

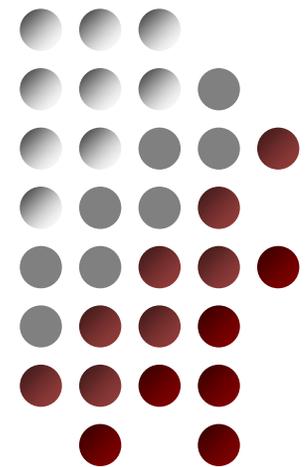
Understanding the Basics: Pollution Insurance for Brownfields Projects

James T. Price
June 20, 2011

Missouri Waste Control Coalition/
Missouri Department of Natural Resources
Conference Brownfields Track

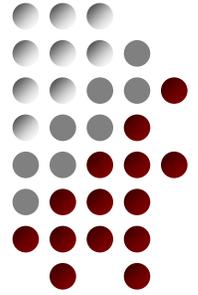
Lake of the Ozarks, Missouri

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SPENCER FANE
BRITT & BROWNE LLP

Contact Information



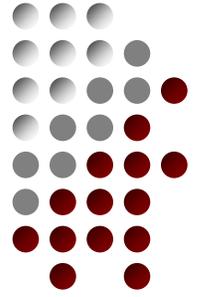
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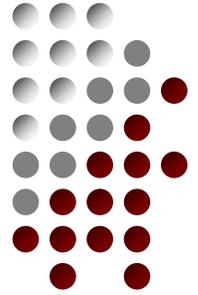
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Overview



- Commonly used in Brownfields Redevelopment Projects
- Very popular with community projects

Limited Number of Companies



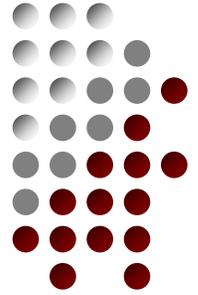
- Ace Insurance Company
- Chartis/AIG
- Zurich
- XL
- Others



Because change happenz™



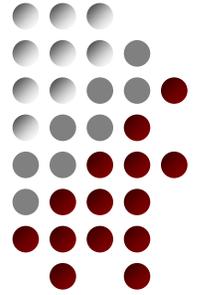
Participants



- Developer
- Contractor
- Community
- Former facility owner
- Risk Manager
- Insurance Broker
- Lawyers



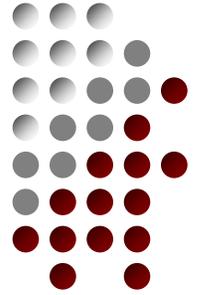
Common Types of Policies



- Pollution liability
 - Property owner
 - Contractor
 - New pollution conditions



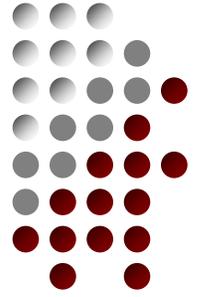
Common Types of Policies cont'd



- Remediation cost cap
- “Finite” policy

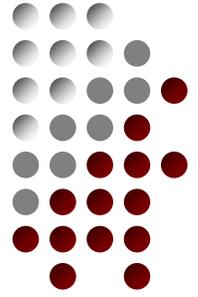


Principal Risks of Brownfields Redevelopment



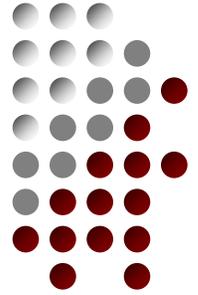
- Liabilities
 - Especially, unexpected liabilities
- Cleanup costs
 - Especially those that escalate or take longer than expected
- Inadequate sources of money
- Delays

Risks, cont'd



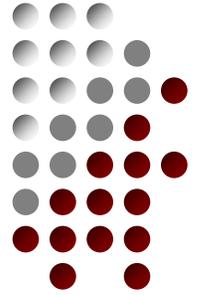
- **Uncertainties**
 - Contamination not previously known or discovered
 - Regulatory change
- **Third-party liabilities**

Techniques to Manage Risks



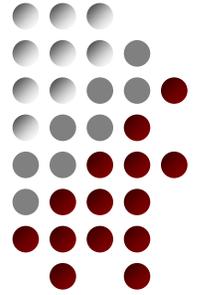
- Contract provisions
- Deal structure
- Superfund statutory exemptions: Bona Fide Prospective Purchaser Status
 - - All Appropriate Inquiry
- Insurance

Contracts as Risk-Management Tools



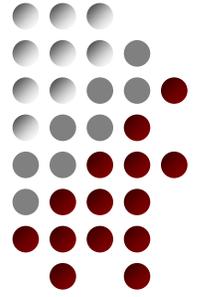
- Indemnities, representations, and warranties
 - Knowledge limitations
 - Time limits
- Due diligence
- Promises by seller
- Promises by buyer
- Lender issues
- Limiting the land purchased

Environmental Insurance as a Risk Management Tool



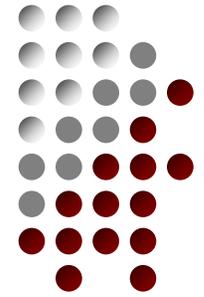
- Can cover certain risks:
 - Cost escalation
 - Unknown contaminants
 - Regulatory changes
 - Third-party liabilities
- Can integrate with performance-based contracts for environmental services
- Can be tailored to transaction
- Can increase comfort levels

Limitations of Environmental Insurance



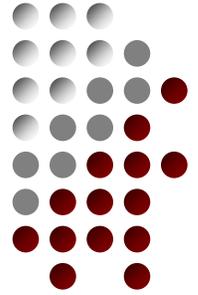
- Can be difficult to underwrite, expensive
- Limited time periods (typically 10 years max)
- Claims-made form
- Individually negotiated

Cost-cap policies



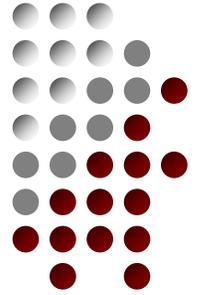
- Sometimes called “stop loss” policies
- Set a figure above which the insurance will “attach”
- Below the attachment point: self-insured
 - Above that point: May be co-insured
- Can cover known or unknown pollutants
- Generally tied to environmental investigations, reports, or specific orders
 - - Revisions?

Cost-cap policies, cont'd



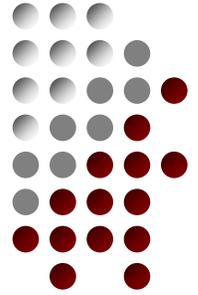
- Challenge: Determining what is in, out
- How are exceedances addressed?
- May be a feature of performance-based environmental contracts
- Challenge: Limited term of years
 - - In some forms: Money must be spent within that term
- Beware of differing interests: Regulators, cleanup obligor, insurer, developer

Finite Insurance Policies



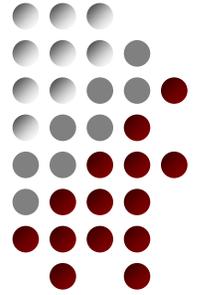
- Ordinarily set up in conjunction with cost-cap policies
- Prefunded: Money paid into a fund to be spent on environmental cleanup
- Insurer may manage the cleanup
- Challenge: Determining what is in, out, and how money is spent

Pollution Liability Insurance



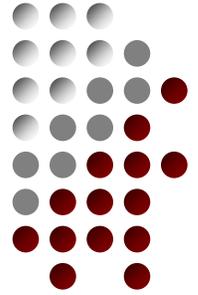
- Protects against claims by third parties
- May cover onsite or offsite
- May cover known or unknown conditions
- May become effective immediately
 - - such as during a cleanup
- May become effective only when cleanup is complete

PLL insurance, cont'd



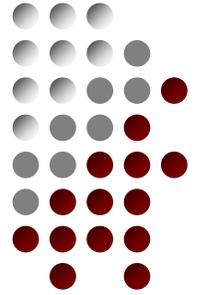
- Challenge: Limited term of years
 - - integrate with the cleanup progress and real risks
- Exclusions: Mold, asbestos, pollution
- Schedule of known conditions
- Scheduled contracts
 - - Details?
- Check definitions
- Future activities: “May” vs. “Shall”

Key Points for Review, Negotiation



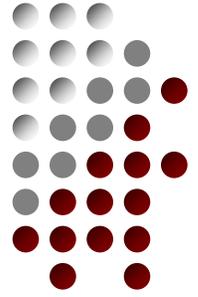
- Claims-made forms
- Term of years
- Renewal provisions
- Additional insured
- What is in, what is out
- Attachment point
- Retention: Who pays?
- Coverage for extra work
- Known vs. unknown, and how covered

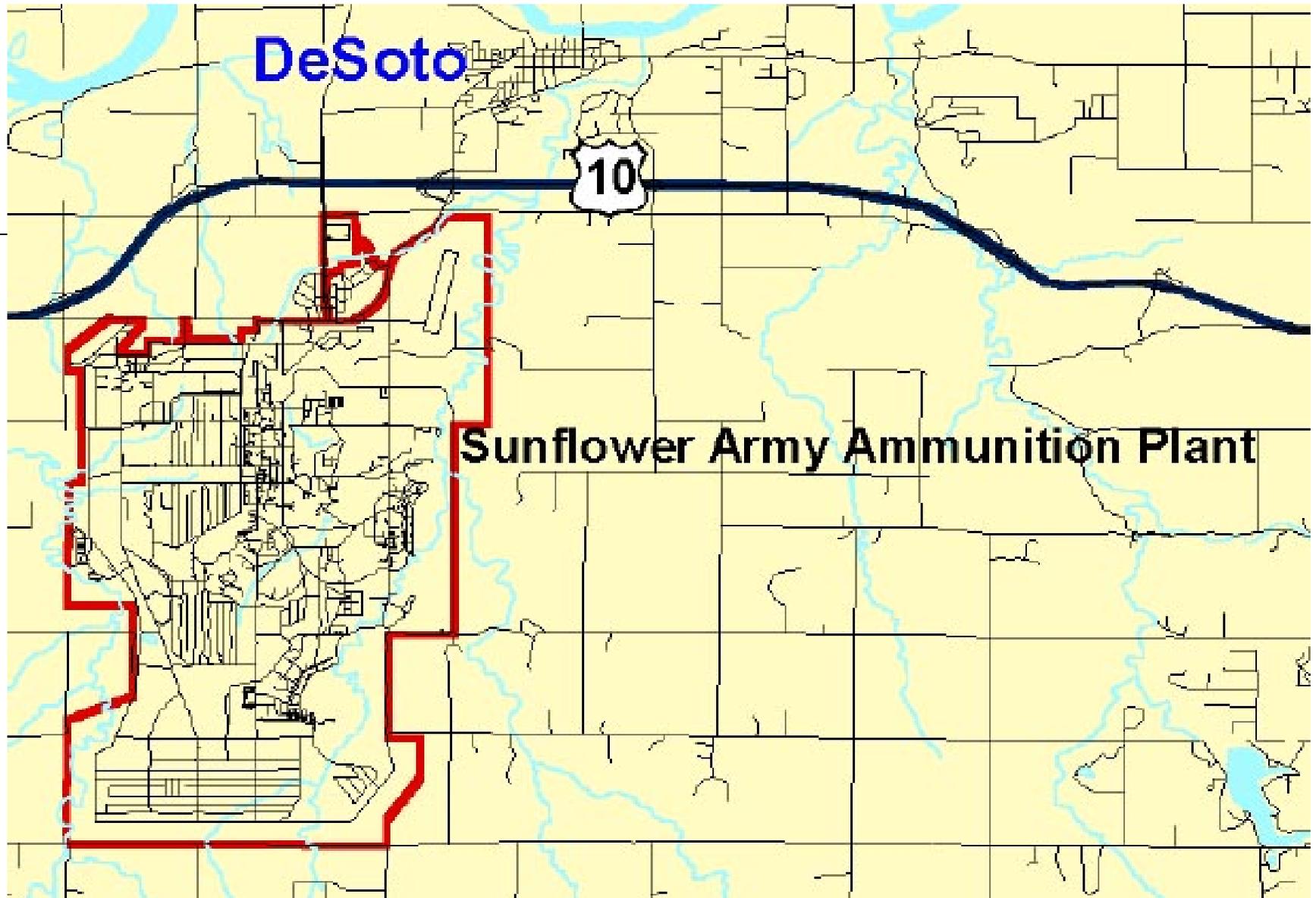
Key Points for Review, Negotiation, cont'd



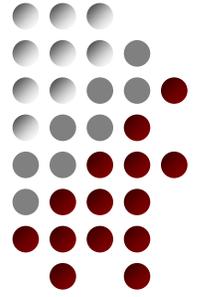
- Definitions
- Exclusions
- Individually negotiated
- Combined coverages
- Insist on reviewing the policy
- Consult with a professional familiar with this type of insurance

Sunflower Army Ammunition Plant



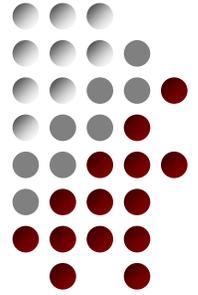


Sunflower Army Ammunition Plant



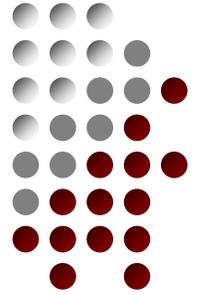
- Johnson County, Kansas and Johnson County Parks District
- Goals
 - See property redeveloped into productive reuse
 - Mixed use: Residential, commercial
 - Parkland via public conveyance
 - Protect public into the future
- Secure developer's promises to clean up
- Obtain appropriate assurances of ability to do so

Environmental Insurance at Sunflower AAP



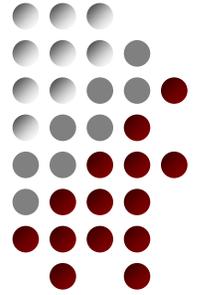
- Finite policy: U.S. would fund
- Cost-cap policy
- PLL coverage
- Selecting the carrier
- KDHE scope of work; coverage for UXO
- KDHE concern: Financial assurance

Selecting an Environmental Insurance Carrier



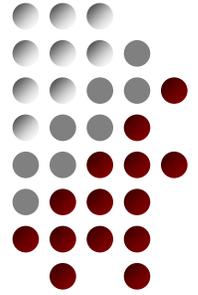
- Limited choices
- Limited capacities
- Financial wherewithal and capacity are real concerns
- Ask questions; talk to your broker

Making Claims



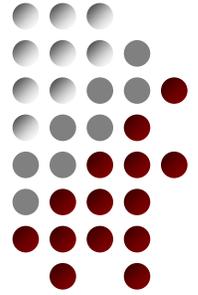
- “Claims made” form
 - Check policy definition
- Work with placing broker
- Keep good records
- How extra costs arise can determine whether there is coverage

Disputes



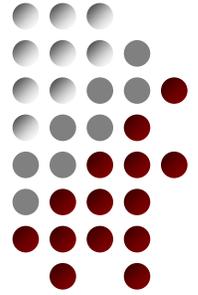
- Meaning of policy terms
- What is in; what is out
- Scope of work
- Whether policy coverage has been triggered
- Whether qualifying costs have been incurred
 - Recordkeeping
 - Development, site preparation?

Disputes, cont'd



- Reasonableness, necessity of costs
- Knowledge at policy inception
- Relationship to policy negotiations

Questions?



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