

Insurance Specifications, Wetlands and Stream Projects

Preamble: How to read any Insurance Policy.

- 1) Get a strong cup of coffee. Read the policy in the following order even if the policy is not written in that order. It will make more sense.
- 2) An insurance policy is a contract (albeit an intangible one). It is a promise to pay (intangible) for consideration in the form of a premium.
- 3) Read the “Insuring Agreement” AKA “Coverage Grant”. This is the backbone of any insurance policy. This is what the policy is designed to do.
 - a. Generic example – flood: We will pay you for direct physical loss by or from flood to your insured property ...
- 4) Read the Exclusions. Find out what is not covered.
 - a. Generic example: Exclusion of liability assumed in a contract, for example a construction contract.
- 5) Read the definitions:
 - a. Generic example: Flood is usually a rising body of water ...
 - b. Generic example: Try to think about how narrow the definition might be because that limits or broadens coverage. In the definitions, many insurance policies will also identify what is not covered in a definition. Example: Flood – what about wind driven rain or other causes of water damage
- 6) Read the terms and conditions.
 - a. Claim reporting requirements, cancellation and nonrenewal, Fraud and Misrepresentations, cooperation requirements, etc.
- 7) Read the Declarations page.
 - a. This is basic policyholder information like name and address of the insured, inception and expiration date, name of insurance company and agent, etc. Limits and deductibles might also be on the Declarations Page.
- 8) Finally! Read the endorsements. There are two types of endorsements.
 - a. State and Federal Compliance Endorsements (a bit like the tag on a mattress).

- b. Change endorsements. These generally go after everything else in a policy. These can be simple, like a change of address or more complex, like revising a definition or changing a limit.

It gets a lot simpler once you know how it is organized and read it in that order!

Basic Insurance Principles:

Insurers try and often fail to simplify policies. There are certain basic principles.

1. KISS. Keep it as brief and simple as possible. Less is more.
2. Use commonly understood terms in definitions.
 - a. Example: What is an automobile? What is a moving piece of construction equipment (not an automobile).
3. Don't try to do too much. If you try to do too much, you only end up with complicated, confusing policies. More than one insuring agreement perhaps combined into one, too many exclusions applying to different coverage parts, conflicting definitions, common policy conditions end up conflicting, claims made vs occurrence terminology, limits of insurance, etc.

Important Description:

Claims Made Policy: That means that the policy that is in place at the time a loss is reported to an insurance company is the policy that applies. Somebody slips and falls in your front yard sues you. The slip and fall happened 3 years ago. The policy that you have in place the day of the suit (today) is the policy that applies.

Occurrence: The policy that is in place when the loss occurred is the one that applies. Somebody slips and falls in your front yard sues you. The slip and fall happened 3 years ago. The policy that you had in place on the day of the slip and fall (3 years ago) is the policy that applies.

Financial Assurance is Claims Made coverage because a claim is when the regulator takes regulatory action (default) and makes a claim, not when performance standards are being addressed through adaptive management. Be sure that the policy does not have conflicts between Claims Made and Occurrence. The policy should clearly state without conflicting terms that it is claims made. Often there is a disclosure requirement required by state insurance regulators.

WETLAND AND STREAM CWA 404 FINANCIAL ASSURANCE POLICY SPECIFICATIONS:

Insuring Agreement:

Example:

The “Company” will pay on your behalf the “Demand” for “Financial Assurance” arising from a determination by the “Regulatory Body” that the “Compensatory Mitigation Project” identified in the Declarations is in “Default” per the terms of the “Compensatory Mitigation Instrument and/or Plan”.

Principles:

1. While this insuring agreement is acceptable, it should not necessarily exclude other alternatives.
2. Simplicity without conflicts emanating from elsewhere in the policy is most critical in the Insuring Agreement. Clarity, brevity and simplicity matter most in the insuring agreement. It is the heart of the policy. This type of policy applies to a very specific, very narrow risk. Simplicity and clarity should not be hard to achieve.

Words in quotes have specific meanings and will be defined in the policy.

- a. “Company” will be the insurance company which is always identified on the declarations page.
- b. “Demand” or in some policies “Claim” is a regulatory action.
 - i. “Default” requires a formal regulatory action against the Named Insured (sponsor or permittee) and can concurrently result in a “Demand”.
- c. “Regulatory Body” (or dual regulatory bodies) will be shown on the declarations page. Usually, a USACE District and on occasion also a state DEP/DEQ.
- d. “Compensatory Mitigation Project” Instrument or Plan are identified on the declarations page.

Exclusions:

Principles:

There should be a very limited number of exclusions because the insuring agreement is very narrow. The Insuring Agreement only applies to a very specific purpose unlike, for example, a General Liability policy.

1. Every policy will have a set of exclusions (endorsements) before the body of the policy. These are often just “notifications”. They are things that insurers can’t ensure by law, that are highly regulated or impacted by law or that are precluded from insurance for other reasons like some other type of policy should address the risk. They generally don’t apply for the specific purpose of the financial assurance policy. They might include but are not limited to:
 - a. Office of Foreign Assets Control,
 - b. Terrorism,
 - c. NBC (Nuclear, Biological and Chemical),
 - d. Regulatory Statement,
 - e. State Mandatory Endorsements,
 - f. Others?

2. Exclusions in the body of the policy:
 - a. Attorney's fees. Typical policies include attorney fees. In this case, the policy is not intended to create a defense against the regulator, therefore fees should be excluded.
 - b. Civil or criminal penalties. The policy is designed for only one thing – financial assurance as a guarantee for the sole benefit of the regulatory obligation. Anything else that slips into coverage, like criminal or civil penalties, erodes the limit available for financial assurance.
 - c. Claims from offsite. They are not and should not be the subject of financial assurance because they erode the limit thereby limiting the amount of financial assurance available for the regulator's objective. While there are possible claims from offsite damages, other insurance policies may cover those.
 - d. Other exclusions may be permissible as long as they do not detract from the purpose of the policy.
3. Exclusions (endorsements) after the body of the policy. These should be actual policy changes. If an exclusionary endorsement exists when the policy was first issued, they do not require a signature from the insurance company. If they are put on after the policy is in force, they do require a signature from the insurer. Examples:
 - a. Adding an exclusionary endorsement (change to the body of the policy) should require written approval from the regulator.
 - b. Sometimes limits are scheduled by endorsement, other times they may be found on the declarations page,
 - c. Often specific district requirements and state DEQ/DEP requirements are added by endorsement.

Definitions:

Principles: Simplicity, clarity and brevity. Definitions may create reporting or other obligations in the policy – read them carefully with that in mind. There are only 2 classes of definitions:

1. Regulatory terms: All regulatory definitions should be taken directly from rule/law and should reference the rule. They should not narrow or expand the rule/law language. Narrowing a definition detracts from the financial assurance purpose and expanding it erodes coverage limits designed for only 1 purpose.
 - a. Exception: It is common for specific district requirements and state DEQ/DEP language to be inserted by endorsement. The changes, where possible, should still be taken directly from rule/law.
 - b. Policies can be written just to cover only "Mitigation Banks", or may by adding definitions be written to include other forms of compensatory mitigation like PRM and others.
2. Insurance terms: There will be definitions needed for insurance purposes. Example, what is a "Demand" or in some policies what is a "Claim".

Terms and Conditions:

Principles: All insurance policies have conditions built in. These are basic operating requirements for a policy. Below are certain important conditions:

1. Bankruptcy or insolvency should not impact coverage. It seems likely a component of possible failure to meet performance standards.

2. Cancellation, termination and should meet the rule requirement of 120 days without the written permission of the regulator. Other than the policy cannot be cancelled for any reason by the insurer, there should not be conflicting cancellation provisions.
3. Changes (Endorsements) should require approval from the regulator, including limit changes.
4. Cooperation in a claim is a common requirement in insurance.
5. Most insurance policies have a misrepresentation and fraud clause that can void the coverage. That is common in contract law in general, not just insurance. In this case, the insurance is required by a regulator who does not complete applications or provide information to underwriters. Therefore, it is important that misrepresentations or fraud by a named insured not invalidate coverage.
6. Claim reporting requirements. Most insurance policies require timely reporting of a claim. That usually means that once a named insured has knowledge of a claim, they must report it to the insurance company. In this case, named insurance and regulators often go through a process of Adaptive Management. The claim reporting requirement must be amended to allow the regulator and the named insured to address performance failures together without invalidating a claim.

Declarations Page:

Principles: This is just important information though it can impact coverage. Declarations pages will vary from one insurer to the next.

1. Names and contact points of parties to the insurance contract,
2. Identification of the project and project site,
3. Policy period (not policies can be written with annual terms with automatic renewal or multi-year terms),
4. Limits are often scheduled on the declarations page but can be endorsements. It should be clear either way that limits do not change without the written approval from the regulator,
 - a. There should be no policy circumstances where there is a conflict with respect to limits.
5. Premium (and tax),
6. Forms and endorsements list,
7. Carrier signature.
8. There will be a Surplus Lines notification. These are required by all state insurance regulators.

Other:

There is often a "Regulatory Statement". This should not impact coverage. It is a recitation of the regulators' legal obligations to a) require financial assurance and to b) manage it.

Miscellaneous Receipts Act: This is an internal concern for Federal regulators. The USACE cannot take possession of money if it is not "appropriated" funds. Regulators avoid "constructive receipt" of funds by not directly dictating the use of funds. Regulators do have a continued obligation to regulate, with full authority to approve or reject solutions brought to it. The regulatory process does not stop. Insurance and surety bonds come with an obligation to adjust a claim (offer a solution driven response) therefore limiting the impact of the Miscellaneous Receipts Act. Often there is a requirement that funds go through a "Designee" who in turn presents the solution and implements it.