

A decorative graphic on the left side of the slide, consisting of a black crosshair with a blue square in the top-left quadrant, a red square in the bottom-left quadrant, and a yellow square in the bottom-right quadrant.

# Pollution Risk as an Economic Development Tool

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American Association of Port Authorities  
Port Administration and Legal Issues Seminar  
April 13 – 15, 2011  
San Francisco

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## **Pollution Risk as an Economic Development Tool**

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### **Introduction**

Cindi Heffernan, CPCU, Managing Director - Hugh Wood Inc.

Michael Johnson, Senior Vice President – Hugh Wood Inc.

Steve Picco, Saul Ewing LLP

Jon Peeples, Vice President - ACE Environmental Risk

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### **Discussion Topics:**

- **Pollution Exposures for Port Authorities**
  - Important Facts
  - Types of Environmental Exposures
  - Examples of Specific Port Environmental Exposures
  - Available Solutions
- **Liabilities arising from the acquisition, divestiture or reclamation of properties**
  - Risk Management
  - Contractual
- **Products available to Port Authorities**
  - Insurance Products

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# **Pollution Exposures for Port Authorities**

Presented by:

Cindi Heffernan, CPCU, Managing Director

Michael Johnson, Senior Vice President

Hugh Wood Inc.

Port Insurance & Risk Management Practice

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### **Important Facts:**

- Prior to the events of 9/11 – Port environmental concerns were priority due to limited land capacity
- After 9/11 – Port environmental issues remain but priority shifted to security and largely unfunded Federal mandates
- Port growth is dependent on efficiency of operations and maximum use of key assets ie: land
- Port expansion is necessary to meet future maritime shipping and cargo demands.
- Ports are a key driver in regional and national economy. Without expansion, an individual port is in jeopardy of future growth and viability.

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### **Types of Environment Exposures:**

- Ground – Historic contamination/current tenant operations
- Water - Storm water runoff/dredging/tenant operations
- Air – Overland trucks/railroad/vessel
- Noise - Terminal/air/rail operations
- Light – Port and terminal operations/tenant operations.

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### Examples of Specific Port Environmental Exposures:

- Contaminated port owned property needed for expansion:
  - ✓ **Historical review of tenants**
  - ✓ **Testing for contamination**
  - ✓ **Proposed usage of mitigated property**
- Newly acquired property with environmental concerns:
  - ✓ **Who is responsible for the cost of the clean up?**
  - ✓ **To what extent is the contamination?**
  - ✓ **Proposed usage of mitigated property**
- Dredge materials:
  - ✓ **Possible contamination**
  - ✓ **Spoil site local and possible clean up**
  - ✓ **Responsibility**

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### Available Solutions:

- Past port tenant responsibility:
  - ✓ **Still in business?**
  - ✓ **Forensic insurance coverage discovery**
  
- Contractual transfer:
  - ✓ **Insurance policies**
  - ✓ **To third party – ie: Public Private Partnership**
  
- Acquisition or purchase of new property:
  - ✓ **Require title transfer of “clean” land**
  - ✓ **Include cost of clean up in purchase of land**



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# **Understanding Contaminated Property in Ports**

**Presented by:**  
**Steven J. Picco, Chair**  
**Project and Resource Development Department**  
**Saul Ewing LLP**

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## Causes of Contamination

- Sloppy industrial operations
- Deliberate Releases
- Accident/Fire
- Illegal Dumping
- Historic Fill

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### **Methods of Property Acquisition**

- Purchase
- Abandonment
- Bankruptcy
- Gift or Transfer
- Condemnation

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### **Before Accepting Property**

- Assess Risk
  - Investigate Title
  - Investigate Prior and historic use
  - Environmental conditions

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### **Assessing Existing Holdings**

- Same investigative standards apply
- Use Attorney-Client privilege where possible
- Avoid triggering remedial action standards until ready to assume them

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### **Adding value to holdings**

- Get use permits where applicable
- Know where the redevelopment money is:
  - Brownfield grants (state or federal)
  - General economic development and jobs funds
  - tax credits for private redevelopers

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### **Attracting development capital**

- The more the limits of risk can be defined, the easier it is to attract development funds
- fear of unknown contamination or unending remediation responsibilities are the two major barriers to redevelopment

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### **Insurance as a Risk Elimination/definition tool**

- Myriad of insurance product available in a redevelopment setting
- Most are designed to eliminate the upside risk of remedial costs-a variant of umbrella insurance
- Elimination of upside risk makes it easier to define redevelopment costs at the planning stage, a huge advantage to landowners





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# **Environmental Insurance and Risk Transfer Liability**

Jon Peeples  
ACE Environmental Risk



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### Disclaimer

The opinions and positions expressed by presenters and participants are the opinions or positions of the speaker only. Product Information is in summary form only. The terms and conditions of the insurance policy govern the right and obligations of the parties.



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## AGENDA:

- Key Terms and Concepts
- Product Offerings
- What is Covered



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### EXPOSURES:

Environmental insurance for fixed facilities can cover environmental exposures at, under, emanating from, or relating to the ownership or operation of a facility. Those exposures include:

- Exposures at and under the location
- Exposures emanating from or to the location
- Transportation to/from the location
- Disposal of waste generated at the location



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### Compliance Support

- Fixed Facility Cover can be used as a Compliance mechanism for:
  - Treatment, storage and disposal facilities
  - Closure/post-closure insurance
  - Spill and discharge prevention
  - Underground and above-ground storage tank liability
  - Dry cleaners
  - Institutional and/or engineering controls



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### **Transactional Liabilities**

- Brownfields & redevelopment
- Mergers
- Acquisitions
- Divestitures
- Real Estate Property Management
- Liability buy-outs



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### Time Element

#### Timeline of Coverage

- Key Terms:
  - Pre-Existing Conditions
  - New Conditions
    - Retro-active dates
    - Reverse retro-active dates
    - Continuity Dates



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### Pollution Products

- Product Offerings
  - Premises Pollution Liability
  - Remediation Cost Containment
  - Contractor's Pollution Liability
  - Underground Storage Tanks /Above Ground Storage Tanks





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### Pollution Legal Liability

#### Premise Pollution Liability

- New Conditions and Pre-Existing Conditions
- Covers BI, PD, and Remediation Costs
- On-Site and Off-Site
- Enhancements
  - Transportation
  - Non-Owned Disposal
  - Business Interruption



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### Pollution Legal Liability

#### Legal Expense and Defense

- Right and duty to defend
- Defense costs erode the limit of liability
- Defense costs included within the SIR



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### **Pollution Legal Liability**

#### **Premises Pollution Liability**

##### **What is covered?**

###### **Remediation Costs**

- Pre-existing and New
- Discovery trigger for on-site
- On-site and off-site
- Unknown and known (if not excluded)
- Third party claims



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### **Pollution Legal Liability**

- **Premise Pollution Liability**
  - **What is Covered?**
    - Bodily Injury
    - Third Party Property Damage
      - Physical injury or destruction to tangible property
      - Resulting loss of use and diminution in value
      - Natural Resource Damages



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### **Cost Containment**

- **Remediation Cost Containment**
  - Who is the purchaser?
    - They are entities that own, buy or sell sites with a contamination problem with a clean up value of greater than \$3,000,000
    - Contractors managing cleanups over \$3,000,000
    - Entities looking for coverage for catastrophic events



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### **Cost Containment**

- **Remediation Cost Containment**
  - Coverage Provided
    - Covers Remediation Cost Overruns
    - Actual contamination greater than estimated
    - Offsite cleanup costs adjacent to the covered site
    - Offsite cleanup costs emanating from the covered site
    - Change orders by governmental authorities that are required during the policy term



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### **Cost Containment**

- **Remediation Cost Containment**
  - Structure
    - Coverage attaches above the expected cleanup.
    - All coverages erode same single SIR.
    - Estimated cleanup costs typically buffered
    - Co-Pay Provision Option
    - Can offer multi-site coverage
    - Often offer limits =100% of cleanup costs
    - Can be offered on risk transfer or blended basis



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### Contractors Pollution

- Triggers:
  - Claims Made
  - Occurrence
- Capacity:
  - Any one carrier can post up to \$50M in limits
  - Market Capacity any one risk - \$200M
  - Typical policies average < \$5M





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### **Contractors Pollution**

#### **Typical Purchasers are:**

- General Contractors
- Design/Builders
- Construction Managers
- Mechanical contractors
- Electrical contractors
- HVAC contractors
- Environmental contractors
- Environmental consultants



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### Contractors Pollution

Risk Liability Identification

Potential Sources of Claims

Substance Specific	Operations	Environmental Regulations
<ul style="list-style-type: none"><li>▪ Asbestos</li><li>▪ Lead</li><li>▪ IAQ</li><li>▪ VOC's</li><li>▪ Other Contaminants</li></ul>	<ul style="list-style-type: none"><li>▪ Waste Disposal</li><li>▪ Manufacturing</li><li>▪ Construction</li><li>▪ Transportation</li><li>▪ Contingent</li><li>▪ Contractual</li></ul>	<ul style="list-style-type: none"><li>▪ Clean Water Act</li><li>▪ Clean Air Act</li><li>▪ RCRA</li><li>▪ CERCLA</li><li>▪ EPCRA</li><li>▪ Other</li></ul>



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### Contractors Pollution

#### Policy Types:

1. Practice
  - Annual basis
  - Cover all operations
2. Project Specific
  - OCIP
  - CCIP
  - Project
  - Terms – Policy Period / Comp Ops up to (13) yrs



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### USTs / ASTs

Underground and Aboveground Storage Tank Coverage  
(USTs/ASTs)

- Certificates issued to meet financial assurance
- Designed for commercial underground and aboveground storage tanks (most tank programs do not cover home heating oil tanks)
- 3<sup>rd</sup> party BI/PD resulting from pollution conditions emanating from scheduled tanks
- Typically UST policies issued on admitted basis; AST and UST/AST policies issued on surplus lines basis
- Typical limits range from \$500K/\$1M up to \$5M/\$5M
- Defense outside limits; average deductibles from \$2,500 to \$25,000; retroactive coverage up to 10 years back
- Typically 1 year policies to meet local requirements
- No limitations on tank age or size



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### USTs / ASTs

#### UST/AST Coverage

- Typical Classes of business
  - gas stations
  - manufacturing facilities
  - institutional facilities
  - auto dealerships

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# QUESTIONS

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