



BRAC I-V



Environmental Insurance

Using Environmental Insurance as a New Tool for Managing Cleanup Risk
in DoD Property Transfers

An increased understanding of the risks related to environmental clean-up and redevelopment of contaminated properties, such as brownfields and Superfund sites, has prompted development of new environmental insurance products. The coverage options now available allow parties—such as the Local Redevelopment Authority (LRA), developer, lender, and lessee—to tailor insurance policies specifically to their situation in managing the potential legal, financial, and environmental risks that may be associated with redeveloping former DoD property. Additionally, where the LRA assumes responsibility for cleaning up property transferred using the Early Transfer Authority (ETA), the LRA can purchase environmental insurance to insure itself against possible cost overruns during its cleanup of the installation property. Insurance coverage for costs related to the interruption of business resulting from newly discovered contamination can also be obtained.

Environmental insurance can cover some of the potential risks associated with the redevelopment of DoD property, such as:

- Cost overruns when the estimated cost of the cleanup plan is exceeded
- Tort liability resulting from injuries that occur to parties involved in the cleanup
- Business or work stoppage caused by discovery of previously unknown contaminants
- Claims by third parties associated with ongoing operations
- Claims by third parties conducting remediation activities
- Failure of the initial remedy before transfer
- New contamination discovered after acquiring the property.

What is Early Transfer Authority (ETA)?

ETA is a Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) provision, §120(h)(3)(C), that allows DoD to transfer property before completing cleanup by allowing DoD to defer the CERCLA covenant that all necessary remedial action has been completed before transfer. While DoD can continue the cleanup under ETA, the LRA may opt to assume responsibility for the cleanup of the property in order to more fully integrate cleanup actions with redevelopment priorities. ETA is not itself privatization, but it can facilitate privatization by allowing DoD to transfer the property and the responsibility for the execution of cleanup activities.

Environmental insurance may make a former DoD property more attractive to a potential buyer or transferee. Insuring the property can help minimize and quantify the risk. This may increase the value of the property and protect against the cost of cleanup outweighing the property's fair market value. Environmental insurance may also aid a redeveloper in obtaining sufficient financing for a redevelopment project. Several insurance policies provide for the lender to be named as an additional insured, which can potentially reduce the lender's concerns regarding future liability and assist in stimulating financing and investment.

What are the different types of environmental insurance policies?

Several types of environmental insurance policies are available for parties interested in purchasing, selling, financing, cleaning up, or redeveloping contaminated properties. These policies can help manage the potential legal, financial, and environmental risk. The most common types are pollution legal liability, cleanup cost cap or stop gap insurance, property transfer, and brownfields restoration and redevelopment insurance. While these general categories encompass a large portion of the environmental insurance market, insurance providers also offer a number of additional, more specific options (e.g., secured creditor insurance).

Pollution Legal Liability Insurance is designed to cover claims against the current or previous property owner arising from cleanup, bodily injury, or property damage. Both known and unknown pre-existing contamination may be covered in the policy. This type of coverage can be used either before or after the cleanup is conducted. Policies providing coverage for business interruptions resulting from discovery of contamination are common under pollution legal liability coverage.

Cleanup Cost Cap or Stop Gap Insurance covers instances where actual cleanup costs exceed the estimated cost. Insurance providers now offer cleanup cost cap or stop gap coverage, which will pay up to an agreed-upon amount once the cleanup costs exceed a designated amount. The policy can also be structured to include coverage for offsite cleanup costs on surrounding properties. The coverage typically ends after completion of the cleanup and certification that the cleanup has been completed.

Property Transfer Insurance is designed to cover claims arising from pre-existing unknown contamination and known contamination below reportable levels. This type of insurance is similar to the pollution legal liability insurance coverage, but is more focused on the property transfer scenario. The seller, buyer, and lender can all be named insureds on the property transfer insurance policy.

Brownfields Restoration and Redevelopment Insurance is designed to cover a site with known environmental contamination for which cleanup and development activities are planned. It is a combination of property transfer insurance and cleanup cap type insurance, and can include the business interruption coverage discussed under pollution legal liability.

Privatizing Cleanup

Unlike outsourcing, where the federal government retains the asset but delegates its management to an outside entity, privatization allows the federal government to divest itself of an asset and the costs associated with maintaining the asset. In the Base Realignment and Closure (BRAC) context, privatization of cleanup means that DoD would transfer both the property and the cleanup responsibility to another entity, although, as between DoD and third parties, the legal liability for the contamination and the efficacy of the remedial action remains with DoD.

Use of environmental insurance in DoD property transfers

As part of every transfer of DoD property, the transferee is afforded protection from liability for environmental contamination through the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) §120(h) covenants. Under CERCLA §120(h), the federal government is responsible for cleaning up any contamination that can be attributed to DoD activities discovered after the property is transferred. In addition to the protections DoD provides, the use of environmental insurance may provide added assurance about future liability and assist in attracting financing and stimulating investment in former DoD property.

Case Studies

Although environmental insurance and its use in conjunction with contaminated DoD properties is relatively new, it has been used to aid the redevelopment of several BRAC installations. An example is the Fleet Industrial Supply Center in Oakland (FISCO), California. FISCO exemplifies the use of environmental insurance where property has been transferred using Early Transfer Authority (ETA), with the LRA conducting the clean-up. Environmental insurance also facilitated redevelopment at Lowry Air Force Base in Colorado and the U.S. Army Research Laboratory in Massachusetts. These two properties provide examples of the use of environmental insurance in more traditional base closure transfers (i.e., cleanup completed by DoD before transfer). In either case, ETA or non-ETA, it is important for interested parties to understand the scope of environmental insurance products and their potential usefulness to the transactions under consideration.

Fleet Industrial Supply Center, Oakland, California

The 530-acre FISCO was selected for closure in the 1995 BRAC round. The Navy transferred title of FISCO to the City of Oakland through the City's Board of Port Commissioners (the Port). The development will create new marine terminals and warehousing and cargo transfer facilities, allowing for increased business-related operations. A new shoreline park will provide greater public access to the waterfront. The Navy transferred FISCO to the Port using ETA, with the Port assuming responsibility for completing the environmental cleanup. After the Port has obtained regulatory concurrence on the cleanup, the Navy will issue the CERCLA section 120(h) covenant stating that all necessary remediation has been completed. The Navy agreed to pay the Port a fixed price to conduct the cleanup. Any amount over that price (except for catastrophic events and unexploded ordnance) is the financial responsibility of the Port. The agreement between the Navy and the Port required the Port to either self-insure or purchase general liability insurance. The Port chose to purchase both cleanup cost cap and pollution legal liability insurance. The cost cap insurance will protect the Port from cost overruns and the legal liability coverage will insure the Port against unforeseen environmental conditions.



Lowry Air Force Base, Denver, Colorado

Lowry, a former Air Force installation that was primarily used as a training center, was selected for closure in 1991 and subsequently closed in 1994. The 1,866-acre former base was located in the center of the Denver metropolitan area, about 15 minutes from downtown. Lowry has been transformed into a new community that includes residential housing, a golf course, commercial businesses, a town center, and educational resources. The Lowry Redevelopment Authority was responsible for redeveloping the property. Contaminants included petroleum, metals, and solvents in the groundwater and soil.



To protect itself during redevelopment and against future release of contamination, the Lowry Redevelopment Authority purchased a comprehensive environmental insurance policy with three main coverage components: legal defense expense, pollution legal liability, and remediation liability/cost cap.

U.S. Army Research Laboratory, Watertown, Massachusetts

The U.S. Army Research Laboratory, a 48-acre property, was established in 1816 as the Watertown Arsenal for the manufacture of cannon and artillery. The installation was selected for closure in 1988. From the 1960s to closure, Watertown was used primarily for research, development, and testing new materials for certain weapons systems. The installation closed on September 30, 1995. The site has a thriving mix of education and commercial uses, including an arts center, a restaurant and several health clubs.



Watertown's comprehensive environmental insurance policy provides three main coverage components: remediation of pollution that occurs during redevelopment, on-site and off-site bodily injury and property damage claims, and related legal defense expenses.

We welcome and invite your comments on this fact sheet as we seek to improve the information provided. Please send comments to: ODUSD(I&E)EM, 3400 Defense Pentagon, Washington, DC 20301-3400. You can find this fact sheet and other information on DoD's BRAC Environmental Management website: <https://www.denix.osd.mil/denix/Public/Library/Cleanup/CleanupOfc/index.html>.