



Lenders Guide to Environmental Insurance on Farms

Farms need real environmental insurance to fill the coverage gaps created by pollution exclusions in both property and liability insurance policies.

This fact became readily apparent on December 30th, 2014 when the Wisconsin Supreme Court in *Wilson Mutual v. Falk* determined that bacteria contamination in drinking water wells, as a result of spreading manure on fields, is an excluded cause of loss due to the pollution exclusion in the liability insurance policies commonly sold to farms. On the same date, the Wisconsin Supreme Court determined in a separate pollution exclusion case, that nitrate contamination in ground water is also an excluded pollution loss in liability insurance policies. These ground breaking decisions at a state Supreme Court level determined that pollution exclusions in insurance policies are in effect "contamination" exclusions.

With bacteria as an excluded "pollutant" in property and liability insurance policies the need for environmental insurance in loan covenants has clearly been driven into main street businesses and the family farm.

The overall significance of these two Wisconsin Supreme Court decisions on how pollution exclusions operate cannot be overestimated:

1. The decisions make it perfectly clear that pollution exclusions exclude losses arising from operations which are unavoidable risks in farming operations.
2. Bacteria and nitrates are very common contaminants in farming.
3. Farm liability insurance policies offering what may appear to have some limited pollution coverage can be "useless" insurance in the opinion of a Supreme Court Justice.
4. These well thought out and rational decisions on how pollution exclusions operate coming from the Wisconsin Supreme Court will have a national impact on how insurance claims involving contamination in other states will be adjusted in the future

Now with the Wisconsin Supreme Court deciding that pollution exclusions actually apply to contamination as the operative word in a pollution exclusion, the need to require environmental insurance on farm loans to fill the insurance coverage gaps created by pollution exclusions should be clear to everyone.

Common uninsured environmental loss exposures in farming:

<ul style="list-style-type: none">• Ground Water Contamination	<ul style="list-style-type: none">• Surface Water Contamination	<ul style="list-style-type: none">• Crop Over Spray
<ul style="list-style-type: none">• Odors	<ul style="list-style-type: none">• Reducing Neighboring Property Values	<ul style="list-style-type: none">• Public Nuisance
<ul style="list-style-type: none">• Operating or Participating in Manure Digesters	<ul style="list-style-type: none">• Natural Resources Damages	<ul style="list-style-type: none">• Bodily Injury from exposure to Bacteria
<ul style="list-style-type: none">• Ground Water Remediation's	<ul style="list-style-type: none">• Fuel Storage Tanks	<ul style="list-style-type: none">• Fertilizer Spills or Releases
<ul style="list-style-type: none">• Custom Farming Operations	<ul style="list-style-type: none">• Transportation Risks	<ul style="list-style-type: none">• Storage of Pesticides and Herbicides

Two different types of environmental insurance for farming

Environmental insurance policies are designed to fill the gaps in property and liability insurance policies created by pollution exclusions. Continuously available for purchase since 1986, there are over one hundred different environmental insurance policies available today. There are no insurance industry standards for environmental insurance policy designs. The most common environmental insurance policies can be categorized into one of these two categories:

- **Environmental Impairment Liability** - primarily insures designated locations, (a farm or leased land)

- **Contractor Environmental Liability** - primarily insures the described operations of the named insured, (a custom farming operation)

What is covered under an environmental insurance policy?

In order to have a covered loss under an environmental insurance policy the proximate cause of the loss must arise from the release or escape of defined "pollutants" during the coverage period.

Core Coverages

- Liability to others for causing them bodily injury or property damage
- The cost of legal defense
- The cost to clean up pollutants

Common Coverage Extensions

- Transportation of materials which could lead to contamination(automobile policies usually exclude spills)
- Non-owned waste disposal sites
- Damage to natural resources
- Bacteria and manure as a defined "pollutants"

With bacteria contamination now qualifying as an excluded “pollutant”, particular attention must be paid to having all types of bacteria covered as a “pollutant” in environmental insurance policies. Not all environmental insurance policies do this.

In general, environmental insurance policies will exclude what is covered under other forms of property and liability insurance. For example bacteria contaminated milk should be covered as a “product” in the general liability policy, if that policy does not contain a “total” pollution exclusions.

Caution is advised when procuring environmental insurance on farms

Most environmental insurance policies sold to farming operations contain fatal coverage flaws. This is because the base environmental insurance policies were not created for farming risks. For example, CEL policy was designed to insure hazardous waste remediation contractors working on Superfund sites for the US EPA. It should come as no surprise that an insurance policy designed to insure hazardous waste contractors would need to be modified to address the environmental insurance needs of agriculture. The same observation holds true for EIL policies. Therefore it is important to specify environmental insurance in loan covenants in detail.

How to require environmental insurance in loan covenants

Simply adding a sentence requiring “pollution insurance” to an insurance requirement in a loan covenant is almost certain to lead to more insurance coverage gap surprises. Unlike the standardized lines of insurance like Workers Compensation, Automobile Liability and Commercial General Liability insurance, Environmental insurance differs in these ways:

1. There are no common insurance industry standards for environmental insurance policies.
2. Insurance commissioners do not regulate the policy forms or rates charged.
3. It is entirely possible to buy an environmental insurance policy that excludes everything the insurance buyer does for a living.
4. Pollution insurance policies are being used today to insure pollutants in places that the original environmental insurance policies were never designed to cover.
5. Due to the absence of training venues for environmental insurance, the fundamental coverage defect rate on environmental insurance placements can be over 90% in some classes of business.

For these reasons it is necessary to be very specific when requiring any form of environmental insurance in loan covenants.

Insurance Specifications for Environmental Liability Insurance on Farms and Custom Farming operations

Environmental Impairment Liability – For the owned/leased locations

- I. Minimum Scope of Insurance for Farmer

- A. Environmental Impairment Liability or an equivalent coverage part within the General Liability policy. (Farm Chemicals Limited Liability endorsements and similar coverage extensions which eliminate parts of a pollution exclusion on another required insurance coverage in these covenants will not fulfill this requirement.)

This policy shall provide coverage for:

- 1. Bodily injury, sickness, disease, sustained by any person, including death;
- 2. Property damage, including physical injury to or destruction of tangible property including the resulting loss of use thereof; cleanup costs and the loss of use of tangible property that has not been physically injured or destroyed including diminution of value and Natural Resources damages.
- 3. Defense costs including costs, charges and expenses incurred in the investigation, adjustment or defense of claims;
- 5. The policy must insure loss arising from pollutants including but not limited to asbestos, lead, silica, odors, bacteria, nitrates and manure.

II. Minimum Limits of Insurance

Borrower shall maintain limits of insurance no less than:

- A. Site Specific Environmental Impairment Liability coverage:
 - \$1,000,000 per loss;
 - \$1,000,000 aggregate

Contractors Environmental Liability – For custom farming operations

I. Minimum Scope of Insurance for Farming Operators

- A. Contractors Environmental Impairment Liability or an equivalent coverage part within the General Liability policy. (Job site pollution coverage extensions to General Liability policies will not fulfill this requirement. Farm Chemicals Limited Liability endorsements and similar coverage extensions which eliminate parts of a pollution exclusion on another required insurance coverage in these covenants will not fulfill this requirement.)

This policy shall provide coverage for:

1. Bodily injury, sickness, disease, sustained by any person, including death;
2. Property damage, including physical injury to or destruction of tangible property including the resulting loss of use thereof; cleanup costs and the loss of use of tangible property that has not been physically injured or destroyed including diminution of value and Natural Resources damages.
3. Defense costs including costs, charges and expenses incurred in the investigation, adjustment or defense of claims;
4. The policy must insure contractual liability, be Primary and Non Contributory and name Site owner as an Additional Insured.
5. The full scope of the named insured's operations as described within the scope of work for this contract.
6. The policy must provide coverage for claims arising from owned and non- owned disposal sites utilized in the performance of this contract.
7. The policy must insure loss arising from pollutants including but not limited to asbestos, lead, silica, odors, bacteria, nitrates and mold.

II. Minimum Limits of Insurance

Borrower shall maintain limits no less than:

- B. Site Specific Environmental Impairment Liability coverage:
 - \$1,000,000 per loss;
 - \$1,000,000 aggregate

Conclusion

The addition of a requirement for environmental insurance into the standard general conditions of a loan contract would be a risk management breakthrough. It is ever more irrational to ignore the existence of pollution exclusions in insurance policies for farms when setting the insurance requirements for a farm loan application. Lenders, farm owners, and insurance practitioners would all be well advised to begin requesting and searching out environmental insurance solutions for pollution exposures effecting farms in their area as soon as possible.

Affordable Environmental Insurance Is Available On Farms

American Risk Management Resources in Middleton Wisconsin offers a wide range of environmental insurance products including the only true environmental insurance policy developed specifically for farms in WI. Minimum premium is \$3500 which covers the average dairy farm in Wisconsin.

For more information on environmental insurance please contact us at 608 836 9590

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