the technology to be used. Limits ranging from $1 million to $35 million typically are available and usually do not exceed the total remediation cost. As with liability coverage, higher limits can be made available, but if the insured specifies very high limits for this coverage, it will incur very high premiums. The policy term generally is the length of time needed to perform the active remedial work plus a period after the completion of the remediation for operation and maintenance activities — a condition generally required by the regulator to confirm the success of the remediation. An LRA also may want to consider multiple insurance carriers (primary and excess coverages) when considering limits on a large remediation project. RSL coverage is much more expensive than liability coverage. Many remedial projects may include the remediation of several smaller units, which generally are not done at the same time.

A strategy involving a site Master Policy for a period of five to 10 years, combined with the use of time- or project-specific liability and/or RSL coverages, may produce better results for an LRA and the site's developers. The decision on policy limits for environmental policies is affected by many variables, including the type and timing of conveyance, the site development schedule, the number and type of current and future tenants or developers, and the mode of operation of an LRA. For example, if the LRA is going to act as the master developer for the site, it may be prudent to begin with a policy that has high limits to cover near-term tenants, adds endorsements that protect the LRA's cash flow and operations as a general contractor, and has a five- to 10-year policy term to adapt quickly to the development schedule without the need to re-underwrite a new policy. If the LRA is going to operate under a finding of suitability to lease (FOSL) and fully lease the site, a policy with limits high enough to protect the LRA and at least the major tenants should be considered. Policy limits of $10 million to $50 million are typical for most LRAs.

KEY COVERAGE CONSIDERATIONS

The application of an environmental insurance policy to a BRAC site is a complex transaction. Standard environmental insurance policy forms contain certain limitations and exclusions for many environmental conditions typically found on a BRAC site. The legal requirements for LRAs also may conflict with the conditions which may apply to a typical environmental insurance policy.

The standard environmental insurance policy can be modified by the use of endorsements, which are negotiated additions to the policy form. Endorsements change the coverage of the policy to meet the specific needs of the LRA.

A policy may be modified even after it is bound. The LRA can implement a Master Policy and request modification to that policy to meet current needs. An LRA can implement a policy and then, by endorsement, request to change specific sections to meet the requirements of a newly executed FOSL, finding of suitability to transfer (FOST), economic development conveyance (EDC), finding of suitability for early transfer (FOSET) or public benefit conveyance (PBC). However, to prevent the LRA from implementing site changes during the policy period that can be interpreted by the insurance company as materially increasing the risk, the underwriter may require a material change in use or similar language endorsement added to the policy at the inception date.

In recognition of the unique nature of BRAC transfers and the associated statutory requirements placed on DOD to approve such a transfer, it is necessary to carefully tailor the environmental policy to reflect the specific needs of each individual transaction. This customization usually includes the modification or deletion of policy terms, or both, through endorsements.

Some of the key issues requiring consideration include:

- **Exclusions** — Many insurers have specific issues (such as underground storage tanks) that they routinely seek to exclude. Where relevant, these exclusions have to be negotiated or removed individually. A suitably experienced environmental insurance broker should be able to advise potential insureds on the realistic potential or scope for removing or modifying the exclusionary language. Typical exclusions might include:
  - Known conditions, such as pre-existing remediation obligations;
  - Unexploded ordnance or munitions and explosives of concern;
  - Changes in material use from the proposed use of the property;
  - Radioactive or nuclear materials;
  - Mold or microbial matter;
  - Underground storage tanks; and
  - Asbestos and lead paint.
- **Severability/Non-Vitiation** — If there is more than one insured party it is crucial to build in robust severability provisions so that the actions or omissions of one party are not imputed on the other parties.
- **Disclosure** — There is both a contractual and legal responsibility to disclose all information that might have a material impact on the risk covered by the policy. It is crucial to manage this disclosure process effectively.
- **Subrogation** — In the event of a claim, the insurer typically is subrogated to all the insured's rights of recovery. In some situations, DOD or another party may request or even require a waiver of subrogation.
- **Claims management** — Some of these policies will run for many years. It is important to agree on practical claims notification procedures and then implement policy management procedures to ensure that the insured parties can comply with these obligations.
- **Jurisdiction, Venue, and Choice of Law** — LRAs generally require that the appropriate state and local legal jurisdiction be named in the policy.
- **Definition of Environmental Regulations** — This definition may require modification to incorporate applicable federal laws that are incorporated into BRAC closures.

The environmental insurance provider also can broaden, extend or tailor the term, limits and coverage during the underwriting process. Typical endorsements that adapt the policy to the LRA's specific needs can include:

- **Extended Reporting Period (ERP)** — This provides the ability to address latent claims, which are presented to the insured during the policy period, but reported to the insurer after the policy period is complete.
- **Additional Insureds** — The policy can include special policy limits, terms or retentions for additional insureds and/or additional named insureds.
- **Special Site Operations** — The reuse of a BRAC site may include operations that have unique environmental exposures, such as airport operations, material distribution and storage. The policy can be adapted to cover these types of exposures for new conditions resulting from ongoing operations.

CHAPTER 3 — Steps to Acquire Insurance

1. WHEN TO CONSIDER COVERAGE

The question of when to put an environmental insurance policy in place is easy to answer. The policy should be in place as soon as the LRA, community or developer incurs any liability as a result of any transfer or conveyance mechanism, including the execution of a lease.

It is important to note that a thorough, competitive underwriting process may take four to six months to complete. Thus, the real question becomes, when should the planning process for an environmental insurance program start? The answer to this question depends on issues such as:

- The type and timing of the proposed conveyance.
- The status of the current site-related environmental information.
- Status of the LRA development plan.

However, to ensure maximum value from a program, it is important that environmental insurance considerations are incorporated into discussions as early as possible and then treated as an ongoing agenda item until the formal procurement process begins.

2. ENGAGING AN INSURANCE BROKER

The design, placement and service of an appropriate environmental insurance solution requires input from many parties and professional advisers. It needs careful management to ensure it provides the greatest value to the client. This is the role of the insurance broker.

Insurance companies, especially those in the environmental insurance marketplace, are in flux. The risk appetites of insurers may change in response to claims trends, re-insurance arrangements or simply the risk perceptions of senior management. It is essential that anyone considering purchasing environmental insurance have access to insurance advisers that

are tracking these changes so they can exploit developments and obtain the best terms.

The broker represents the best interests of insurance buyers to obtain the broadest coverage available at a competitive price. The broker's role extends beyond the essential knowledge of the insurance markets to comprise a wider project management role that ensures that an appropriate policy is ready to bind by the required deadline.

Thus the broker should be a key member of the BRAC project team and the selection of an appropriate broker is a significant decision. BRAC projects and the associated insurance programs are inherently complex from technical and contractual perspectives, and it is vital to appoint a broker (and, specifically, a team of brokers) with the necessary breadth of skill and experience.

Some of the factors that should drive broker selection are:

- Demonstrated BRAC and environmental insurance experience.
- Environmental consulting and underwriting experience.
- The ability to work as a team with attorneys, environmental engineers and other BRAC consultants.
- Strong working relationship with the major BRAC environmental insurers.
- Disclosure and proposal of all services and compensation formats up front.

The broker is compensated either through commissions that are included in the premium, a flat fee or an hourly fee or some combination of commissions and fees. The broker should disclose how they will be compensated at the time of engagement.

3. THE PROCUREMENT PROCESS

The key to an environmental risk management program structure is balance. The objective is to design a program that recognizes the proposed transfer structure, reflects the risk appetites of the parties and is flexible enough to adapt to unanticipated future changes.

While each BRAC project poses unique challenges, the general approach to each environmental insurance program design and placement should include the following stages:

i. Evaluation of proposed transfer and conveyance mechanisms; assessment of redevelopment objectives and remediation requirements; and identification of key stakeholders, community concerns, political climate and funding issues.
ii. Formulation of project risk management objectives; assessment of site-specific risk exposures; and consideration of risk management alternatives and program structuring options.
iii. Assessment of relevant regulatory requirements, site characterization data and associated underwriting information; identification of specific data gaps; and consideration of the need for additional studies.
iv. Identification of viable insurance companies and the development of a competitive insurance marketing strategy.
v. Production of project-specific requests for proposal and underwriting presentations for insurers; supply insurers with underwriting information.
vi. Initial underwriting negotiations with insurers; assessment of insurer proposals; and proposal selection.
vii. Management of final coverage negotiations and placement of policy.
viii. Ongoing program servicing, administration and claims advocacy, including coverage evaluation and dispute resolution.

This process will ensure that the broker and project team develop a full understanding of the needs of the stakeholders. This will enable the design and placement of a program that has an ideal balance between the variables of capacity, retentions, and terms and conditions into a program that delivers consistent, cost-effective coverage.

4. INSURER SELECTION

There are many considerations when selecting a panel of viable insurers. It is important to establish prequalification conditions (e.g., BRAC experience) and then define clear selection criteria.

Insurer selection considerations will include:

- A strong and stable financial position through industry ratings.
- Track record of previous BRAC placement.
- Commitment to the BRAC market all the way to senior management.
- The ability to bring an efficient team of underwriters, environmental consultants and legal experts with demonstrated BRAC experience to the table.
- The ability to work alongside your attorneys, environmental consultants and broker as a team.

Conclusion

While preparing strategies for reusing former military property, communities should consider integrating environmental insurance with their plans. Environmental insurance helps communities manage the liability that comes with military base land. Insurance helps LRAs by mitigating the risks associated with accepting property from DOD. This helps attract developers and obtain financing for reuse projects that can make former military property an asset to communities again.

Disclaimer

This publication has been written by a number of different persons and entities. The statements contained herein do not necessarily represent the views of all or any specific persons or entities. Nothing herein contains legal, tax or accounting advice. Please contact your legal, tax or accounting professional for advice. The description of insurance coverage herein is a summary only. It does not include all terms, conditions and conditions of the policies described. Please refer to the actual policies for complete details of coverage and exclusions. Coverage may not be available in all states. Issuance of coverage is subject to underwriting.

Appendix 1 — Glossary of Insurance Terms

Additional Insured
A party, other than the named insured, who is protected by the terms of the policy.

Aggregate
The total amount of losses, or limits, that a policy will pay.

Blanket Policy
A single limit of insurance that covers a number of items, such as one amount of coverage to cover several locations. A blanket policy usually contains certain restrictions, which may be absent in a more specific or customized policy.

Claim
The formal request by a policyholder or a claimant – another party that has suffered a loss — for payment of a covered loss under an insurance policy.

Claims-Made
A liability insurance method covering losses from claims asserted against the insured during the policy period, regardless of whether the liability imposing causes occurred during or prior to the policy period. The coverage trigger is based on the retroactive date stated in the Declarations of any given policy.

Contingent Liability
A liability that may be incurred by an insured as a result of negligence on the part of an individual or business engaged to perform work.

Coverage
The insurance protection offered by a policy.

Deductible
The amount of money that must be first subtracted from the total damage incurred before determining the insurance company's liability.

Endorsement
A clause that is added to and becomes part of an insurance policy, for the purpose of modifying the standard policy form.

Exclusion
An exposure, hazard, or circumstance that is not covered by an insurance policy and is so stated in the policy. An exclusion specifies what is not included in an insurance policy's coverage.

Exposure
Synonymous with risk. It is the chance of suffering a loss. For the insurance company, it also equates to the total of what a policy insures.

Extended Reporting Period (ERP)
Also known as a "tail," this is an endorsement to the claims made policy that extends the reporting period for the filing of a claim past the expiration date of the policy.

First Named Insured
The party named first in an insurance policy. The named insured has the primary duties and obligations for payment of premium, self-insured retention, and co-payments.

First-Party
Also called on-site, refers to coverages provided for incidents that occur on a covered location.

Indemnification
An agreement to pay for loss suffered or to reimburse.

Insured
The person or party(ies) protected by an insurance policy.

Limit or Limit of Liability
The maximum amount that an insurance company will pay for any one loss, or for aggregate losses, according to the terms of the insurance policy.

Master Policy
An insurance policy which covers a group of parties, or a large number of separate exposures.

Premium
The amount of money an insurance company charges to provide coverage.

Pooling
A joint insurance or underwriting arrangement in which the participant insurers assume a predetermined share of all covered exposures. Members in the pooling arrangement share proportionately in the premiums, losses, expenses, and profits.

Reinsurance
A transaction between two insurance companies. The reinsurer agrees to indemnify another insurance company, known as the ceding company. The reinsurer agrees to cover all or a portion of a loss which the ceded company may sustain under a policy or policies it has issued.

Reinsurer
An organization that assumes the liability of an insurer by way of reinsurance.

Renewal
A process by which a policy that will expire is extended for a new term.

Self-Insured Retention (SIR)
The amount of money that the policyholder assumes as its own liability and which is not otherwise covered in the insurance policy. Although similar to a deductible, an SIR is typically a larger amount of money and applies to both damages and legal expenses.

Sub-Limits
A smaller limit of insurance coverage that exists within a larger limit, and which applies to a specific type of exposure or endorsement.

Term
The length of time for which a policy is written.

Third-Party
Also called off-site, refers to coverages provided for incidents that occur off the covered location.

Trigger
An incident or event that causes coverage provided by a policy to respond.

Endnotes

[1] "Property Revitalization – Lessons Learned from BRAC and Brownfields"; The Interstate Technology & Regulatory Council Brownfields Team, 2006.

[2] "Military Base Closures: Updated Status of Prior Base Realignments and Closures," U.S. Government Accountability Office, January 2005.

[3] CERCLA, also known as Superfund, addresses past environmental activities. It provides for liability, compensation, cleanup and emergency response for the remediation of hazardous waste sites, including abandoned properties.

Appendix 2 — CERCLA 120(h)(3)(C) Covenant Deferral

Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §9620)
§120(h)(3)(C)

(C) Deferral

(i) In general

The Administrator, with the concurrence of the Governor of the State in which the facility is located (in the case of real property at a Federal facility that is listed on the National Priorities List), or the Governor of the State in which the facility is located (in the case of real property at a Federal facility not listed on the National Priorities List) may defer the requirement of subparagraph (A)(ii)(I) with respect to the property if the Administrator or the Governor, as the case may be, determines that the property is suitable for transfer, based on a finding that—

(I) the property is suitable for transfer for the use intended by the transferee, and the intended use is consistent with protection of human health and the environment;

(II) the deed or other agreement proposed to govern the transfer between the United States and the transferee of the property contains the assurances set forth in clause (ii);

(III) the Federal agency requesting deferral has provided notice, by publication in a newspaper of general circulation in the vicinity of the property, of the proposed transfer and of the opportunity for the public to submit, within a period of not less than 30 days after the date of the notice, written comments on the suitability of the property for transfer; and

(IV) the deferral and the transfer of the property will not substantially delay any necessary response action at the property.

(ii) Response action assurances

With regard to a release or threatened release of a hazardous substance for which a Federal agency is potentially responsible under this section, the deed or other agreement proposed to govern the transfer shall contain assurances that—

(I) provide for any necessary restrictions on the use of the property to ensure the protection of human health and the environment;

(II) provide that there will be restrictions on use necessary to ensure that required remedial investigations, response action, and oversight activities will not be disrupted;

(III) provide that all necessary response action will be taken and identify the schedules for investigation and completion of all necessary response action as approved by the appropriate regulatory agency; and

(IV) provide that the Federal agency responsible for the property subject to transfer will submit a budget request to the Director of the Office of Management and Budget that adequately addresses schedules for investigation and completion of all necessary response action, subject to congressional authorizations and appropriations.

(iii) Warranty

When all response action necessary to protect human health and the environment with respect to any substance remaining on the property on the date of transfer has been taken, the United States shall execute and deliver to the transferee an appropriate document containing a warranty that all such response action has been taken, and the making of the warranty shall be considered to satisfy the requirement of subparagraph (A)(ii)(I).

(iv) Federal responsibility

A deferral under this subparagraph shall not increase, diminish, or affect in any manner any rights or obligations of a Federal agency (including any rights or obligations under sections 9606, 9607, and this section existing prior to transfer) with respect to a property transferred under this subparagraph.

Appendix 3 — Section 330 Indemnification

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1993 (P.L. 102-484)

Sec. 330. Indemnification of Transferees of Closing Defense Property.

(a) IN GENERAL.—

(1) Except as provided in paragraph (3) and subject to subsection (b), the Secretary of Defense shall hold harmless, defend, and indemnify in full the persons and entities described in paragraph (2) from and against any suit, claim, demand or action, liability, judgment, cost or other fee arising out of any claim for personal injury or property damage (including death, illness, or loss of or damage to property or economic loss) that results from, or is in any manner predicated upon, the release or threatened release of any hazardous substance, pollutant or contaminant, or petroleum or petroleum derivative as a result of Department of Defense activities at any military installation (or portion thereof) that is closed pursuant to a base closure law.

(2) The persons and entities described in this paragraph are the following:

(A) Any State (including any officer, agent, or employee of the State) that acquires ownership or control of any facility at a military installation (or any portion thereof) described in paragraph (1).

(B) Any political subdivision of a State (including any officer, agent, or employee of the State) that acquires such ownership or control.

(C) Any other person or entity that acquires such ownership or control.

(D) Any successor, assignee, transferee, lender, or lessee of a person or entity described in subparagraphs (A) through (C).

(3) To the extent the persons and entities described in paragraph (2) contributed to any such release or threatened release, paragraph (1) shall not apply.

(b) CONDITIONS.—No indemnification may be afforded under this section unless the person or entity making a claim for indemnification—

(1) notifies the Department of Defense in writing within two years after such claim accrues or begins action within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the Department of Defense;

(2) furnishes to the Department of Defense copies of pertinent papers the entity receives;

(3) furnishes evidence or proof of any claim, loss, or damage covered by this section; and

(4) provides, upon request by the Department of Defense, access to the records and personnel of the entity for purposes of defending or settling the claim or action.

(c) AUTHORITY OF SECRETARY OF DEFENSE.—

(1) In any case in which the Secretary of Defense determines that the Department of Defense may be required to make indemnification payments to a person under this section for any suit, claim, demand or action, liability, judgment, cost or other fee arising out of any claim for personal injury or property damage referred to in subsection (a)(1), the Secretary may settle or defend, on behalf of that person, the claim for personal injury or property damage.

(2) In any case described in paragraph (1), if the person to whom the Department of Defense may be required to make indemnification payments does not allow the Secretary to settle or defend the claim, the person may not be afforded indemnification with respect to that claim under this section.

(d) ACCRUAL OF ACTION.—For purposes of subsection (b)(1), the date on which a claim accrues is the date on which the plaintiff knew (or reasonably should have known) that the personal injury or property damage referred to in subsection (a) was caused or contributed to by the release or threatened release of a hazardous substance or pollutant or contaminant, or petroleum or petroleum derivative as a result of Department of Defense activities at any military installation (or portion thereof) described in subsection (a)(1).

(e) RELATIONSHIP TO OTHER LAW.—Nothing in this section shall be construed as affecting or modifying in any way section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9620(h)).

(f) DEFINITIONS.—In this section:

(1) The terms “facility”, hazardous substance”, “release”, and “pollutant or contaminant” have the meanings given such terms under paragraphs (9), (14), (22), and (33) of section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, respectively (42 U.S.C. 9601 (9), (14), (22), and (33)).

(2) The term “military installation” has the meaning given such term under section 2687(e)(1) of title 10, United States Code.

(3) The term “base closure law” means the following:

(A) The Defense Base Closure and Realignment Act of 1990 (10 U.S.C. 2687 note).

(B) Title II of the Defense Authorization Amendments and Base Closure and Realignment Act (10 U.S.C. 2687 note).

(C) Section 2687 of title 10, United States Code.

(D) Any provision of law authorizing the closure or realignment of a military installation enacted on or after the date of the enactment of this Act.

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