

INSTRUCTIONS RE  
***PORT RISK MANAGEMENT & INSURANCE GUIDEBOOK***  
**(1998)**

**REVISION PROCESS**

Revisions will be published and distributed annually each fall. If no changes are made, an announcement to that effect will be mailed to the distribution list. We count on ports to let us know of any situations or changes in law that could affect other U.S. ports in their risk management activities. An Alert Bulletin will be distributed as needed for critical issues. Please contact the Office of Ports and Domestic Shipping, Maritime Administration, at 202-366-4357 (phone) or 202-366-6988 (fax) with any information.

**Revision of June 1999**

Changes in the *Port Risk Management & Insurance Guidebook* (1998) made during the period from September 1998 through June 1999, inclusive.

Attached to this instruction sheet are new and/or replacement pages for your loose-leaf copy of the *Guidebook*. In order to keep your copy of the *Guidebook* up to date, you must remove the following indicated pages from the *Guidebook* and replace them with the indicated pages contained in this Amendment Package. In the bottom of each page is the identifying revision "**REVISED 6/99**".

**Page Changes**

Remove from *Guidebook*

Cover & spine  
Table of Contents (pp. i to x)  
Chapter 4 (pp. 4--1 to 4--17)  
Chapter 6 (pp. 6--1 to 6--25)

Add to *Guidebook*

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## CHAPTER 4: IDENTIFICATION OF LOSS EXPOSURES

### IMPORTANCE OF IDENTIFICATION PROCESS

Risk management begins with the identification process. Unless there is recognition of risk, one cannot take appropriate measures to deal with it. An organized approach to identify risks is one of the most important responsibilities of the risk manager.

Insurance evolved as a means of providing protection for known and commonly understood risks. However, a key point of risk management is that insurance may not be the best way to deal with a risk in terms of either cost or the protection afforded.

It is important to keep in mind that risks are not static but are subject to change in many ways. Examples of how risk can change include the following:

- Introduction of new equipment
- Automation
- Introduction of new products and services
- New methods of loading or unloading
- Dealing with new products, cargo, or vessels
- New laws and regulations
- Court decisions
- Changing social attitudes
- New employees and customers
- New construction, remodeling, and renovation

The element of change requires that the identification process be ongoing. The risk manager must be familiar with and knowledgeable about the port's basic services and facilities, etc., and also must be aware of new exposures to loss.

Prior to the development of risk management as a recognized method for dealing with the risk of loss, only obvious exposures were likely to be

given consideration, and, there was no organized approach to identifying and handling risk. The risk of loss is not always readily apparent. Because of this, a variety of techniques are required. The following methods of risk identification can be used.

### Inspections

First hand knowledge of a port's facilities and properties is essential. This knowledge can only be obtained by a practical familiarity with what exists in the way of physical assets and how these assets are used.

A helpful tool to use in an inspection is a map of the property showing not only the port itself but also adjacent and surrounding property as well. Spatial relationships are important, such as the proximity to a facility of hazardous nature.

Inspection will reveal physical characteristics such as:

- Type of construction (frame, fire resistive, windstorm resistive, etc.)
- Stored materials or inventories (flammable, explosive, pollutants, products subject to spoilage)
- Housekeeping
- Security
- Equipment guarding
- Exposures to injury of employees and the public
- Traffic exposures (ship, rail, vehicular)
- Fire protection

### Internal Records

A port's internal records are a valuable source of information useful to the risk identification process.

Financial records and budgets are helpful in a number of ways. Some of the questions which

are prompted by them can include: how much cash is on hand at any given time? Is it susceptible to theft? How is it transported to the bank? If by armored car, is the armored car company responsible for the full amount of any loss? The cash exposure may or may not be significant, but all businesses deal with checks. Are incoming checks recorded in a manner that would make it possible to obtain replacements or reimbursement if the originals were lost, stolen, or destroyed? Are accounts receivable backed up to allow reproduction?

The income section of a financial report, if in sufficient detail, will highlight which operations, activities, or services generate the most revenue, requiring treatment of business interruption or extra expense risks.

Financial statements will assist in evaluating the capability of a port to self-insure loss exposures. A healthy cash flow and surplus position can help in the determination of the advisability of self insurance.

Other important sources of information are asset records which show the location and original cost of all real and personal property. Copies of all requests for purchase and disposal of property can be routed through the risk manager to provide an additional check to ensure that all new property is being included, and that property which is sold or otherwise disposed of is reflected in the insurance records. Inadequate asset records will also make proving a property loss difficult.

Copies of all contracts should also be routed to the risk manager for review to determine exposures from outside organizations. The decision to retain or transfer risk can then be made.

Contracts may also indicate the existence of hazards not previously known. It is preferable, but not always practical, to have the risk manager review contracts prior to their execution. This will allow for comment to legal counsel or finance on issues that are important from a risk management viewpoint and which may not otherwise be given the consideration they deserve.

Minutes of meetings of the port commissioners are an invaluable source of information regarding many things affecting the port but primarily as respects plans for future expansion, new activities, new operations, and new construction, purchase of major new assets, other major expenditures, etc. Minutes will also provide timely

notice regarding planned discontinuance of operations and activities.

Loss runs (all insurance coverages) properly maintained and organized, are critical in identifying loss frequency and severity. The risk manager can then initiate appropriate loss prevention measures.

Department manuals (human resources, accounting, and operations) often give insight into certain potential problem areas. For example, if policies are written, they should be enforced, otherwise continued nonenforcement may be interpreted as a practical repudiation of policy. Also, there should be no formal, oral statements permitted that are inconsistent with written procedures and policies, particularly as regards human resource matters.

Checklists or survey questionnaires can often be helpful in pointing out exposures that are overlooked. A number of sources have developed "exposure checklists or questionnaires," which are sometimes lengthy, multiple page outlines for possible loss exposures. An exposure identification questionnaire developed specifically for ports can be found in Appendix C of this *Guidebook*. Checklists have inherent limitations in that they cannot be relied on to identify your complete exposure to loss. While the operations of ports are similar, each has its own unique activities and operations which generate exposures to loss.

Flow charts are diagrams that picture the flow of goods through the various parts of a facility. These charts are critical to maintaining continued operation and gauging contingent business interruptions.

Employees are a good source of information. The risk manager should become acquainted with a broad spectrum of employees, particularly key persons, in various operations, divisions, departments, etc. On a regular basis, questions should be asked about their activities, problems, concerns, and any information that may be useful in identifying risk.

### **External Sources of Information**

Changing technology, business practices, law, government regulations, etc., all compound the problem of risk identification. The risk manager should attend relevant seminars and workshops.

Examples of organizations that sponsor such meetings include:

- *Risk and Insurance Management Society (RIMS)* (see Appendix A, page A--9), whose membership is composed of full-time and part-time risk managers. Meetings are held both at local chapters and at the annual national conference. This organization also promotes meetings with special industry groups, including "Ports and Marine Terminals."
- *Public Risk Management Association (PRIMA)* (see Appendix A, page A--9), is a national public risk management association which promotes effective risk management in the public interest as an essential component of public administration.
- *American Management Association* conducts a variety of meetings throughout the year on many aspects of insurance and risk management. Meetings are held at different locales.

Other organizations – These include the National Fire Protection Association, the National Safety Council, and the National Maritime Safety Association. National and regional port associations often include insurance and risk management topics in their meetings. A number of associations, such as the American Association of Port Authorities (AAPA), the Pacific Coast Association of Port Authorities (PCAPA) and others, have standing risk management committees.

Even though many ports do not have a full-time risk manager, it would be worthwhile for ports to contact these organizations and ask to be placed on their mailing lists to receive notice of seminars and meetings. Additional benefits of attending such meetings is the opportunity to meet others with like interests and to exchange information which can often be very helpful in designing and improving your own program.

Risk identification can be augmented by having knowledge of current problems, industry changes, losses, etc. Legislative enactments, such as those affecting responsibility and liability for pollution and its clean-up are a good example. Useful information can be obtained from the referenced books and periodicals listed in Appendix A (page A--17).

## Outside Specialists

Professional risk management consultants can provide meaningful services to both part-time and full-time risk managers. A common service is the audit, review, and evaluation of an organization's overall exposures and programs. The periodic use of outside consultants for assistance is practiced by a growing number of organizations.

An insurance agent or broker can also prove to be a helpful resource. These, at times, can be more insurance oriented since many agents and brokers have little practical experience with risk management concepts and practices.

There are a wide variety of specialized consultants that can also be used for specific needs. These include such specialists as computer and other security specialists, safety and industrial hygienists, cargo handling loss prevention specialists, fire protection engineers, etc.

## COMMON EXPOSURES AND RISKS

Ports represent very specialized business enterprises. While they vary in size, methods of operations, facilities, and in many other areas, certain loss exposures are common to almost all ports. Additionally, many port loss exposures are of a type that are common with many other organizations.

It was previously stated that the risks of loss can be categorized under three general categories:

- Property Loss
- Liability Loss
- Personnel Loss

In this section, we will provide a discussion and examples of what types of risks are included in these three classes.

### Liability To Others

Ports are faced with a multitude of possible liability claims because of injury to other people or damage to their property. Some of these exposures are unique to ports and marine operations, while others are not. This discussion does not attempt to comment on the exposures in any particular order of importance. In many cases, the difference between a small and a large liabil-

ity claim is a matter of luck, or of the opinion of a particular jury or judge.

### **Public Officials Liability**

Private industry has long recognized the need to protect the interests of those individuals who run a company via indemnification of losses and/or directors and officers liability insurance.

Most ports are public entities but the same need is obvious. Public Officials liability insurance is designed to provide similar protection to port officials and employees for their liability arising out of management of a port.

Coverage includes the cost of defending a claim, a port's obligation to reimburse officials and employees for costs or judgments incurred and, where no reimbursement is required or permitted, to cover the personal liability of officials and employees for their management activities.

Common areas of claims or suits to which officials are exposed include:

- Conflict of interest
- Failure to follow legally mandated procedures
- Breach of labor regulation
- Purchasing practices
- Condemnation or sale of land
- Conspiracy or collusion
- Unfair trade or labor practices
- Breach of contract

Historically, these causes amount to over 65 percent of claims or suits against public entities.

### **Employment Practices Liability**

Claims alleging sexual harassment, discrimination, wrongful termination, and many other employment-related torts are being filed in escalating numbers. Although this is a relatively new exposure, it has great loss potential. There are currently more than 25 federal and state laws, together with hundreds of regulations, applying to almost every workplace relationship. Few employers and employees understand their rights in the workplace.

For example, the precise meaning of provisions of the federal Americans With Disability Act requiring "adequate access" and "reasonable accommodations" are being interpreted through litigation. Also, compliance with the federal act does not assure compliance with conflicting state and local regulations.

While Employment Practices Liability insurance is available, underwriters require evidence that employers have developed and are consistently enforcing fair employment practices.

### **Bailments**

Bailments refer to a special type of legal liability. In the case of a port, it is mainly reflected by the warehousemen's liability for damage to goods left in the port's care, custody, or control. Other exposures are represented by any type of property that is in the port's care, custody, and control.

Many ports have broadly worded tariff agreements under which customers who use the port facilities must absolve the port from any loss or damage to the customers' property. The value of these agreements is questionable to the extent the loss or damage is attributable to negligence of the port. The courts generally hold that ports may not contractually transfer their sole negligence. In other words, regardless of what a tariff may say, if a customer sustains loss or damage and can show the cause of such to be negligence of the port, the port may be held responsible. Since ports typically have substantial warehousing and storage facilities, they should recognize that a very large potential for liability exists should property be damaged because of their negligence (such as by a fire that originates from a negligent cause).

Common carriers are another type of bailee. For example, ports that operate their own railroad would have this exposure. In most cases, a common carrier retains absolute liability for damage to goods being carried, except for damage attributable to "acts of nature" or "the common enemy" (war-like acts and revolutions). Governments usually control the ability of common carriers to limit their liability by contract via the control exercised over rates and terms of shipment.

## Motor Vehicle Liability

The use of automobiles is a common exposure to almost every business. To the extent that the operation of a port automobile results in injury to others, a port will no doubt be liable for resulting damages. In addition to the obvious exposure represented by owned vehicles, a port can incur liability from the operation of non-owned automobiles such as leased automobiles, rental automobiles (should the renter's insurance be inadequate, deficient, or non-existent), the personal automobiles of employees used on port business, and automobiles of contractors or sub-contractors.

Exposures may also arise out of no-fault laws and uninsured/underinsured motorists' laws.

## Product Liability

Anyone who makes, sells, or distributes products to be used by others is susceptible to liability if the product is defective, or not fit for its intended use. Ports can have a serious product liability exposure in some instances. An example is a port that in some way processes bulk grain. To the extent the grain may be contaminated, significant damages may result if the grain is then used in food products or animal feed. The exposure related to product liability can be further complicated if the product is exported to a foreign country. In that case, the port is faced with foreign laws and practices, which can be totally different from those of the U.S. In some states, equipment designed or manufactured by an employer could allow the injured employee to bring suit under product liability.

## Contractual Liability

The risk of loss arising out of a particular undertaking can be transferred from one party to another via contract. Contractual transfer of risk and the assumption of risk are commonplace occurrences in the business environment.

A port is responsible for its own negligent acts and should avoid assuming contractually the responsibility of others, particularly those for whom they provide services or the use of port facilities.

Application of this principal is sometimes not possible or practical because of business or other overriding reasons, especially where a port is doing business with another governmental body, a valued customer, a local or specialized

contractor. In such instances, the port may be obliged to accept the transfer of liability because it wants or needs a particular unique service, or because a firm will not do business on any other basis. However, as a matter of policy, a port should attempt to eliminate contractual assumption of risk whenever possible. Where there is leverage, efforts should be made to transfer risk to the other contracting party.

All matters pertaining to contractual transfer of risk should be reviewed by legal counsel and others who are familiar with legal and business implications of the contract.

In some instances, the risk assumed in the contract will explicitly identify primary exposure areas. An example of this would be a construction contract for a new dock, where the contractor is required to specifically assume liability for bodily injury and property damage to others, and to his employees, arising out of the performance of the work.

In other cases, the potential exposure may be latent, due to the fact that the contract is silent in a particular area. An example of this would be where a port hires a helicopter to photograph certain port-owned facilities along with adjoining neighboring property, and the rental agreement is silent as to responsibility for injuries or damages arising out of use of the helicopter. It is important that exposure to a port should be specifically identified and analyzed by those who are familiar with both the legal and risk management implications of a contract to determine what the exposures are, and which exposures have been assumed or transferred.

Liabilities are inherent in a wide variety of activities and services related to contractual agreements, and care should be taken to see that a port is properly insulated against liabilities that should have been clearly assumed by the other party to the agreement. Contractual risk assumption or transfer can occur under a wide variety of agreement including:

- Construction Contracts
- Lease Agreements
- Purchase Orders
- Rental Agreements
- Maintenance Contracts
- Service Agreements

- Warranties
- Vendors
- Mutual Aid Agreements
- Verbal Agreements
- Contracts of Sale
- Charters

The most commonly found example of contractual transfer of risk for ports is in the port tariff. A landlord typically has only minimal liability for damage to ships or injury to stevedores or crew during the loading and unloading process because the tariff makes the user of the port facilities responsible for such damages.

### **Aircraft Liability**

Liability related to use of aircraft is comparable to that under automobile insurance. A port does not have to own an aircraft to incur liability. Rental, charter, or use of any non-owned aircraft on behalf of a port may result in liability should the aircraft injure persons or damage property. Additionally, the use of port property as a landing area (heliport) or hangar facility can result in liability to an aircraft owner or operator similar to the exposures under garage or garagekeepers insurance.

### **Watercraft Liability**

As with automobiles and aircraft, a port may incur liability from either owned or non-owned vessels. Port vessels can be involved in occurrences with other vessels or property resulting in injuries to both the port's crew and third parties as well.

Liabilities may arise from pollution situations and for removal of wrecks that block or impede navigation. A port with a fireboat(s) may also be exposed to liability from fire fighting activities.

### **Pollution Liability**

Exposures can vary depending largely on whether or not a port handles or stores petroleum, flammable or hazardous materials, the volume of such goods handled, and the potential they pose for pollution and contamination. Pollution liability can be a gradual occurrence over a period of time such as leakage from a storage tank or sudden or accidental, such as a fire, ex-

plosion or tank collapse. Required clean-up costs can make up a significant portion of pollution liability claims. Exposures may exist from old or prior uses of a port's property. Remediation costs can be substantial.

Pollution liability can be based on common law, the Federal Water Pollution Control Act of 1972 and its amendments in the Clean Water Act of 1977; the Oil Pollution Act of 1990; the Clean Air Act of 1970 and its 1990 amendments; the Emergency Planning and Community Right-to-Know Act of 1986; and the Noise Control Act of 1972 and other state or federal statutes. In addition to pollution losses arising from the discharge, claims for disposal or seepage of contaminants into or upon land, water, or air, can be based on the generation of smells, noise, vibration, light, or other sensory phenomena.

### **Professional Liability**

A growing area of liability exposure is that relating to the errors or omissions of employees acting in a professional capacity. In these instances, the employee and port may both be held responsible, the employee directly and a port vicariously.

Professional liability insurance should be considered for the following professions:

- Health care professionals
- Accountants and financial analysts
- Lawyers
- Surveyors
- Engineers
- Non-employee trustees of benefit plans
- Consultants
- Police or harbor patrols
- Fire departments
- Pilots
- Harbor masters

The liability of accountants, financial analysts, lawyers, surveyors, or engineers will generally be minimized by the fact that they are not in public practice. As long as the port is the only organization to which they provide their professional skills they are relatively shielded from liability

claims – so long as the port itself chooses to absorb their mistakes (if any) as a business risk. Outside counsel, of course, should rely on its own professional liability insurance.

Ports with their own police, guard, or security are exposed to claims for such acts as false arrest/detention, malicious prosecution, libel, slander, wrongful entry/eviction, assault-battery, violation of civil rights, and abuse of prisoners.

Fire fighting departments can also incur liabilities such as when they are allegedly negligent in their fighting of a fire (improper equipment, faulty equipment, failure to recognize fire fighting needs for special exposures, etc.).

### **Completed Operations Liability**

This is a stand-alone companion coverage to Products Liability. Completed operations liability includes bodily injury or property damage arising out of work completed by or on behalf of a port after the acceptance of the work or after it is put to its intended use.

### **Personal Injury Liability**

Personal injury liability claims can arise out of a variety of allegations including libel, slander, defamation of character, false arrest or imprisonment, malicious prosecution or invasion of the rights of privacy.

### **Fiduciary Liability**

Passed in 1974, the Employment Retirement Income Security Act (ERISA) deals primarily with employee welfare plans. The Act holds the trustees of these plans to the standard of an ordinary, reasonable, and prudent expert. Reliance upon outside, professional advice is not a defense.

### **Employee Benefits Liability**

This is often confused with Fiduciary liability. Employee benefits liability refers to the common law liability that can arise out of errors or omissions in the administration of the port's employee benefits programs. These can result from improper advice, mistakes in enrollment, errors in counseling as to plan options, and from other acts or failure to act.

### **Joint Ventures**

Ports can become exposed to risk arising out of activities of others when they participate in joint ventures. A joint venture may involve a regional security or fire fighting organization, joint ownership or operation of special loading and storage facilities, joint operations of railroad facilities, etc. To the extent the written joint venture agreements establish liabilities through hold harmless and indemnity agreements or insurance provisions, these must be reviewed to determine a port's liability exposures. Also, a port can find itself exposed to significant unknown risk when a joint venture agreement does not address these important subjects.

### **Wharfinger's Liability**

Docks and wharf owners have a recognized liability to provide for safe berthing of visiting vessels. They must exercise care to protect clients' property from damage from causes which a port can reasonably control.

Ports, in general, rely heavily on their tariffs and hold harmless and indemnification provisions to insulate and protect against claims involving property damage to vessels, cargo, and bodily injury to crew, stevedores, etc. To the extent that a port does not negligently contribute to a loss, such provisions may be sound and reliable. However, in any claim or loss situation where a port is judged negligent, injury and property damage liabilities can be substantial.

### **Mutual Aid Liability**

Ports will, at times, participate in mutual aid agreements with other organizations. These agreements will most often involve the areas of fire fighting, fire inspections, hazardous waste material handling, oil spill clean up, and police activity. Care should be taken to structure the agreement to minimize potential liabilities. For example, a mutual aid agreement with a nearby chemical complex for fire fighting may be sound and desirable. However, there should be adequate and regular training of a port's fire fighting personnel in any special or unique fire fighting requirements that may be present at the chemical complex. Otherwise, improper fire fighting could result in a claim for damages against the port.

## Charterers Liability

Ports, from time to time, charter watercraft. This can involve the charter of a dredge, a floating crane or pile driver, a temporary replacement for a police or fire boat, or a passenger boat to take people on a tour of port facilities (such as might be done on completion of a new important addition to the port's facilities or for a special event). The usual liabilities exist in such situations (potential for damage to the vessel under charter, damage to property of others, injury to employees, and injury to others). Particular care should be exercised in those cases where the vessel is chartered with captain and crew. In these cases, the port can still be held liable for claims arising out of use of the vessel. Hold harmless and insurance requirements contained in the charter agreement should be reviewed carefully and evidence of insurance obtained from the charter operator.

## Liability to Employees

### Workers' Compensation, Other Statutory Liabilities, and Employers' Liability

Every employer is exposed to the liability inherent in work related employee accidents or occupational illnesses. These are typically "no fault" situations where the employee does not have to prove negligence on the part of a port. The employee must establish only that the injury in an accident arose out of employment.

The employer's statutory obligation in most cases is to provide for all required medical care, disability payments for wage loss, and death benefits.

There are many different laws applicable to employee injuries. Each state has its own workers' compensation law and the scope of benefits varies from state to state. In addition, depending on the circumstances of a given injury, federal workers' compensation statutes may apply. The two federal laws that may apply to a port's employees are the Federal Longshore and Harbor Workers' Compensation Act (USL&H), and the Jones Act.

Except for employees of governmental bodies (who are specifically exempted from the USL&H), any employee working around navigational waters may fall under USL&H. These

benefits are typically substantially higher than state workers' compensation benefits.

If a port owns vessels and employs crewmen, it may be subject to the Jones Act, which imposes the obligation on the employer for transportation, wages, maintenance and care for disability, or illness incurred by employees on the vessel.

General maritime law may also be applicable should a port owned or operated vessel be found unseaworthy, after injury to a crew member. Unlike state workers' compensation acts where liability is limited, the Jones Act is a negligence type act without statutory limitations for injuries or medical benefits. In such circumstances, the crew member has the right to bring action directly against the vessel and any liability that exists is imposed against the vessel, rather than the port (*in rem* actions).

Employers' liability claims result from injuries not included under the jurisdiction of a state or federal compensation act. Employers' liability claims are not common, but they do occur. Employers' liability claims can result from such occurrences as illegally employed minors, suits from spouses for loss of consortium, and employees of third parties working for a port where there is a contractual assumption of liability by a port.

Employers' liability claims can also arise out of dual capacity situations. These arise when an employee is also a "consumer." The allegation is that, as a consumer, an employee should be entitled to sue as a consumer with employer immunity waived. Dual capacity claims are an area of concern to employers. However, as with most employers liability claims few, if any, are successful.

The Occupational Safety and Health Act (OSHA) or similar state statutes are designed to ensure a safe work place for employees. While not directly related to liability for employees, they do create liabilities for employers, typically in the form of costs for both compliance with regulations and in fines and penalties for failure to meet required safe working conditions. Attention to OSHA requirements is a prudent application of sound risk management practices.

## Terminal Operators Liability

Like any other business enterprise, a port is exposed to losses from the existence of its

premises and those operations conducted at and from those premises. All other exposures to loss emanate from the port environs and operations thereon.

Exposures exist from bodily injury and property damage to the general public, visitors, contractors, and others working at port facilities, vessels and their cargo, and surrounding property. Insurance normally covers (1) liability from the premises hazard and operations necessary or incidental thereto, (2) vicarious liability from the operations of contractors or sub-contractors, and (3) liability assumed under contract, products, completed operations, personal injury and the ownership, operation, maintenance, loading or unloading of watercraft.

### **Garage Operations**

All ports have parking facilities for employees, clients, visitors, and others with business at the port. These require no special treatment other than the care exercised at all port facilities.

Some ports have paid parking areas and some even provide valet parking. These activities are outside the normal scope of a port's operations and offer unique exposures to loss, which must be considered.

Park and lock facilities create a situation requiring a duty to warn of dangers to the business invitee. Failure to provide normal security or allowing parking in dangerous or unsuitable areas will create liability exposures.

Valet parking can also create a situation which requires a higher degree of care, including protection from harm, for the invitee.

Also, exposures exist from the operation of automobiles resulting in bodily injury or property damage to others and damage to the automobile itself.

As respects damage to automobiles belonging to others, for which a port is providing parking facilities, exposures arise from collision of the automobile and comprehensive perils such as windstorm, fire, theft, vandalism, glass breakage, flood, etc.

Exposures must be measured in terms of the value of individual automobiles and the aggregate value of all automobiles at risk from a single occurrence.

Then, the decision to treat collisions or comprehensive exposures separately or together is required. Normally, collision loss involves single automobiles and may be considered for self-insurance treatment.

Comprehensive exposures involve many automobiles exposed to the same loss and can be significant. Insurance with an acceptable occurrence deductible is prudent.

If the decision is made to insure, then two forms of "Garagekeepers" coverage are available:

- 1) Direct Damage – payment is made without regard to liability and may be written as excess of an owner's own insurance (covers the owner's deductible) or as primary insurance without involving the owner's insurance.
- 2) Legal Liability – provides defense to a port and will pay only if liability is imposed.

### **Damage to Owned or Leased Property**

All ports have the loss potential associated with damage to, or destruction of, owned or leased property. The obvious loss exposures are those related to buildings and their contents, to equipment, and to vehicles. These classes of property are all readily insurable. We will comment in this section on some of other property risks to which a port is exposed.

#### **Piers, Wharves, and Docks**

These are common to all ports. However, they are often not insured. Flood damage, collapse, wave damage, slippage of pilings, damage or loss of pilings below the water line, unreported dock damage (such as by vessel collision), and earthquakes are all examples that are typically not insured.

#### **Electronic Data Equipment and Media**

Loss exposures in this area are often uninsured or overlooked. Equipment should be both located above the ground floor to protect against water damage and located in non-combustible buildings. Special hazards include possible power surges, short circuits, damage caused by dampness, dryness or extremes of temperature (such as might occur through failure of an air conditioning or heating system), and electronic

or mechanical failure. Media can be subject to accidental erasure, to magnetic injury, and to damage resulting from breakdown or malfunction, in addition to the more obvious loss exposures such as fire and other standard causes of loss.

### **Storage Tanks**

These are often not insured if constructed of metal or concrete. One could easily believe that there is only minimal chance of loss, particularly if no flammables or caustics are being stored. However, storage tanks are susceptible to loss from collapse, vehicles, vessels, and from such incidents as tornadoes, hurricanes, and earthquakes. Including such assets in an overall property insurance program is generally worth considering.

### **Boiler, Machinery, and Equipment Breakdown**

Machinery and equipment breakdown often results in significant repair costs. Large transformers, motors, air conditioners, cranes, electric control panels, compressors, pump generators, and other equipment can fail, breakdown, or be subject to electric injury. Boilers and other pressure vessels are subject to cracking and explosions where mechanical and safety controls fail or malfunction.

In addition to damage to the equipment itself, explosions create potential exposures for damage to surrounding equipment as well as buildings housing the boilers and machinery. Consequential loss exposures frequently far exceed costs associated with repairs to boilers, machinery, and equipment. Objects of small value can cause losses far in excess of the value of the object. A small cooling fan which breaks down can cause failure of a much larger or more complex piece of equipment, resulting in a sizable loss.

### **Mobile Equipment and Vehicles**

Railroad switch engines and cars, cranes, trucks, loading and unloading equipment, ship trimming equipment, bulldozers, and other similar types of equipment are by their nature usually not readily susceptible to severe damage as they are generally of heavy construction. In some cases, the loss of a single piece of equipment may not be significant. However, a major loss occurrence involving a number of such items in

one incident can result in a substantial expenditure for repairs or replacement equipment. Explosions, fires, floods and hurricanes all can cause significant losses to such equipment.

### **Fire Sprinkler Leakage**

Warehouse and storage facilities often have automatic sprinkler systems for fire protection. Whenever a facility has sprinklers, the exposure to water damage from accidental discharge, or rupture of the system, is present. Coverage for such damage is available by endorsement to property insurance policies. It should be noted, however, that standard sprinkler leakage coverage includes only the water pipes and heads of the system. Large sprinkler leakage losses have resulted from breakage of underground feed mains. Without specifically covering the feed mains as well, such damage would not be insured.

### **Bridges**

Many ports own and operate bridges as part of their normal operations, and, many are served by bridges owned and operated by others (authorities, municipalities, private companies).

Usually, bridges over navigation channels will be designed to avoid impeding navigation. These can include lift bridges, draw bridges, and swing bridges.

A port must consider not only exposures of direct damage to the bridge itself but also exposures from mechanical breakdown or damage to the mechanism which operates the bridge.

Loss exposures exist from the cost of repairing or replacing a bridge, the cost of repairing or replacing machinery, gears, etc., and lost revenues from the inability to move either vessels or land vehicles through or over a bridge.

If a bridge becomes inoperable or unusable, consider the alternatives available. Are there alternative routes to move traffic, can vessels be berthed at other piers or docks, or can traffic be diverted to other ports? Crisis management is a must if bridges are an essential part of a port's operation.

### **Boats and Barges**

Ports generally own some watercraft, which may be small and of low value. Physical damage to these type boats, such as those used for inspec-

tion of docking areas and vessels, or to take soundings, are probably well suited to self-insurance. However, larger vessels of significant value are typically insured. Care should be taken to be sure that all special outfitting or equipment that is part of a vessel (cranes, compressors, pumps, tanks, etc.) are included in a vessel's total value for insurance purposes.

### **Locks**

Some ports may own locks as part of their facilities. The most obvious exposure is that related to collision from vessels. Floods can also damage locks if the flood water is of sufficient volume and strength. Where an exposure exists, a decision to insure or retain the risk must be considered.

### **Radio Masts and Antennas**

Ports will sometimes have a communications center that includes broadcasting and receiving antennas. Masts and antennas can be damaged by lightning, wind, and other perils. When masts and antennas are of more than incidental value, insurance should be considered. Antennas generally are not covered by standard insurance policies without special endorsement.

### **Valuable Papers and Records**

Ports will, at times, have what are considered to be valuable papers and records. These are records that are not maintained on electronic data media (discs, tapes, etc.). Examples include blueprints, deeds, engineering drawings, maps, abstracts, leases, etc. The cost to reproduce such documents, if lost or destroyed, can be significant. Standard policies provide small sub-limits, if at all. Reproduction before a loss is the best insurance along with safe storage. Where neither is practical, securing insurance coverage should be considered.

### **Accounts Receivable**

Destruction of accounts receivable represents a special loss exposure from the inability to collect or even know the amount of moneys owed by customers. In addition to loss of revenue, a port can have additional costs including:

- Interest charges on loans to offset the revenue lost;
- Higher than customary collection expenses;

- Expenses incurred to reconstruct, to the extent possible, the records of accounts receivable.

### **Crime**

Loss exposures from crime arise from two sources, employee dishonesty and third party theft including burglary, robbery, pilferage, forgery, etc.

Third party losses are usually immediate and easily discovered. Employee losses are more insidious and can occur over a long period of time. Embezzlement, check kiting, cash or inventory pilferage are difficult to detect and can result in a large aggregate total although each transaction is small.

When considering insurance, the amount of coverage for third party theft of money, securities or other property, the amount at risk at a given time is the proper amount to be insured. Employee dishonesty limits are more difficult to measure because of the time over which losses can occur.

The best protection is the proper application of security, physical protection, internal controls and procedures and audits.

### **Loss of Use of Property**

Loss of use of property can result in both direct and indirect losses. A direct loss includes the loss of revenues resulting from damage to or destruction of a revenue-producing facility or assets. An indirect loss could include extra expenses incurred to continue operations such as employee overtime to carry out necessary functions manually, air freight, rental expenses for temporary equipment.

The "loss of use" exposure is referred to in the insurance business as "Time Element Risk," as all such losses are related to the time period for which there is loss of use.

All ports are subject to varying degrees of the "loss of use" exposure. The measure of exposure is the amount of lost profit and continuing expenses, or extra expense incurred in operating alternative systems, or a combination of both during the period that damaged facilities are being repaired or replaced. These also include extraordinary expenses incurred in expediting the return to normal operations.

## Channel Blockage

This can result from both direct and indirect causes including the sinking or stranding of vessels, weather related incidents affecting the ship channel (silting, shifting, etc.) or "Humpfrey the Whale" type incidents (a lost whale in the Sacramento ship channel forced closure of the channel during rescue operations).

## Damage to Real and Personal Property

Any part of a port's facilities (docks, warehouses, silos, cranes, conveyor systems, storage tanks, etc.) is at risk of damage or destruction. Likely events include any of the perils that can damage property, such as fire, windstorm, explosion, flood, earthquake, vessel collision, etc. Business interruption loss is a consequential exposure resulting from damage to real and personal property.

## Facilities Leased or Rented to Others

Many ports operate in a landlord capacity where land, warehouses, and docks are leased to others. In such cases, the potential "loss of use" exposure is generally governed by the terms of the lease or rental contract. If a port's contract requires continued payment of rent even though the property may be severely damaged or destroyed, then there may be little or no business interruption exposure to the port. However, typically, such contracts will contain clauses that cancel the obligation to continue rent payments because of damage to the facilities from "acts of God" or other causes. Care must be taken to determine if an exposure presented by any rental or lease agreement terms or conditions present risk of loss to a port.

## Consequential Loss

Ports with warehouses for temperature/humidity controlled goods have a special exposure from interruption of refrigeration resulting in spoilage of stored goods.

Also, certain products may be stored in bulk tanks where the contents must be kept at fixed temperatures to allow for pumping, to prevent solidification, or to prevent a chemical reaction. Loss of temperature, fractures in tanks, or damage to equipment can result in substantial business interruption losses. Port tariffs will, in most cases, place liability for such loss on the customer. However, where such losses can be

shown to result from the port's negligence, the tariff hold harmless agreement may not be enforceable.

## Contingent Business Interruption Exposures

This is a loss exposure to a port resulting from third party property destroyed or damaged. Examples of contingent business interruption include:

- Damage to a non-owned lock that prevents vessels from using port facilities.
- Damage to a non-owned bridge that prevents or impairs the movement of rail, truck, or vessel traffic.
- Damage to the facilities of a crane manufacturer that delays delivery of a new crane for a dock. Without the crane, the use of the dock is limited from its intended operation with a resulting loss of revenue.
- Severe damage to a nearby manufacturing or processing plant that utilizes port facilities to import bulk raw materials or other necessary goods.
- Interruption of incoming utility service (gas, electricity, water) resulting from damage at utility facilities.

Contingent loss exposures are present in many situations and are often overlooked in the risk identification process.

## Transit Business Interruption

This type of business interruption is a loss exposure from transportation of a critical piece of equipment or other property. For example, a loading system is being delivered by barge. The barge is involved in an accident causing substantial damage to the equipment. The planned start-up date is significantly delayed while the equipment is salvaged for repair, or replaced.

## Loss of Information

This can involve loss of property comprising data processing media, other valuable records, and information in conventional form. If duplicate data and records do not exist, a port must incur the expense to reconstruct the lost information to the fullest extent possible.

## Leasehold Interests

Ports holding tenancy under an advantageous lease can lose such advantages if the leased building is severely damaged or destroyed and new leased space must be arranged at a higher cost or less liberal terms. Inflation or high occupancy rates can substantially increase real estate values and the attendant cost of leasing space. A port with favorable leases should recognize the loss potential that exists should the lease be lost resulting in relocating to more expensive quarters.

## Strikes

Employee relations will, at times, deteriorate to the point where strikes may occur. Failed labor negotiations can result in a strike, which may shut down a port facility. The principal difference between a strike and the other loss exposures discussed is that a strike is not inherently accidental, and does not, in itself, involve damage to or destruction of a physical asset.

## MANAGING ENVIRONMENTAL HAZARDS

Managing the risks associated with environmental hazards presents a number of unique challenges. If properly managed, loss exposures can be significantly minimized. One of the basic premises of minimizing environmental liability is having in place an action plan to respond to pollution contingencies. A key element in such plans is clear instructions concerning notification of appropriate governmental agencies. Some statutes, such as the Oil Pollution Act of 1990 and the Emergency Planning and Community Right-to-Know Act of 1986, place great emphasis on such notifications.

Also, knowledge of the growing field of environmental audits and the role of the International Organization for Standardization's (ISO's) Environmental Management Standards is a crucial skill needed today.

It is important to have a basic understanding of some of the laws that affect the management of environmental hazards. In addition, knowing the agencies involved and the resources available can reduce critically important response time. The following is a summary of laws, agencies and other related information.

## Limiting Liability of Ports for Tenant Environmental Compliance

As the owner of land under lease, a port has an interest in minimizing environmental contamination of its property. Certain environmental laws (air and water) allow prosecution of the landlord as an "owner/operator" for tenant's violation of the laws because violations are prosecuted based upon the statutorily-imposed theory of joint and several liability. Therefore, most leases will allow some inspection or monitoring of the tenant for environmental purposes. This requires a port to walk a fine line between too little and too much involvement in the tenant's activities.

These lease provisions may cause the port to have knowledge of a tenant's noncompliance with environmental laws. The port must document that it responded properly and reasonably to the situation. Absent such proper response and documentation, the port may have difficulty avoiding fines and penalties and defending against allegations that it may have been "negligent" in addressing the issues, given its knowledge or reason to know of a tenant's non-compliance. The port could be in a position of knowing too much and thus be deemed to have assumed responsibility for environmental compliance. Consult your attorneys.

This balancing act could be made more difficult by language in the lease that allows a port to enter tenant property to correct environmental non-compliance. Such language allows the port a remedy in the event of property contamination. The language gives the port the legal right to step in and correct an environmental problem, particularly when there is the potential for harm to human health or the environment. Failure to exercise such rights may be considered negligent.

If lease language allows the port any right of inspection or monitoring, it is important to ensure an appropriate regular program for the port's response to potential tenant non-compliance with environmental laws is in place, followed, and documented.

## Subject Areas for a Program

### Inspection issues

- Regular, pre-determined intervals.
- If all properties cannot be inspected more than once a year due to manpower or other issues, properties can be "ranked" according to potential likelihood for environmental issues and those highly ranked properties can be inspected on a more frequent basis.
- Review checklist to be used.
  - Checklist is part of documentation showing port's due diligence and assists in defense against negligence allegations if properly maintained.
  - Checklist should clearly document frequency and results of regular, diligent inspections.
  - Checklist should have a space for documentation of any immediate threat to public health or environment, to show that there is no immediate threat, thus diminishing the issue of the port's negligence in leaving a situation unresolved. However, if this type of approach is taken, the port MUST follow up and be prepared to step in and resolve the issue if a threat exists.
  - Checklist should have space to identify port's prompt response and how the situation was handled. Software, such as Caribou, can be used to aid in this effort.

### Notification/Enforcement Against Tenant

- Procedure for notification of tenant orally and in writing:
  - Direct tenant to cure
  - Notify that port may terminate lease if violation not corrected in specified/reasonable time.
  - Advise that the port may be required to report non-compliance. By virtue of port landowner status and knowledge, it may be deemed to have "allowed" (i.e., no person shall cause, suffer, allow...).
  - Advise that port may step in to cure violation and charge tenant for costs.

- Procedure for response
  - Ensure appropriate response.
  - Establish procedure to ensure decision is made by port, within a reasonable, specific period of time after port's notice of a tenant violation, as to the remedy to be exercised in a particular situation.
  - Document and consistently follow decision.
  - Schedule routine monthly status meeting for environmental group (i.e., Environmental Department, Real Estate, and Legal Department). Agenda to include internal review of all ongoing instances of tenant non-compliance, scheduling of follow-up inspection or planning contact with tenant to monitor tenant's progress on remedying problem and progress, and ensuring decision is made about how port should resolve issue (i.e., terminate lease, report the violation, remediate and seek reimbursement from tenant, etc.).

### Other issues

- Risk assessment
  - Conduct a risk assessment for all potential new tenants prior to entering a lease. A checklist could be developed to assist in such an assessment, focusing on issues such as the potentially hazardous nature (or lack thereof) of tenant's intended operations and past compliance record.
  - Utilize risk assessment to tailor appropriately protective and restrictive lease provisions and perhaps to rank tenants for the frequency of inspection required based upon intended operations and materials used.
- Insurance upon renewal of lease
  - If continuing environmental problems exist, rent, security deposit or bond provisions could be modified or added to account for port's increased potential exposure.
  - Similarly, if necessary lease could be terminated.
- "Permitted Use" definition in lease

- Define as specifically as possible.
- Allows port to more readily exercise its remedies under the lease if regular inspection reveals deviation from permitted operations.
- Allows port to assess and rank property regarding frequency of inspection.
- Consistency necessary regarding exercise of port's remedies under lease.
- Follow up on additional insured status. This could lead to coverage and should get the attention of tenants who are pressured by insurance companies when insurance companies begin investigation prior to insuring.
- Provide tenants with generally applicable permits or plans held by port that require compliance. Amendments, updates, or revisions need to be provided to the tenant.
- Penalties/fines/increased security deposit
  - Consider adding provision to lease to provide for penalty or fine for environmental non-compliance assessed against port but caused by tenant to be paid by tenant as part of rent, with non-payment a default of the lease.
  - Consider requiring increased security deposit or another "environmental response" security deposit, particularly for high-risk tenants.

#### Sample Language

"Section 4.02. Specifically Prohibited Use. Tenant will not (a) use, occupy, or permit the use or occupancy of the Leased Premises or use Landlord's other property for any purpose or in any manner which is or may be, directly or indirectly, (i) inconsistent with the requirements of Section 4.01 hereof, (ii) violative of any of the Legal Requirements, (iii) dangerous to life, health, the environment or property, or a public or private nuisance, or (iv) disruptive to the activities of any other tenant or occupant of property adjacent to the Leased Premises, (b) commit or permit to remain any waste to the Leased Premises, or (c) commit, or permit to be committed, any action or circumstance in or about the Leased Premises which, directly or indirectly, would or might justify any insurance carrier in canceling the insurance policies main-

tained by Tenant or Landlord on the Leased Premises and improvements thereon.

"Section 4.03. Environmental Restrictions. Tenant shall not cause or permit any Hazardous Materials to be generated, treated, stored on or about the Leased Premises or transferred to the Leased Premises in contravention of Landlord's Tariffs or any other Legal Requirement. Any use of Hazardous Materials by any person on the Leased Premises shall be in strict conformance with all Legal Requirements and shall not cause the Leased Premises to be subject to remedial obligations to protect health or the environment. The term "Hazardous Materials" shall mean any flammables, explosives, radioactive materials, hazardous waste, toxic substances or related materials, including substances defined as "hazardous substances," "hazardous materials," "toxic substances," or "solid wastes" in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. Sec. 9601, et seq.; the Hazardous Materials Transportation Act, 49 U.S.C. Sec. 1801, et seq.; the Resources Conservation and Recovery Act, 42 U.S.C. Sec. 6901, et seq.; the Toxic Substance Control Act, as amended, 15 U.S.C. Sec. 2601, et seq.; Landlord's Tariffs; the Texas Solid Waste Disposal Act, Tex. Rev. Civ. Stat. Ann. Art. 4477-7; or any other Legal Requirement.

"Section 4.04. Notification of Potential Liability Triggering Event. Within twenty-four (24) hours of receipt, Tenant shall notify and provide Landlord with all copies of notices, demands, lawsuits, or other correspondence from any federal, state or local governmental agency or private party including, but not limited to, the following:

- (a) "The violation of any federal, state, or local statute or regulation;
- (b) "The loss of any operating permit;
- (c) "Any enforcement action undertaken by any federal, state or local governmental agency, or any private party;
- (d) "The institution of any lawsuit by any governmental entity or any private party; or
- (e) "The service of a potentially responsible party demand letter from any private or governmental party."

## Organizations and Agencies

### Federal

#### Environmental Protection Agency (EPA)

The purpose of the federal EPA is the protection of the environment today, and, for future generations to the fullest extent possible under the law. The Agency's mission is to control and abate pollution in the areas of water, air, solid hazardous waste, pesticides, toxic substances, noise, and radiation. EPA's mandate is to mount an integrated, coordinated attack on environmental pollution in cooperation with state and local governments. Recent Brownfields legislation changes what had been an adversarial relationship to that of a partnership between government and industry.

It should be noted that states have "Departments of Environmental Protection" that have delegated authority from EPA, as well as legislated state authority over water quality, air quality, hazardous materials, and waste management. These agencies can be involved in everything from construction permitting near wetlands to the proper disposal of fluorescent bulbs.

#### Occupational Safety and Health Administration (OSHA)

The Occupational Safety and Health Administration functions under the United States Department of Labor. Its primary purpose is to prevent workplace injuries and protect the health of America's workers. Its enforcement powers are largely derived from the Occupational Safety and Health Act of 1970. OSHA's staff of inspectors, investigators, engineers, physicians, educators, standards writers, and other personnel reaches out to the American public through technical assistance and consultation programs.

#### U.S. Coast Guard (USCG)

Founded in the 1790s as part of the Department of Treasury, the USCG is now part of the Department of Transportation. Its mission is to enforce the rules of navigation, including vessel traffic management and recreational boating safety, regulate merchant marine licensing and exams, regulate vessel design and operation for safety and environmental protection, administer vessel documentation, and oversee vessel response and shipboard oil pollution emergency plans.

Among the USCG responsibilities that may be of concern to risk managers are:

- Proper receiving, storing, and shipping of hazardous cargo
- Placarding and stowage of hazardous cargo
- Emergency response to hazardous cargo releases
- Inspection procedures for certain high-hazard cargoes
- Employee training and retraining on hazardous material regulations
- Fire prevention requirements on berths, piers, and vessels
- Local hurricane contingency planning
- Coordination of military deployments through the terminal

Additionally, the USCG often assigns some of their younger officers to a terminal or port to learn industry practices and procedures. This can be an excellent opportunity to educate future compliance officers as to the real problems and exposures faced by entities attempting to earn a profit while complying with applicable regulations.

Some pertinent regulations are:

- 33 CFR Part 126 (Explosives)
- 33 CFR Subchapter M (Oil Spill Liability)
- 49 CFR Subchapter C (Hazardous Materials regulations)

#### U.S. Army Corps of Engineers (USACE)

USACE provides engineering, construction management, and environmental services to defense and civilian agencies, as well as to the nation. Some of the agency's many responsibilities include: planning, designing, building and often operating and maintaining projects that provide river and harbor navigation, flood control, water supply, hydroelectric power, environmental restoration, wildlife protection, and recreation; protecting U.S. waterways and wetlands; and undertaking disaster relief and recovery work. USACE also issues permits for dredging projects.

### **Federal Emergency Management Agency (FEMA)**

Founded in 1979, FEMA is an independent agency of the government. The agency is responsible for the U.S. emergency management system and works to reduce risks, strengthen support systems and help people and their communities prepare for and cope with disasters regardless of the cause.

The range of FEMA's activities is broad and includes: administering the national flood and crime insurance programs; advising on building codes and flood plain management; coordinating the federal response to a disaster; and making disaster assistance available to states, communities, businesses, and individuals.

### **National Oceanic and Atmospheric Administration (NOAA)**

An administration within the Department of Commerce, NOAA's mission is to describe and predict changes in the Earth's environment, and conserve and wisely manage the United States' coastal and marine resources. Four of NOAA's agencies are the National Weather Service (NWS), the National Marine Fisheries Service (NMFS), the Office of Oceanic and Atmospheric Research (OAR), and the National Ocean Service (NOS).

One of NOAA's many responsibilities is to promote safe navigation by managing the nautical chart data collection and information programs. The only official chartmaker, NOAA produces marine navigation and tidal current charts, as well as tide tables. Another responsibility is to administer agency programs that support the domestic and international conservation and management of living marine resources.

### **National Institute of Occupational Safety and Health (NIOSH)**

NIOSH was established to conduct research on a national level to eliminate on-the-job health and safety hazards. NIOSH is responsible for identifying workplace safety and job health hazards and for recommending changes in health and safety regulations. NIOSH conducts research to study the effects of exposure to hazardous substances and other factors involved in occupational health and safety.

### **Non-Federal**

#### **Air Quality Management District (AQMD)**

The Air Quality Management District controls emissions from a variety of stationary sources of air pollution. The AQMD continually monitors air quality at many different locations and notifies the public whenever air quality is unhealthful.

#### **Board of Equalization (BOE), or its equivalent**

For example, in California one of the functions of the Board of Equalization is to administer *Environmental Taxes* through the Environmental Fees Division. These *environmental taxes* include an annual Hazardous Waste Generator Fee and Waste Reporting Surcharge Fee, a quarterly Underground Storage Tank Fee, Extremely Hazardous Waste Permit Fee, and a Hazardous Substance Disposal Fee.

#### **American Industrial Hygiene Association (AIHA)**

The American Industrial Hygiene Association is engaged in protecting the health and well-being of workers and the general public through the scientific application of knowledge concerning chemical, engineering, physical, biological, or medical principles to minimize environmental stress and to prevent occupational disease.

#### **National Fire Protection Association (NFPA)**

This is a non-profit organization dedicated to fire safety, fire research, and education. It publishes a number of publications on fire safety and prevention.

### **Technical Resources**

#### **Chemical Transportation Emergency Center (CHEMTREC)**

CHEMTREC provides emergency information about hazardous chemicals involved in transportation accidents 24 hours a day. The nationwide telephone number is 1-800-424-9300. Information is provided on response actions and procedures to follow in the event of a spill, leak, fire, or exposure.

## Chemical Evaluation Search and Retrieval System (CESARS)

The Chemical Evaluation Search and Retrieval System is part of the ongoing cooperative effort to regulate toxic chemicals in the environment by the Michigan Department of Natural Resources and the Ontario Ministry of the Environment. CESARS contains profiles on chemicals of environmental concern. Each record consists of chemical identification information and provides descriptive data on up to 23 topic areas, ranging from chemical properties to toxicity to environmental transports and fates.

## Chemical Information (CHEMINFO)

CHEMINFO provides comprehensive, practical, summarized occupational health and safety information on chemicals. Produced by the Canadian Centre for Occupational Health and Safety, occupational health specialist, each chemical profile uses non-technical language to describe potential workplace hazards and control measures. Each profile provides a detailed evaluation of health, fire and reactivity hazards, as well as recommendations on topics such as handling and storage, personnel protective equipment, accidental release, first-aid, and hazardous classifications.

## Chemical Hazards Response Information System (CHRIS)

The Chemical Hazards Response Information System database represents the literal text of the United States Coast Guard printed CHRIS Manual. CHRIS was developed in 1985, and new records are added periodically. It was designed as a comprehensive source of emergency response information for those individuals in the transport of hazardous materials. However, it is useful for many emergency situations involving hazardous materials. Records for more than 1,300 materials are provided in English.

## Federal Health, Safety, Labor, and Environmental Statutes and Their Regulations<sup>1</sup>

[Citations are to the United States Code (U.S.C.) or to the Code of Federal Regulations (CFR)]

To underscore the complexity of the legal system, a good example of the interplay between legal requirements that can lead to uncertainty to everyday activity is the legal treatment of a marine terminal. The law deals with the terminal at various times, and, occasionally, at the same time, as different legal entities. The uncertainty created by different liability concepts can be viewed as an administrative obstacle to implementing a risk management plan. For example, a marine terminal can be viewed as one of eight different legal entities, depending upon the facts. (See Exhibit I in Appendix B, page B--10 for a detailed discussion.)

### The Clean Air Act (CAA)

**Statute:** The Clean Air Act (CAA), 42 U.S.C. §§7401-7431; 7501-7671q – **Regulations:** 40 CFR: e.g. Part 52 (EPA - Approval and Promulgation of State Implementation Plan); Part 63 (EPA - National Emission Standards for Hazardous Air Pollutants for Source Categories); Part 90 (EPA - Emission Standards for New Nonroad Spark-Ignition Engines at or Below 19 Kilowatts); Part 81 (EPA - Designation of Areas for Air Quality Planning Purposes); Part 82 (EPA - Protection of Stratospheric Ozone/Incorporation of Montreal Protocol Decisions); Part 89 (EPA - Control of Emissions of Air Pollution from New CI Marine Engines at or Above 37 Kilowatts).

### The Clean Water Act (CWA)

**Statute:** The Clean Water Act (CWA), 33 U.S.C. §§1251-1387 (also referred to as the Federal Water Pollution Control Act of 1972), as amended by the Oil Pollution Act of 1990 (33 U.S.C. §§2701-2761; 46 U.S.C. §3703a) – **Regulations:** 40 CFR: e.g. Part 227 (EPA - Ocean Dumping Testing Requirements); Part 228 (EPA - Ocean Dumping Site Designation); 40 CFR Part 110 (EPA - Oil Discharge Program); 33 CFR: e.g. Parts 130-138 (USCG pollution regulations); Parts 150 and 154 (USCG - Response Plans for Marine Transporta-

<sup>1</sup> To the extent not pre-empted by Federal law, state health, safety, labor, and environmental statutes and their regulations would apply.

tion-Related Facilities); 15 CFR: e.g. Part 990 (National Oceanic and Atmospheric Administration - Natural Resource Damage Assessments).

### **Comprehensive Environmental Response Compensation, and Liability Act of 1980 (CERCLA)**

### **Superfund Amendments and Reauthorization Act of 1986 (SARA)**

**Statute:** The Comprehensive Environmental Response Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§9601-9675 (which includes the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. 99-499 & 99-563, 42 U.S.C. §§9611, 9671-9675, 29 U.S.C. §655) – **Regulations:** 43 CFR: e.g. Part 11 (Department of the Interior - Natural Resource Damage Assessments: Type A Procedures); 40 CFR: e.g. Parts 51 (EPA - Requirements for Submittal of Implementation Plans), 279 (EPA - Standards for management of Used Oil), 300 (EPA - National Oil and Hazardous Substances Pollution Contingency Plans).

### **The Noise Control Act of 1972**

**Statute:** The Noise Control Act of 1972, 42 U.S.C. §§4901-4918 – **Regulations:** 29 CFR e.g., §1010.16 (OSHA - Longshoring and marine terminals); §1910.95 (OSHA - Occupational Noise Exposure).

### **Resource Conservation and Recovery Act (RCRA)**

### **Hazardous and Solid Waste Act Amendments of 1984 (HSWA)**

**Statute:** The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§6901-6992k (which includes the Hazardous and Solid Waste Act Amendments of 1984 (HSWA), Pub. L. 98-616) – **Regulations:** 40 CFR: e.g., Parts 261, 262, 264, 265, 270, and 271 (EPA - Hazardous Waste Treatment, Storage, and Disposal Facilities and Hazardous Waste Generators; Organic Air Emission Standards for Tanks, Surface Impoundments, and Containers); Parts 148, 261, 266, 268, 271, and 302 (EPA - Hazardous Waste Management System).

### **Hazardous Waste Operations and Emergency Response (HAZWOPER)**

**Statute:** SARA – **Regulations:** The Hazardous Waste Operations and Emergency Response (HAZWOPER) Regulations issued by OSHA, as mandated by SARA – 29 CFR Part 1910

### **Toxic Substance Control Act of 1986 (TSCA)**

### **Asbestos Hazard Emergency Response Act of 1986 (AHERA)**

**Statute:** The Toxic Substance Control Act of 1986 (TSCA), 15 U.S.C. §§2601-2629 (which includes the Asbestos Hazard Emergency Response Act of 1986 (AHERA), Pub. L. 99-519, 15 U.S.C. §§2641-2671) – **Regulations:** 40 CFR: e.g. Parts 750 and 761 (EPA - Disposal of Polychlorinated Biphenyls (PCBs); Part 763 (EPA - Asbestos); Part 799 (EPA - Test Rule for Hazardous Air Pollutants).

### **The Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA)**

**Statute:** The Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. §§11001-11050) (EPCRA) – **Regulations:** 40 CFR e.g., Part 372 (EPA - Toxic Chemical Release Reporting; Facilities Included; Toxic Release Inventory Reporting; Community Right-to-Know).

### **Longshore & Harbor Workers' Compensation Act (USL&H)**

**Statute:** Longshore & Harbor Workers' Compensation Act (USL&H), 33 U.S.C. §§901-944; 948-950 – **Regulations:** 20 CFR e.g., Parts 500-599 (Employees' Compensation Appeals Board); Parts 800-899 (Benefit Review Board).

### **Jones Act**

**Statute:** Jones Act, 46 U.S.C. app. §688.

### **The Occupational Safety and Health Act of 1970**

**Statute:** The Occupational Safety and Health Act of 1970, 29 U.S.C. §§651-678 – **Regulations:** 29 CFR Part 1910 (Occupational Safety and Health Standards).

## CHAPTER 6: INSURANCE COVERAGES

This chapter is devoted to a basic discussion of insurance policy coverages, terms, conditions, and exclusions. Due to the variety of activities and resulting exposures to loss, it is impossible to cover every type or form of insurance a port may purchase. The emphasis of this section, therefore, is on those insurance coverages common to most ports or which may be encountered by port risk managers.

This section often refers to "standard forms." However, it should be noted that while there has been a move by the insurance industry toward standardization, policy language, provisions, terms, and conditions can vary between insurers. Due to this, a port should review so called "standard policy forms" to ensure that the coverage is appropriate for its activities and exposures. To assist ports in their analysis and evaluation, the discussions in this section will highlight some of the more important aspects of the policies.

Insurers are often willing to modify or alter the standard provisions or exclusions of their policy forms. Some modification can be achieved by the use of pre-printed endorsements. Sometimes the development of special language or provisions for an endorsement or even the entire policy is required to meet particular circumstances. The latter method is often referred to as a "manuscript endorsement" or "manuscript policy." The important point to keep in mind is that many of the provisions of insurance policies are subject to modification to meet a port's particular needs and circumstances.

### PROPERTY – DIRECT DAMAGE

Any discussions of property loss exposures can be broken down into two categories: (1) the value of the property subject to loss and (2) the loss potential associated with that property. In this section, it is the first category with which we are concerned, i.e., the loss of physical port assets. The second category is discussed in the next section of the *Guidebook*.

### Named Perils

The basic Fire Insurance policy covers direct loss by fire, lightning, and removal of property from premises endangered by fire. The Extended Coverage Endorsement broadens the policy by extending coverage for the perils of windstorm, hail, explosion, riot and civil commotion, damage by aircraft or vehicles, and smoke damage. A common method used by many for remembering the perils covered by the Extended Coverage Endorsement is the acronym "WHEREAS" (Windstorm, Hail, Explosion, Riot and Civil Commotion, Aircraft and Automobile, and Smoke).

The basic Fire Insurance policy can also be extended to cover the perils of vandalism, malicious mischief, and sprinkler leakage. A policy insuring specific perils enumerated is generally referred to as a Named Perils policy.

### All Risks

An alternative form of coverage which provides broader protection than a Named Perils policy is an "All Risk" form. Unlike Named Perils coverage, which provides coverage for only those specifically scheduled perils, an All Risk policy provides protection against all perils causing direct physical loss unless otherwise excluded. Naturally, there are certain risks such as wear and tear which underwriters do not wish to cover. These are the items excluded. The advantage of All Risk coverage is that the burden of proving that a loss is not covered is shifted to the insurer. In a Named Peril policy, the burden of proving that a loss was caused by a covered peril is the responsibility of the port.

There are two customary approaches to providing All Risk insurance. One is an "All Risk" policy which provides coverage in one master policy form. The second, a Difference-In-Conditions (DIC) policy is used as a supplement to a Named Perils policy. The DIC provides All Risk coverage for those perils not covered by the Named Perils policy.

The best approach for providing All Risk insurance will depend upon the appetite of the

insurance carrier and cost. An insurer willing to provide Named Perils coverage may be unwilling to provide "All Risk" coverage at a reasonable cost, if at all, thus the need for DIC.

### **Flood Insurance**

Flood insurance is available as part of an "All Risk" or DIC insurance policy. It can be expensive, particularly for ports having facilities in known flood zones. Often, insurers faced with this situation will impose high deductibles or decline to provide protection.

It was for this reason that in 1968, the federal government created the National Flood Insurance Program. The program falls under the jurisdiction of the Federal Emergency Management Agency (FEMA) which operates the program through the Federal Insurance Administration. The purpose of the program is to make flood insurance available to all at a reasonable cost.

Originally, the program was a joint effort of private insurers and the Federal Government. Today it is strictly a Federal program with the Federal Government underwriting all policies. Flood insurance policies are available through all licensed agents and brokers. The agents and brokers also process claims made against the policies.

Due to the relatively low limits available through the Federal program, many ports with high valued buildings use a layered program. Primary limits are purchased in the Federal program and excess limits are then purchased from a commercial insurer under an All Risk or DIC policy as excess over the Federal policies.

### **Builders Risk**

Builders Risk insurance was designed to protect a building or structure during the course of construction, including materials and supplies that will be used. Some ports prefer to purchase the coverages to maintain control of pricing and coverage. Other ports prefer to require the contractor to do so. If the contractor is purchasing the policy, it is essential that the port write specific insurance requirements in the contract including requiring the port and all participating contractors and sub-contractors to be Named Insureds on the policy. Either way, a port will need to evaluate the scope of coverage of the

policy to ensure that it meets the port's particular coverage requirements.

Builders Risk policies can be written on either a "Named Perils" or "All Risks." However, the "All Risk" is perhaps the more common approach. When considering the appropriate limits, a "Completed Value" Builders Risk policy is usually more desirable than a "Reporting Value" policy. Under a Completed Value policy, the dollar limit of coverage is equivalent to the completed cost of the project. The advantage of the completed value forms is that it eliminates potential underinsured values that can arise in a reporting value form. This occurs either when errors are made in calculating interim insurable values or when a monthly or quarterly report is inadvertently not sent to the insurer.

A Builders Risk policy commonly covers property while in transit and while at locations other than the job site. Also, coverage is provided for collapse during the course of construction resulting from defective materials or methods, boiler explosion, and theft of building materials not attached to the building. A port can obtain or require the contractor to obtain an endorsement to the policy that covers the perils of flood and earthquake, as these perils are normally excluded on a builders risk property form.

Another important endorsement to consider is an endorsement providing coverage for "soft costs" or delayed opening loss exposures. These are additional costs associated with construction of a building, for example, loss of rents, additional architects' and engineers' fees, additional interest on funds borrowed, additional advertising expenses, and additional insurance premiums.

### **Valuation**

In order to guaranteed that insurance protection is neither inadequate nor excessive, an appropriate program of establishing insurable values should be implemented by a port. One way to develop values is to do it internally. Original construction costs adjusted for remodeling and repairs, less non-insurable values such as land, excavation costs, site preparation, etc., can be trended using inflation or deflation factors to trend the base cost to a current value. Trending factors are often available from insurers, brokers, agents, or from independent publishing sources.

Another method is to use the appraisal services of an insurance company or broker. Ports should be aware, however, that these appraisals may not provide the details desired and may be somewhat self-serving for the insurer.

A third method of determining property values is to use an independent professional appraiser capable of rendering impartial and unbiased services. An appraiser's knowledge of court decisions involving obsolescence, fair market value, and depreciation may greatly help in determining the port's equipment values at risk. In addition, formal appraisals are more readily accepted by insurance carriers when granting certain policy provisions such as an Agreed Amount Endorsement and when settling claims after loss. A goal of completing a physical appraisal of all property each ten years, with interim annual valuation adjustment using trend factors, would not be unreasonable. By staggering appraisals for multiple locations over a ten year period, the expense of physical appraisals is often more acceptable to the budgeting process.

### Actual Cash Value vs. Replacement Cost

Two methods of valuation are recognized in property insurance. The first method is replacement cost, where the value assigned to the building or contents is the cost to rebuild or replace the property with materials of like kind and quality. The second method is actual cash value, where the value represents replacement cost less an amount which accounts for the technological obsolescence and the physical deterioration of the property. Market value is also a consideration in establishing actual cash value. Actual cash value more nearly represents the value of the property at risk for an organization, although because of inflationary trends, the actual cash value can be in excess of the initial purchase price shown on company accounting records.

Replacement of any structure which is important to operations would require the expenditure of more money than an actual cash value insurance recovery. For this reason, the concept of replacement cost insurance was developed. Replacement cost coverage is one method by which a port can provide funding for this additional loss cost element. Replacement cost coverage should not be used indiscriminately and may not be available for specific properties.

Policies written on a replacement cost basis require that the repairs be made or property actually replaced in order to collect full replacement cost. Where property is not repaired or replaced, actual cash value will be paid even though a replacement cost valuation is provided by the policy. For this reason, an actual cash valuation should be used where ports have property which would not be repaired or replaced if damaged.

### Coinsurance Clause

To encourage policyholders to insure to full value and simplify property insurance rate making, property policies contain a provision termed a "coinsurance clause." The effect of this clause is to penalize a policyholder who fails to insure to proper value.

Simply stated, the insurance formula operates as follows:

$$\text{Amount of Loss} \times \frac{\text{Limit Purchased}}{\text{Limit Required by Coinsurance Clause}} = \text{Amount of Insurer Loss Payout}$$

The "Limit Required by Coinsurance Clause" in the formula is determined by multiplying the coinsurance percentage stipulated in the policy times the replacement cost or actual cash value depending on which valuation method is used in the policy.

If the ratio of purchased insurance to full value is not equal to the required coinsurance percentage stated in the policy, the port becomes a coinsurer. As an example, assume the following:

Total Insurance Value	\$100,000
Amount of Insurance Purchased	\$ 67,500
Coinsurance Percentage	90%
Loss Suffered	\$ 10,000

Plugging these assumptions into the formula yields the following results:

$$\$10,000 \times \frac{\$67,500}{\$90,000} = \$7,500$$

On this \$10,000 loss, the insurer will only pay \$7,500 and the port will be a "coinsurer" for the remaining \$2,500, in addition to the applicable deductible.

### **Agreed Amount Endorsement**

A special provision can be included in a property policy to offset the possibility of a coinsurance penalty. This provision is known as an Agreed Amount Endorsement and is written affirmation by the insurance company that the values as stated in the policy are sufficient. It suspends the provisions of the coinsurance clause. The Agreed Amount Endorsement is generally granted only when the insurance company is convinced that a good faith effort is being made to establish acceptable values and maintain an adequate level of insurance. Typically, the Agreed Amount Endorsement is granted for a stipulated time period (generally one year) and must then be renewed by the carrier when the insured updates its property values.

### **Specific and Blanket Limits of Coverage**

"Specific" insurance limits is that form of coverage where a stipulated amount of protection applies separately to each building and its contents as scheduled in a policy. In the event of a loss, the amount of recovery is limited to the specific amount scheduled for the property involved.

"Blanket" insurance limits is a form of coverage where all buildings and contents are insured under the policy for one overall amount. The amount or limit is generally arrived at by adding together the individual values of the buildings and contents insured under the policy.

A relatively new approach to limits is sometimes referred to as a "first loss" or layered approach. Under this approach, a maximum limit is established in the policy equivalent to or slightly higher than the highest value for any single location. The single limit applies to each loss regardless of what property is involved. For example, if a port had individual buildings valued at \$500,000, \$7,000,000, \$8,000,000, and \$10,000,000, under a first loss policy the limit might be set at \$10,000,000 where as under a blanket limit policy the limit would be \$25,500,000 (\$500,000 + \$7,000,000 + \$8,000,000 + \$10,000,000). Be-

cause of the lower limits, first loss policies are sometimes less expensive. They are generally used by firms with buildings of relatively uniform value where there is a geographic distance between locations. This latter point is important since the limit is per loss. If several buildings, because of close geographic proximity are subject to the same loss, sufficient limits for full recovery would not be available under a "first loss" limit approach.

### **Loss Due to Application of Building Codes**

Building codes, electrical codes, or other building ordinances change over time and may be more restrictive than those in effect at the time a particular building was constructed. When a building is damaged by fire or other insured peril, it is possible that extensive portions of the building undamaged by the insured event may have to be demolished, and replaced due to application of the new codes. Insurers are responsible under contract only for the direct damage not the additional expenses caused by the enforcement of the code. Coverage for such additional expenses is available and negotiable. Coverage is available for:

- The value of the undamaged portion of a building which must be demolished because it is not in compliance with the existing building codes.
- The cost to demolish the undamaged portion of a building so affected.
- Coverage for the increased cost of construction of the type required by the stricter code(s).
- The business interruption resulting from the additional time needed to repair or replace the undamaged building portion.

"Demolition Costs" coverage is separately available to cover only the second exposure listed above for property that might not be replaced.

A port would be well advised to stay informed on code changes that can affect older buildings. The costs of demolition or meeting code changes can be substantial and can create unexpected losses to a port.

## Valuable Papers and Records

Recoveries under standard fire insurance policies for valuable papers and records are limited to the cost of the media (i.e., paper) in blank form plus the cost of transcribing the records. Fire policies do not insure the cost and expense a port may incur in recreating and reconstructing the information required to enable it to transcribe the data. Insurance protection for this exposure is available through Valuable Papers and Records insurance. Coverage is generally written on an "all risk" basis subject to a deductible. The coverage is relatively expensive and often less cost-effective than a procedure to duplicate valuable papers and records and store them at another location. When off-site storage is not practical, storage in fire proof files in another part of the same building may be an acceptable alternative.

## Equipment Floater

Ports generally have a certain amount of equipment not licensed or designed for use on public roads or part of a building or its contents. Items such as forklifts, bulldozers, graders, cranes, street sweepers, tractors, etc., fall into this category of equipment. Coverage against physical loss is provided by an Equipment Floater. While most provide "all risk" coverage, terms can vary between insurers. Smaller values generally are included on a blanket basis. Insurers, however, often require that equipment with significant values, such as mobile cranes, be specifically scheduled. Coverage is often written as a rider to the property insurance policy but can also be written in a separate policy. Because coverage, rates and deductibles vary substantially, a port considering this coverage should seek quotations from several sources.

## Property – Time Element

Fire, explosion, or other loss to physical assets of a port can result in two losses. The first would include the cost to repair or replace the damaged property. The second is the "loss of use" of the property. This includes loss of income plus continuing expenses where operations are totally or partially interrupted and costs over and above normal operating expenses where operations must be continued using alternative facilities.

## BUSINESS INTERRUPTION INSURANCE

Business Interruption insurance policy forms are designed to insure against loss of income and continuing expenses incurred as a result of an interruption of business from direct damage to property. The Business Interruption policy forms most commonly used to insure a port's exposure include a gross earnings form for mercantile and service risks or a combined business interruption and extra expense insurance form.

The geographic spread of facilities and the availability of substitute or alternative operating facilities within a port can affect the need for or amount of business interruption insurance. A port lacking multiple identical facilities which can serve as backup or which is heavily dependent on a continuous stream of revenue for financial stability has a genuine need for business interruption insurance. In addition, bond rating agencies, creditors, or other outside parties, with an interest in a port's ability to meet financial obligations may require the purchase of business interruption insurance. As such, business interruption is a contract of indemnity covering only actual loss of profit and unavoidable continuing expenses otherwise included in normal operating revenues.

Typically, business interruption insurance is provided by endorsement to a Property Insurance policy on either a named peril or an "all risk" basis. It is important to note that for the business interruption insurance to respond, the loss must be caused by an insured property damage peril. Business interruption losses resulting from uninsured property damage perils are not covered. As an example, business interruption under a policy covering only the fire and extended coverage perils would not respond to a business interruption loss resulting from damage to a warehouse caused by building collapse.

Coverage for the perils of flood, earthquake, subsidence, or employee strikes are generally not covered by standard Business Interruption policy forms. Where these exposures are applicable, coverage must be negotiated.

Standard Business Interruption forms normally contain a coinsurance clause. Generally, the port may choose 50, 60, 70, or 80 percent coinsurance. The appropriate percentage will depend on the estimated period of time that operations would be interrupted.

The exposure identification questionnaire contained in this *Guidebook* (see Appendix C) provides a worksheet which will assist in calculating the business interruption loss potential. It should be noted that the calculations are based on anticipated future loss potential. Working from current budgets, therefore, requires a certain amount of estimation to account for inflation, changes in operation, or other factors which might impact future income.

Ordinary payroll expenses may be insured under Business Interruption. Ordinary payroll can be defined as all payroll except for executives, department managers, employees under non-cancelable contracts, and other employees vital to port operations. Ordinary payroll, under business interruption forms may be excluded, insured in full, or in part. Factors affecting the decision of how much payroll to insure would include:

- The length of time the operations may be interrupted.
- The condition of the labor market. In a tight market it may prove difficult to hire needed employees when operations are resumed.
- The skills and experience needed by employees in order to operate the facilities. It may be a greater expense to train new employees than to keep existing employees on the payroll during the period of interruption. Excluding ordinary payroll can result in disputes with the insurer over the classification of payrolls between those "vital to port operation" and ordinary payrolls.
- The cost of reimbursing the State Unemployment Compensation Fund can exceed the cost of insurance by a significant amount.

### **Extra Expense**

Extra Expense insurance is designed to reimburse the policyholder for the additional expenses incurred to continue operations under alternative methods following physical damage to its assets. Due to the nature of port operations, some services would need to be continued following a physical loss. For example, if the port's administrative offices were damaged by fire, it might rent temporary offices in another building until repairs could be completed. If a critical crane were damaged, the port could

lease a mobile crane to avoid an interruption of services which could jeopardize revenues and even result in loss clients.

There is generally little relationship between the normal cost of operations and the extra expenses a port may incur in operating under alternative means following a property loss. This makes it extremely difficult to determine the amount and limit of extra expense insurance to maintain. Perhaps the best method for establishing extra expense limits is to develop contingency plans for possible loss scenarios and then estimate the cost which would be incurred in carrying out those plans. Such plans, when not developed under the stress of an emergency, may even reduce the extra expense should a loss occur. When properly developed, the plan can be implemented quickly and efficiently thereby reducing or eliminating costly mistakes and expenses.

Unlike business interruption insurance, extra expense insurance forms do not contain coin-surance provisions. Extra expense forms, however, may contain sub-limits designed to restrict the amount of recovery to a given period of time. Typically, the sub-limits are stated as a percentage of the policy limits. For example, a policy may stipulate recovery is limited to:

- 40 percent of the policy limit if the period of restoration is less than one month;
- 80 percent of the limit if the restoration period is not in excess of two months; and
- 100 percent of the limit if the period of restoration is over two months.

Sub-limits can be adjusted to the particular needs of the individual port. Because of the limitations that the sub-limits may place on a port's recovery, they should be evaluated carefully. Oftentimes, the greatest portion of extra expenses is incurred immediately following a loss.

## **BOILER & MACHINERY INSURANCE**

Boiler and Machinery insurance is designed to provide coverage for losses resulting from the explosion or accidental breakdown of boilers and other covered machinery. Historically, the standard fire insurance policy excluded coverage for

direct and indirect exposures arising from the operations of boilers and other machinery except for loss due to fire. For this reason, specialized Boiler and Machinery policy forms were developed.

Boiler and Machinery insurance tends to be a very stable line and not subject to the wide swings in the premium pricing associated with other lines such as general liability insurance. It responds very well to loss control and engineering measures designed to reduce losses.

### Coverage Forms

There are numerous modifications available to the basic Boiler and Machinery policy which permit a port great flexibility in designing the coverage to fit its particular needs. The insuring agreement of the standard policy generally states that the policy will insure against losses from an accident to an insured object during the policy period.

Coverage can be written on a scheduled object basis, blanket group object basis, or comprehensive (all objects) basis. On a specifically scheduled basis, individual boilers or items of machinery are scheduled on the policy. Coverage is provided only on those objects scheduled.

On a blanket group basis, coverage is provided for all objects falling within the description or definition of the group contained in the policy. This method eliminates the need to specifically schedule each individual object and provides flexibility to the port by insuring only those objects where coverage is needed.

Under the comprehensive basis, the definition of object includes all non-production boilers and mechanical and electrical machinery which a port may operate or own. Where desired, coverage can be extended to production machinery as well. This method has a decided advantage over the scheduled and blanket object basis in that it eliminates the need to specifically identify or schedule boilers and machinery to the policy. Premiums for this coverage are generally higher because of the diversity of objects insured. However, premiums can be controlled by the use of deductibles. Deductibles, in essence, eliminate claims on smaller objects or loss exposures while still providing the catastrophic coverage required by many ports.

### Coverage

There are six coverages offered under standard Boiler and Machinery policies. The following are the coverage options available in a standard policy:

- *Loss to Property of the Insured* – Physical damage coverage for the objects and other real and personal property of the port damaged by the accident to the object.
- *Expediting Expenses* – Covers the cost of making temporary repairs and the cost which a port may incur in speeding up or expediting permanent repairs. Typically, this coverage is limited to \$25,000. In the basic policy, however, these limits can be increased. Additional limits may be warranted where a port has vital or unique equipment that must be put back into service by the quickest possible means to avoid delay and financial hardship.
- *Liability for Property of Others* – Provides coverage for property of others in a port's care, custody, and control which may be damaged as a result of an accident.
- *Defense Settlement Supplementary Payments* – Covers the cost of legal defense, court and other associated expenses, interest on judgments, and other costs resulting from claims. This coverage is similar to that found in the liability insurance policy.
- *Automatic Coverage* – Provides automatic coverage for objects which a port may install at any location scheduled in the policy or at newly acquired locations, provided they fall within the class of objects which are already insured. Typically, the port must notify the insurer within ninety days for coverage to continue.
- *Bodily Injury Liability* – Covers bodily injury resulting from an insured accident. It is an optional form of coverage under a Boiler and Machinery policy. Because this duplicates the coverage of a port's general liability insurance policy, it is normally not required.

### Method of Valuation

Standard Boiler and Machinery provisions limit recovery to actual cash value (see ACV discussion under Property – Direct Damage, page 6--

3). It is possible to amend the actual cash value provision to replacement cost basis. Recovery under repair or replacement is limited to the smaller of:

- The cost to repair the damaged property at the time of the accident.
- The cost to replace the damaged property with property of like kind and quality.

If the property is replaced by property of different kind or better quality, larger size or capacity, the insurer is not liable for the amount in excess of what would have been paid if replacement had been made with like kind. If the object is not replaced or repaired, the insurer is liable only for actual cash value. Unless an object will not be replaced, it is advantageous for a port to insure its boiler and machinery on a replacement cost basis.

### **Indirect or Time Element Insurance**

Boiler and Machinery policies can be extended by endorsement to provide insurance protection for indirect or time element losses (see Property – Time Element, page 6--5) arising from a boiler and machinery loss. Both business interruption and extra expense insurance coverage can be obtained under Boiler and Machinery policies. Because physical damage from boiler and machinery accidents, except caused by fire or lightning are excluded from fire insurance policy forms, time element coverage provided under a fire policy will not respond for boiler and machinery related time element losses. Where significant boiler and machinery time element exposures exist, a port will also need to purchase this coverage under the boiler policy.

### **FIDELITY INSURANCE**

The potential for loss caused by employee dishonesty is most difficult to recognize or adequately evaluate. Often employees who are the most valued and trusted, commit embezzlements or misappropriations, which can occur over a period of time. When the loss is finally discovered, it may often exceed the amount of insurance maintained by the organization.

Although considered insurance, Fidelity coverage is actually a bond. There is an important difference between insurance and bonds. An

insurance policy is a two-party contract between the insured and insurer where the insurer promises to reimburse the insured in case of loss. A bond is a three party contract, which guarantees that one party (the surety) will meet an obligation due to a second party called an obligee (the port), as a result of the failure of the principal (port employee) to fulfill his or her obligations. In every surety bond, there is an obligation that the principal will make restitution to the surety for any payments the surety must pay to the obligee.

The coverage for loss caused by employee theft is a fidelity bond in which the surety obligates itself to the port to make good on losses caused by the dishonesty of port employees.

There are a number of different fidelity bond forms. The forms most appropriate to ports, however, are the public employees blanket bond and the public employees blanket position bond.

### **Public Employees Blanket Bond**

This form covers all employees of the port. New employees are automatically covered without notice to the insurance company. The limit of the bond is the insurer's aggregate liability per loss regardless of the number of employees involved. It does not apply separately to each employee causing the loss.

This bond is on a discovery basis so that the entire loss, without regard to period of time over which thefts occurred, is covered unless specifically limited by the insurer.

### **Public Employees Blanket Position Bond**

This policy form provides coverage similar to the blanket bond. The principal difference in forms, however, is that under the blanket position bond, the limit of liability applies per employee rather than per loss. Because the bond limit could be paid for each of a number of employees involved in a loss, the premium rate is generally higher for this bond than for the blanket bond form.

Many knowledgeable bond experts believe that the public employees blanket bond is the preferred form. They argue that most employee dishonesty losses are caused by a single employee and that, for an equivalent premium, a higher limit can be purchased under the public employees blanket bond as compared to the

public employees blanket position bond. The most appropriate form for ports, however, will depend on its specific circumstances and perhaps statutory requirements.

### **Faithful Performance Provisions**

Public employees bonds may be written on a "faithful performance" basis. The primary difference between this and the "honesty" form discussed earlier is coverage for loss resulting from the failure of employees to faithfully perform their duties or to account properly for all funds or property received by virtue of their position or employment. The term "faithful performance" is generally based on statute and regulations that define the degree of care imposed on employees. Faithful performance provisions provide broader coverage than normal fidelity bonds since statutes and regulations defining the degree of care imply that employees may be held responsible for losses even though they may have been entirely honest in their own conduct.

### **Employees Covered / Employees Excluded**

Employees are defined in the honesty insurance form as all members of the staff of a port, excluding anyone who is required by statute to be individually bonded for faithful performance. Also excluded from coverage is any treasurer or tax collector, regardless of whether or not the employee has such a title.

Faithful performance forms define employees as all members of the staff while in the employment of a port and not required by law to furnish an individual bond to qualify for office.

Ports should review governing statutes or regulations to determine which of the honesty or faithful performance bond form is required.

Due to the definition of covered employees, coverage under both bond forms end when an employee is terminated. Sometimes, however, a terminated employee is able to appear as still being employed which could permit access to port assets. This exposure to loss would be uninsured under standard bond provisions making it practical to have coverage extended beyond the standard bond provisions. Many insurers will extend coverage to 30, 60, or 90 days following termination of an employee.

From time to time, ports find it necessary to contract with intervening employers, such as Kelly Services, etc., to obtain part-time or additional employees for peak work periods. These employees are often given access to vital records and are in a position to embezzle port funds. Coverage is not provided under the standard provisions of a port fidelity bond for these individuals.

The most appropriate risk management practice is to require proof of insurance from the intervening employer. However, this is not always practical. Often, these employees are hired as needed, on short notice, without the risk manager's knowledge. For this reason, it is practical for the port to extend the definition of employee under its own fidelity coverage to provide protection for employees hired through intervening employers.

## **MONEY AND SECURITIES INSURANCE**

This insurance provides coverage for theft of money and securities both inside and outside of port premises. Money and securities is defined as currency, coins, bank notes, bullion, travelers and registered checks, money orders and negotiable or non-negotiable instruments, or contracts representing either money or property.

Inside coverage provides protection against losses within the port premises or any banking premises caused by actual destruction, disappearance, or wrongful abstraction of money or securities.

Outside coverage provides protection for the destruction, disappearance, or wrongful abstraction of money and securities outside the premises or while being conveyed by a messenger or armored car company or while within the home of any messenger.

Property, other than money and securities, is covered against robbery while being conveyed and theft, while in the home of a messenger. For other property, recovery is limited to the cost to repair or replace the property with like kind and quality. The policy limit is on a per occurrence basis.

## FORGERY INSURANCE

Depositors forgery insurance provides protection against loss from forgery or alteration of outgoing checks or other instruments of the port. Forgery on incoming instruments can also be insured. It is often assumed that the bank is liable for losses caused by forgery or alteration. However, where a port's negligence contributed to the loss, a bank may be able to escape liability. If a port fails to notify its bank of the theft of blank checks, a check writer, or signature stamp, the bank can look to the port for reimbursement. Because of this, defense coverage is included to protect the port against allegations of negligence.

## GENERAL LIABILITY

General liability insurance protects the port against claims seeking to hold the port responsible for personal injury, bodily injury, or property damage losses to third parties. There are a number of general liability policy forms available, but perhaps the most appropriate for ports is the Commercial General Liability Form. This form provides the broadest coverage of all the various forms.

### Commercial General Liability Form

The commercial general liability policy form provides the following basic coverages:

- *Premises and Operations* – Covers liability arising from the ownership, maintenance, and use of premises owned or occupied by the port and operations on or away from the premises unless excluded by the other provisions of the policy.
- *Contractual Liability* – The basic form provides limited coverage for contractually assumed liability. Cover is limited to agreements for the lease of premises, easements, sidetrack agreements with railroads, elevator maintenance, agreements required by municipalities except those involving performance of municipal work, and the part of any contract pertaining to business under which the port assumes the tort liability of another to pay for bodily injury or property damage to a third person or organization.

- *Independent Contractors* – Covers the liability of the port arising from operations performed on its behalf by independent contractors.
- *Products and Completed Operations* – Covers bodily injury or property damage arising from products sold, handled, or distributed by the port or from its performance of faulty work once the work has been completed.
- *Personal and Advertising Injury* – Personal injury typically includes the perils of libel, slander, malicious prosecution, loss of reputation, humiliation and false arrest, imprisonment or restraint. Advertising injury means injury arising out of oral or written publication of material which slanders or libels a person or organization or disparages their goods, products, or services which infringes upon copyright, title, or slogan.

The standard commercial general liability form, while providing broad scope of coverage, is not "all encompassing." The standard form is designed to provide coverage for those exposures common to all commercial concerns. For this reason, it must be tailored to meet the particular needs of the ports where non-standard exposures exist.

### Extensions and Modifications to Coverage

#### Incidental Medical Malpractice

Courts have given professional status to individuals and employees for medical malpractice losses arising out of rendering first aid treatment. Although not specifically excluded, court precedence has been set where incidental medical malpractice is not covered by standard liability policies. Coverage under the commercial general liability policy can be obtained, however, by the addition of an Incidental Malpractice Endorsement.

#### Defense of Persons or Property

The definition of "occurrence" in the standard policy requires that property damage must be neither expected nor intended from the standpoint of the insured. This definition eliminates coverage for those instances where the port may perform any intentional act which results in property damage. An example might be where port

employees damage property of others in order to prevent the spread of a fire.

Many insurers will amend their definition of occurrence to include coverage for the use of reasonable force which results in property damage if caused for the purpose of protecting persons or property. This is a valuable extension of coverage for ports and generally worth obtaining.

### **Employee vs. Employee Claim Exclusion**

Employees are "insureds" under the standard commercial general liability policy but only "for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However none of these 'employees' is insured for bodily injury or personal injury to a co-employee while that co-employee is either in the course of his or her employment or performing duties related to the conduct of your business...." This is sometimes referred to as the "fellow employee" or "employee vs. employee" exclusion which can be removed by endorsement.

### **Non-owned Watercraft**

Ports may periodically charter or hire boats or other craft in the pursuit of port business. An example of this can occur when the injured party could institute a claim against the port alleging that at the time of the accident, the boat was being used in connection with port business. The watercraft owner's insurance provides primary coverage but may not extend protection to the port or be inadequate to fully cover a judgment.

Automatic coverage for non-owned watercraft is restricted to watercraft under 26 feet. If a port is a frequent user of non-owned watercraft or charters larger watercraft, it should insure this exposure with a separate specialized policy.

## **OWNER CONTROLLED INSURANCE PROGRAM (OCIP)**

An Owner Controlled Insurance Program (OCIP or Wrap Up) is an arrangement where the owner of a construction project buys insurance coverage for general liability, workers' compensation, and course of construction risks for all project participants.

There are two considerations before selecting an (OCIP) as the project insurance. Does your State permit (OCIP) programs and is the project large enough to generate the economies of scale desired.

### **Reasons for an OCIP**

All major construction projects (\$100,000,000 and up) should avail themselves of these programs whenever possible. The benefits to all and especially the Owner are many, in addition to the considerable savings in insurance costs. Briefly the owner benefits as follows:

- The project owner has control. In the absence of an OCIP, the owner has no chance to review the insurance coverages of each contractor coming on the job let alone continuing to monitor them after receiving initial certificates, etc.
- The owner enjoys enormous economies of scale and invariably has broader coverage. Individual insurance programs for many contractors are invariably inadequate.
- An OCIP affords higher limits of liability. Limits of insurance carried by most contractors are inadequate and requirements are usually higher than individual contractors can obtain or afford on a "one job" basis. Aggregate limits shown on certificates of insurance may be eroded by other claims already submitted.
- Subrogation waivers and hold harmless agreements are more easily obtained where there is a single insurer.
- Situations frequently arise wherein two or more contractors are involved in a single loss occurrence. With one insurer, there are no problems - with several insurers, usually everyone suffers.
- In an OCIP, contractors individually have the privilege of insuring deductibles or other coverage limitations that might exist in the general program, particularly where it is obvious they cannot absorb the risk.
- An OCIP eliminates conflict of interest.
- An OCIP achieves fully controlled centralized claim handling by a single carrier.

- Centralized coordinated Safety Program produces both direct and indirect savings.
- With an OCIP, the owner is protected from "safe place to work" and "fellow employee" suits because there is but one carrier for both the Liability and Workers' Compensation coverages.
- Where dividends are earned, the owner receives them, thus further reducing costs.
- Overall, the OCIP affords vastly eased administration. This, in turn, provides energy conservation, reduces problems, and enables project managers to concentrate on building.
- An OCIP broadens the number of contractors eligible to compete, especially minority contractors and subcontractors who otherwise may be unable to obtain required limits and the broader coverages demanded.

Figure 12 shows the differences in a program of individually insured contractors vs. an OCIP.

**Figure 12**  
**Comparison Between OCIP**  
**and Individual Program**

<b>Individual Program</b>	<b>OCIP Program</b>
Each Contractor Procures his own insurance	The Owner/GC purchases insurance for all
Additional Insureds Endorsement required for Owner/Builder on each contractor's policy	No Endorsement required - protection exists for all
Duplicate Coverage	Overlap is eliminated by homogeneity by Broad Coverage purchased
All Risk Builders Risk unless otherwise self-insured	All Risk Builders Risk: which can include transit exposures is purchased by owner for all parties assuring uniformity of coverage and proper limits
Auto Liability	Not included
Equipment Floater	Not included
Professional Liability is secured by each contractor with an exposure at varying limits and aggregate impairments	Owner/GC purchases for all. Limits per claim and aggregate apply to the project only. Bids reduced by contractor's cost of insurance

## How an OCIP Works

1. Programs on major construction projects normally include the following coverages:
  - a) Workers' Compensation, including Employer's Liability
  - b) Commercial General Liability (excluding Automobile) covering operations originated at or from the job site.
  - c) All Risk Builder's Risk

The Commercial General Liability policy and Workers' Compensation policies are usually negotiated with underwriters on a "cost plus" basis whereas the All Risk Builder's Risk would be negotiated on a rate per \$100 of final construction costs.

Unless state laws permit otherwise, Workers' Compensation rates and modifications of each contractor or sub would apply and separate policies are issued for each.

Under the OCIP's Commercial General Liability policy the Owner, All Contractors and all Subs (excluding suppliers and those subs whose payrolls do not exceed \$10,000) are covered under one very broad program and individual policies are written for all parties. However, only one insuring company is involved. Some states that do not permit Wrap-ups will permit Owner Controlled Programs. The insurance regulations of the State of the project prevail.

2. The following coverages are normally excluded in each of these programs:
  - a) Automobile Liability and Physical Damage – this is due to the fact there is no way that a contractor can assign specific vehicles to any one job.
  - b) Contractor's Equipment Coverage – this is due to the same condition as autos. Contractors will assign their equipment as needed to various jobs. Normally included in this category is the exclusion of any tools, equipment, scaffolding staging, personal property of subcontractor or lower-tier subs, structures erected to house workmen, field offices, and/or materials; the capital value of which is not included in the work.

- c) Professional Liability for any architects, engineers, doctors, nurses, or other persons who would need such coverage. These parties are normally included for their job site general liability exposure only. OCIP coverage for the professional liability of architects and engineers is available as a separate program.
  - d) Transit Coverage could, if desired, be included within the All Risk Builder's Risk.
3. The Owner pays the premiums and will be the recipient of any dividends.
  4. The Commercial General Liability policy can be written to include or exclude Products and Completed Operations Liability. Normally they are included. When excluded, each contractor or sub would have to negotiate with their carriers for this coverage which could be quite costly since the underwriter is not benefiting from the other wrap-up premium generated. It is strongly recommended that these coverages be included in the OCIP CGL along with an extension of at least two years on the Completed Operations.
  5. Carriers – Insurance Companies

Several American insurance companies currently participate in OCIP programs and those that are writing them vary greatly in their approach.

The plans generally used are as follows:

- a) *Guaranteed Cost* – Generally all companies that use this approach adjust their liability rates annually. However, any such adjustment would reflect a much lower rate than individual contractors could achieve by themselves using different carriers.
- b) *Retrospective (Retro) Plans* – Usually, under these plans the maximum would be 125 percent; the minimum, 40–50 percent; a basic of approximately 20 percent, and a Loss Limit varying between \$250,000 and \$1,000,000. Some carriers prefer no Comprehensive Loss Limit. The loss limits used will determine the excess premiums charged.

- c) *Retention Plan* – This is similar to an “all down” retrospective plan (see (b) above) except that premium discounts are permitted while they are not permitted under Retro programs. The standard is the maximum, and the minimum is approximately 50 percent. Again, the loss limit will determine the excess premium charged.

Carriers also vary in their choice(s) of payment plans. The objective is to set up the best cash flow arrangements possible for the owner.

Of paramount importance in these programs is the effort expended by the carriers in the areas of loss control and claims. Generally, one claim person, at a minimum, is assigned to the project, usually on a full time basis. The Insurance Company Loss Control specialists work closely with the Owners, Project Manager, and the Broker's Loss Control personnel to establish and monitor a program that is thoroughly communicated to all and consistently enforced.

## AUTOMOBILE LIABILITY AND PHYSICAL DAMAGE INSURANCE

Ports typically own a number of private passenger automobiles, vans, and trucks licensed for highway use. In addition, ports may lease, hire, or permit employees to use personal vehicles in the pursuit of port related business. The use of automobiles creates an exposure to loss in the areas of bodily injury and property damage to third parties, injuries to third party passengers in port vehicles, and physical damage losses to the port's vehicles.

Due to statutory requirements, the potential catastrophic nature of liability losses and the need for experienced personnel to adjust third party claims, insurance is the most commonly used risk financing method for port vehicle liability exposures. For larger ports or those with a significant fleet, the most cost-effective means for financing physical damage to a port's vehicles is often self-insurance.

## Coverage

The Business Auto (BAP) is the mostly commonly used policy for insuring automobile exposures. The BAP offers a simplified approach to designing insurance coverage. On the declaration page, (see Exhibit G, page B--7) the various coverages available under the form are scheduled. For each scheduled coverage, space is provided to insert a number. The number to be inserted can be selected from a table in the policy which defines the automobiles to be insured (Exhibit G). For example, a number "1" inserted in the space next to liability coverage would mean all automobiles are covered for bodily injury and property damage liability to another party.

Physical damage coverage may provide either comprehensive or specified perils coverages and collision. Comprehensive is an all-risk type coverage. However, specified perils cover only specific occurrences such as fire and theft. Collision covers hitting another object or overturning. Physical damage coverage is typically subject to a deductible. Ports interested in insuring physical damage exposures should obtain quotations at several deductible levels in order to determine the most cost-effective deductible.

Physical damage losses to individual vehicles are generally within the self-insurance capacity of most ports. Over the long run, substantial savings can be realized by assuming these losses. Of course, feasibility and cost-effectiveness of self-insuring depends on many factors including the size of the port, the individual value of the vehicles, the size of the port's fleet, and the effectiveness of its loss control programs.

Ports which choose to self-insure physical damage exposure to vehicles should recognize one exposure which may be beyond the ability of the port to comfortably retain. The exposure is created when many of the port's vehicles are parked together. A fire, explosion, or similar peril could destroy a large number of vehicles in a single accident. One method for a port to obtain protection for this loss potential is to insure its automobiles for physical damage under the property insurance policy covering the port's buildings. Some insurers will extend coverage to vehicles parked within a specified distance of an insured building.

A second cost-effective method for obtaining this coverage might be to insure the vehicles for comprehensive coverage under conventional automobile policy, establishing a "per loss" limit adequate to cover the combined values of all vehicles at risk with a "per loss" deductible at a level in excess of the value of a single automobile.

## Medical Payments Coverage

Medical payments coverage pays for any necessary, medical, surgical, and dental expenses incurred by a passenger in a vehicle operated by or with permission of the named insured port. Benefits are paid without regard to legal liability.

Since the port's liability protection will respond for claims where the port is legally liable, medical payments coverage can be viewed principally as a public relations form of insurance. Where a port feels an obligation for these claims, it is generally more cost-effective to treat them as a cost of doing business by paying them out of current operating funds rather than by purchasing insurance. It should be remembered that injuries to employee passengers while working are covered by workers' compensation. Therefore, medical payments coverage is not needed for this exposure.

## Contractual Liability

Liability that a port may assume under a contract is covered under the standard automobile insurance policy. Such a liability exposure can arise for a port in the hire or rental of vehicles belonging to others.

## Fellow Employee Exclusion

Anyone using a vehicle with the port's permission is protected against liability claims of third parties. Coverage, however, is excluded for any employee where the claim is made by a fellow employee and results from an accident involving a vehicle being operated in the course of the employee's work. This exclusion eliminates potential employee collusion in making claims. However, it also bars coverage for deserving claims. As a result, some employers have eliminated this policy exclusion. Others have kept the exclusion but developed contract language to the effect that the insurer will waive this condition when requested by the insured. This has the

effect of allowing the exclusion to be waived for deserving claims yet used as a bar of coverage where employee collusion is suspected. The appropriate treatment of this exclusion depends upon the philosophy of the individual port.

### **Employee Use of Vehicles**

The business automobile policy can provide coverage for the port when employees use their own personal automobiles for business of the port. The port's policy, however, will not provide protection for the employee when a personal automobile is used. This should not be confused with the coverage that is extended to employees while driving port-owned vehicles.

Many employees believe that the non-ownership liability insurance purchased by a port also insures them while using their personal vehicles in pursuit of port business. When an accident occurs, often the employee will turn to the port for insurance protection only to find that there is no coverage. To eliminate potential employee relations problems, it is often advantageous to inform all employees who may use their personal vehicles on port business of this fact, and that it is their responsibility to arrange their own personal insurance protection. Generally, this does not place an undue hardship on employees since most ports provide mileage allowances, a portion of which is designed to cover the cost of insurance. (Note: Coverage can be extended under the port's policy for an employee using his/her personal auto on port business. However, coverage is always excess of the employee's personal insurance and is never primary.)

It should also be noted that this is not coverage for the personal automobile of an employee who is provided a port vehicle for his regular use. He has coverage while operating the port vehicle, but not for another vehicle he may use or borrow. Any employees who are provided a vehicle for the regular use should be aware of this situation.

### **PUBLIC OFFICIALS LIABILITY**

A port and its appointed or elected officials and officers face legal liability exposures arising out of executive and management decisions. This is distinct from other forms of liability which generally involve accidental bodily injury or property damage. The port and its officials are exposed to threat of legal action for every decision they

make, much the same as corporations and their boards of directors. Directors and officers liability protection is the insurance remedy for private corporations whereas public officials liability is generally used by public entities. Both insurance coverages provide protection for wrongful acts arising out of executive and management decisions. Coverage for all employees is normally included.

Claims can arise from a number of acts, errors, or omissions. Citizens file claims for poor quality of services; for failure to provide services; zoning and rezoning; annexation/detachment and property condemnation. Employees have filed claims for dismissal/nonhire, failure to promote, disciplinary action, and unfair labor negotiations.

Ports may have professional engineers, attorneys, and other professionals on staff whose professional acts may be added to the coverage under the Public Officials Liability policy, or coverage can be arranged under a separate Professional Liability policy to avoid shared limits situations. The policy annual aggregate limit applies to all coverages on a shared basis.

### **Policy Forms**

A port's risk management program should include public officials liability coverage to protect its public officials. Presently, no standard liability forms have been developed for this loss exposure. The risk manager should carefully review the insuring requirements and exclusions of the various public officials policies in selecting a policy most appropriate for the port. All wrongful acts committed by public officials, whether actual or alleged, should be covered including errors, acts, omissions, breach of duties including misfeasance, nonfeasance, or violation of federal or state civil rights laws. The insurance policy should include, in addition to the port, all individuals who were, now, or shall be elected or appointed to commissions, councils, or other units under the jurisdiction of the port. Both paid and non-paid individuals should be included, in addition to all employees.

Insurance policies are written on a claims-made basis. Insurance protection is determined by the date of the claim for claims-made policies subject to a retroactive date which limits claims to events happening after that date.

## Employment Practices Liability

In addition to Public Officials liability, a risk management program should include coverage for Employment Practices liability. It is a line of insurance for one of the fastest growing litigation threats to employers. Employment Practices liability (EPL) extends coverage for the perils of sexual harassment, wrongful termination, discrimination, failure to promote, breach of employment contract, and similar actions. EPL insurance is a product that was created in the late 1980s as a result of expanded civil rights laws, including federal employment acts such as American with Disabilities Act (ADA), Civil Rights Act (CRA), Age Discrimination in Employment Act (ADEA), Equal Pay Act (EPA), Family, Medical Leave Act (FMLA), etc.

EPL cases typically involve charges of economic damages as well as emotional distress, humiliation, damage to reputation, mental anguish, etc. A Commercial General Liability (CGL) policy is not intended nor designed to pay claims for these EPL type exposures. CGL policies typically have a broad exclusionary endorsement for employment practices claims. Risk managers should review their CGL and Public Officials Liability policies and are encouraged to obtain their insurer's position regarding these types of claims. Many Public Officials Liability policies are silent as respects to EPL perils or will have specific exclusions that can be deleted. A port's Human Resource Department should be kept up to date concerning labor laws, and employee handbooks should contain port policies regarding employment related issues, i.e., anti-discriminations policy, sexual harassment policy, substance abuse policy, etc. Good employment practices will help reduce potential losses.

Given various limitations and exclusions in other liability policies, a stand-alone EPL policy should be considered. EPL is a relatively new line of insurance, and coverages offered by insurers vary with some providing broader coverages than others. Some advantages of having a stand-alone EPL policy include an independent limit of liability (does not need to be shared) and a broad definition of covered wrongful acts. Most insurers will cover administrative, civil, criminal, arbitration, and Equal Employment Opportunity Commission (EEOC) proceedings. Careful consideration should be given to definitions, terms, conditions and exclusions, who is an insured, is the entity covered, what are the claim triggers, what are the specified perils, de-

fense costs, deductibles and exclusions. Punitive damages are normally excluded but can be included usually at an additional premium. It is highly recommended that punitive damages be included.

Loss prevention practices, including well-written policies and procedures, are the best means of both controlling and defending these claims.

## POLICE PROFESSIONAL LIABILITY

Those ports that operate their own police department or harbor patrols to enforce applicable laws and regulations on port facilities are exposed to a loss exposure that may not be adequately covered or maybe excluded in general liability policies. The loss exposure is greatest for ports that operate detention facilities and that have employees with full arrest authority. Of course, a police professional liability exposure does not exist for those ports which do not operate a police department.

### Policy Forms

A police professional liability policy should optimally cover all liability arising out of law enforcement activities including bodily injury, property damage, false arrest-detention, malicious prosecution, libel-slander, wrongful entry/eviction, assault-battery, Section 1983 violation of civil rights under color of law, other discrimination, inmates property loss, inmate vs. inmate fights, and intra-employee claims. Coverage for police professional liability is written on either a claims-made or occurrence basis.

## UMBRELLA LIABILITY

One of the most important policies carried by any port is its umbrella liability policy. This policy provides protection for catastrophic liability loss exposures. An umbrella liability policy serves as a blanket over many primary liability policies. It may provide excess insurance protection for general liability, terminal operators liability, auto liability, public officials liability, police professional liability, and employer's liability coverages. An umbrella liability policy may also go a step further and provide broader insurance protection than is provided by the primary policies. This is accomplished through broad insuring language.

There are no standard industry forms. This necessitates an evaluation of every umbrella contract. The policies may exclude employee injuries, failure to perform a contract, nuclear damages, long-term pollution, asbestos, employee benefit plan fiduciary liability, war, and responsibility for property of others in your custody.

Umbrella liability policies may be confused with pure excess liability policies which provide protection over a specific liability policy. As mentioned previously, an umbrella liability policy may provide broader protection than the primary coverages. Where an umbrella liability policy provides broader protection than the primary coverages, an insurer will require that a port assume the first portion of any loss. Usually the lowest minimum retention is \$10,000.

### **Extension and Modifications to Coverage**

Conversely, umbrella liability policies may not be as broad as the port's primary liability policies because of differences of policy language between the umbrella and underlying liability policies. To assure that the umbrella provides coverage at least as broad as that of the underlying policies, following form (policy language) or as-broad-as primary endorsements (add-ons) have been developed for umbrella policies. Representative language may be similar to:

"As respects the underlying insurance identified herein, this insurance shall apply to any loss for which the underlying insurance has been maintained. Where no underlying insurance exists or where terms, conditions, and limitations of the umbrella are broader than the underlying insurance, the umbrella will apply based on its terms, conditions, and limitations."

An umbrella liability policy will include a schedule of all underlying insurance policies. A port's risk manager should make sure that the information included in the schedule is correct and that all applicable liability policies are listed. It is also important that the primary insurance policies have the same anniversary date as the umbrella liability policy. When different anniversary dates exist between the underlying policies and the umbrella policy, a gap in protection can arise. This can occur when the aggregate liability limit of a primary policy is exhausted and some of the

losses making up the aggregate do not fall within the policy of the umbrella because the primary and umbrella policies have different anniversary dates. The umbrella insurer could refuse protection since the primary policy has not exhausted the aggregate liability limits within the policy term of the umbrella. To avoid this potential conflict, anniversary dates of all policies should be made concurrent. If it is not possible to have the anniversary dates of all the policies the same, the umbrella policies should include a non-concurrent endorsement.

The cost of attorney's fees and other costs associated with a liability claim can be substantial. Consequently, a port should make sure that adequate defense coverage is provided within its umbrella policy. First dollar defense coverage should be provided where there is no underlying insurance and excess defense coverage should be provided on claims involving both primary and umbrella coverages.

The umbrella policy should include the provision that, in the event of exhaustion of the primary aggregate limits, the umbrella will drop down to apply as primary insurance.

## **MARINE INSURANCE**

While the principles of marine insurance are similar to those of the more familiar property and casualty insurance coverages, customary practices, terminology, and policy forms differ substantially. Although marine insurance was the first type of insurance in the commercial world, it is different and unique in many ways, including valuation methodology, general average, salvage, third party liability and defenses available to the ship owner, among others. The objective of this discussion, therefore, is to introduce the reader to some of the terminology and more important coverage points.

It is customary that insurance for a port is provided under Marine forms tailored to merge land exposures and marine exposures.

### **Coverage Forms**

Over the years, insurers have developed a number of policy forms and amendatory provisions to cover the particular needs of an insured or group of insureds. The provisions of these forms could be made to apply to either ship or cargo by the addition of specific terms or provisions. Cover-

ages for port operations were added to create a package of coverages for the exposures of a port commonly referred to as Ports Liability or Terminal Operators Liability.

The coverages, most common to a Port Package, which can be purchased singly or in combination, include:

### **Commercial General Liability**

Covers "on-land" operations and exposures not including watercraft. The watercraft exclusion can be deleted to cover watercraft.

### **Protection and Indemnity**

Covers the operation of watercraft by a port. A Protection and Indemnity (P&I) policy is purchased in conjunction with a hull insurance policy to provide liability protection not found in the hull policy. This type of coverage is usually placed either through a mutual P&I club or with individual stock insurance companies. The risks covered and exclusions are found in the P&I club's rule book or in the several policy forms used by individual insurers.

The P&I policy provides coverage should an insured vessel cause damage to piers, wharfs, bridges, cable, or other fixed or removable objects. Also covered is the cost of raising, destroying, or removing a wreck which is sunk and constitutes a hazard to navigation. Bodily injury, loss of life, and sickness of seamen, passengers, ship visitors, stevedores, etc., are major loss exposures covered under the P&I policy. In addition, this policy also provides coverage for the repatriation expenses of seamen who become sick and injured during a voyage and collision – risks not fully covered under a hull policy.

The P&I policy also provides coverage for damage to cargo caused by the insured vessel should the damage arise from the negligence of the vessel operator. The ship owner is protected for fines or penalties that may be levied because of the violation of the laws. The P&I policy can cover pollution risks and operators often use this coverage to meet the requirements of the U.S. Coast Guard to obtain Certificates of Financial Responsibility.

For those ports owning ships or vessels who are not a member of a mutual P&I club, the amount of insurance provided in a P&I policy is usually equivalent to the amount of insurance on the hull

of the vessel. This amount of insurance is usually adequate where the ship owner may limit its personal liability to the value of the hull. However, where the owner of the ship has privity or knowledge of the events or conditions that caused a loss, this limitation on the ship owner's liability may no longer be applicable. To obtain additional liability protection for this exposure, an owner may wish to purchase an Excess P&I policy.

### **Wharfingers Liability**

Covers a port's obligation to provide safe berthage for a vessel moored at port-provided docks, wharves, or piers. This obligation includes safe approach and departure. Certain liabilities can be contractually transferred to others such as a tug boat operator, tie-down contractor, pilot contractor, stevedoring company, and even a vessel owner. However, the ultimate responsibility is the port's necessitating insurance protection.

### **Stevedores Liability**

Covers a port's liability arising out of loading or unloading a vessel and moving goods.

A landlord port will have, at worst, a vicarious liability as the owner of the port facilities. Defense coverage is the most important aspect of coverage in this situation.

An operating port may or may not provide stevedore services directly. Stevedores may be employees of a port or hired under contract with a stevedoring company.

In either case, liability for losses caused by "unseaworthiness" of a vessel should be contractually imposed on the vessel owner and not accepted by a port. For stevedore subcontractors liability should be contractually transferred to the subcontractor via hold harmless wording.

### **Warehouseman's Legal Liability**

Covers the legal liability of a warehouseman (bailee) for lost or damage to property in its care, custody, or control. A port that stores goods for customers has the legal status of a bailee for hire. A port can be held liable for the disappearance or destruction of goods in its custody if it can be proven that the port was negligent.

The warehouseman's legal liability policy provides protection if the port is held legally liable for lost or damaged goods. This policy provides broad protection for goods stored in specified port locations. Coverage applies to the property of port customers only for the account of the bailor (port). Thus, port property is *not* covered and liability must be proved before an insurer will make a claim payment. Defense is included in the policy coverage.

When evaluating a port's loss exposures in terms of the warehouseman's legal liability, an insurance underwriter will look for favorable loss experience, qualified personnel, good facilities and equipment, and reputable clientele. Insurance coverage is usually written subject to a deductible to eliminate high frequency/low severity claims.

### **Pilots Liability**

Covers loss exposures to a port that provides pilots to vessels entering and leaving the port. Coverage includes Bodily Injury and Property Damage liability including damage to the vessel.

The basic policy form excludes "Loss of Use" of the vessel while undergoing repairs. Coverage can be extended to do so and it is strongly recommended that the coverage extension be added.

### **Towers Liability or "Tugboat" Insurance**

Covers loss caused by negligence from the operation of a tugboat that causes damage to a vessel under "tow." Coverage is normally added to the insurance on the vessel rather than to the Terminal Operators policy. However, this should be included as a part of the "package" of coverages for a port.

### **Hull Insurance**

Covers loss from physical damage to a vessel owned by a port. There are a number of different Hull & Machinery (H&M) policies available in the market today. Perhaps the broadest is the American Institute of Marine Underwriters' Form. An H&M policy is a named perils type policy and covers physical damage to the vessel, its machinery, and equipment. In addition, the policy normally covers general average, salvage, sue, and labor and collision liability. Coverage for a vessel under an H&M policy is written with a vessel value which has been agreed upon be-

tween the owner and the underwriters of the policy. Most H&M policies include a deductible for partial losses. Often a shipowner may elect to cover a portion of the value of a vessel for total loss only. This is done using an Increased Value policy which usually costs significantly less than a full form H&M policy. There are several factors taken into account when determining the rate being charged for an H&M policy. They include the type of vessel, the value, the owner/operator's experience, the loss record, the size of the deductible, and the intended trade.

H&M policies can be written to cover a single vessel or an entire fleet. There are several different types of policies a vessel owner can purchase to insure his vessel. The navigation policy is the one most commonly referred to when one speaks about H&M insurance. This policy provides coverage when vessels are used in maritime operations. A Port Risk policy can be used when a vessel is expected to be laid up or non-operational for an extended period of time. The Builder's Risk policy is used to cover a ship being built from the time its keel is laid until the ship is completed and accepted by the owner including sea trials. Finally, a full form War Risk policy covers damage to the vessel for war and other risks excluded from the H&M policy by the War, Strikes, and Related Exclusions clause. It should be noted that this policy also covers damages caused by strikes, lock outs, labor disturbance riots and civil commotions which may be important in a port environment. Coverages for these risks can normally be added to the H&M policy by adding the SRCC endorsement instead of purchasing full form War Risk insurance.

### **Railroad Liability**

Covers the operations of port owned railroad facilities. Exposure in this area of operations will vary substantially from port to port. Some ports have no railroad operations, others may have a switching, loading/unloading operation, and still others may operate a short line railroad.

In any event, railroad operations present an added exposure to loss anywhere from crossing safety requirements to damage to railroad cars and cargo. Also, if considered operating "in furtherance of interstate commerce" employees may be subject to the Federal Employers' Liability Act (FELA).

Coverage for FELA is not included in a standard workers' compensation policy and must be specifically added.

Benefits available under FELA are potentially very generous. They can include lost wages, medical expenses, estimated future earnings, and pain and suffering. Awards are determined in the tort system and based on comparative negligence. Because these tort-based recoveries are usually larger than the no-fault workers' compensation benefits, the FELA premium rates are substantially higher than workers' compensation rates.

The effect of a port tariff, statutes exempting port employees, or court rulings should be considered in determining the need for FELA coverage for railroad employees.

## ENVIRONMENTAL LIABILITY

*Background* – For the last 30 years, the insurance industry has been attempting to find a solution to covering or not covering liability for losses caused by pollution and contamination events.

Adverse court decisions under general liability and umbrella liability policies resulted in the first steps to limit coverage for events deemed uninsurable under standard rate structures, if at all. The so-called "D," "E," "Z" exclusions were introduced to eliminate liability for the oil industry perils of explosion, blowout, and cratering of wells.

Continued court decisions held that, in the absence of an exclusion, each policy in force during a period of gradual pollution covered the ultimate loss on a pro-rata basis. This led to the introduction of a Gradual Pollution Exclusion in 1973.

The interpretation of this exclusion varied widely from federal to state courts and even between state jurisdictions. In some, the exclusion was upheld, in others discovery was held to be the occurrence and thus covered.

An inevitable result of the chaos within the courts was the development of an Absolute Pollution Exclusion in the mid-1980s. At the same time, exclusionary wording for asbestos and lead paint exposures was added because neither was defined as a pollutant or contaminant by the Environmental Protection Agency (EPA).

*Current Status* – Increased scientific knowledge of exposures, risk, and insurance needs has led to the emergence of specialized underwriters and insurance coverages to meet virtually every need in the area of pollution risks.

Also, the EPA's 1995 Brownfields Action Agenda created a partnership relationship between the responsible government agencies and property owners, operators, sellers, buyers, and communities replacing the old adversarial means of doing business.

Stated simply "Brownfields" is an attempt to apply uniform standards to contaminated sites for the purpose of encouraging clean-up and redevelopment. Instead of remediation to original conditions, "Brownfields" allows a standard of intended use that can dramatically reduce clean-up costs and liability exposures.

A menu of the products and services available through one or more insurers would include:

- Contractors Pollution Liability
  - Consulting, Engineering and Design Professional Liability
  - Fixed site clean up costs and third party liability (can include Business Interruption, Loss of Rents, or Rental Value for owner)
  - Storage Tank Liability
  - Restoration Cost Stop Loss (Per Project)
    - a) Excess of Retention
    - b) First dollars utilizing funded captive reinsurance
- Note: Investment income and unused funds belong to the insured party under b) above
- Analytical Laboratories Errors & Omissions
  - Transporter Pollution Legal Liability
  - Waste Treatment Pollution Legal Liability
  - Property Transfer Liability, Clean Up, Business Interruption, and Extra Expense
  - Brownfields Restoration/Development Liability, Clean-Up Costs including Stop Loss, Business Interruption
  - Creditor Reimbursement including Collateral Value Loss Reimbursement
  - Pollution Event Crisis Management

- Crisis Management Procedures Audit
- Crisis Management Response Simulation and Assessment

Additional coverages and services are available on a tailored basis to meet specific needs or unique situations. The above list is only a sampler. Increased competition, exposure knowledge and experience have made the current environmental risk marketplace quite responsive to buyers' needs.

## WORKERS' COMPENSATION

The objective of workers' compensation statutes is to assure the payment of medical expenses and prescribed wage replacement for employees injured in work related accidents. The laws of governing jurisdictions vary considerably in content and scope, however, all center around the concept of statutory medical and wage replacement (compensation) to injured employees regardless of fault.

Workers' compensation statutes, in addition to establishing the benefit levels for injured employees, are designed to ensure that employers are financially able to meet workers' compensation obligations. Generally, this is accomplished through requirements that employers either purchase insurance from a commercial carrier or qualify with the governing jurisdiction as a self-insurer. In Nevada, North Dakota, Ohio, Washington, West Virginia, Wyoming, Puerto Rico, and the Virgin Islands, monopolistic or state administered funds have been established. In these jurisdictions, if an employer is not permitted or cannot qualify as a self-insurer, it must purchase insurance from the monopolistic fund since commercial insurance is not permitted.

### Policy Form and Coverage

The basic workers' compensation policy consists of two parts:

*Coverage A – Workers' Compensation:* Under this part, the insurer agrees to pay all benefits or obligations falling within the workers' compensation statutes of specified state jurisdictions. This coverage is probably the only insurance contract which does not contain a maximum limit of liability.

*Coverage B – Employers' Liability:* Under this coverage part, insurance is provided for the claim of employees that do not fall under the workers' compensation statute. Coverage is limited to those states which are designated in the policy. This section contains specific limits of liability. The standard limits are:

Bodily Injury by Accident – Limit/Accident – \$100,000  
 Bodily Injury by Disease – Policy Limit – \$500,000  
 Bodily Injury by Disease – Limit/Employee - \$100,000

However, higher limits are available. Umbrella policies will provide coverage in excess of primary employers' liability limits.

*Coverage C – Other States Insurance –* The policy is issued listing one or more states, under item 3A of the Declarations Page, in which employees of the port are working. The part of the policy, item 3C, enables the port to have automatic insurance coverage for new operations in the states listed in this section. Suggested wording for item 3C to assure most comprehensive coverage: "States of the United States except those listed in Item 3A above and in ND, NV, OH, WA, WV, WY." Note your responsibility to advise the insurer at once if you begin work in any state listed in item 3C.

In addition, the basic policy provides for the insurer to undertake the legal defense of any suits, even if fraudulent or groundless, and to pay all expenses in connection with defense of a claim.

## Extensions of Coverage

### Voluntary Compensation Endorsement

In certain jurisdictions, not all classes of employees fall within the Workers' Compensation Act. Also, certain states do not require employers to carry coverage where only a few employees exist. Constantly changing compensation statutes make it difficult to stay completely up-to-date on potential loss exposures not covered under the law. It is possible to provide coverage for this exposure by attaching a Voluntary Compensation Endorsement to the policy. Coverage can be extended to either a particular class of employees by designating the class or to all employees of the port.

Since an injured employee not covered by the compensation act may have no recourse other than to sue his employer, the voluntary compensation endorsement can be advantageous by avoiding litigation.

The policy excludes coverage for the monopolistic states of ND, NV, OH, WA, WV, and WY. In those states, if the employment is such as to be subject to the compensation act, coverage must be purchased from the state fund. Coverage from the state fund, however, normally do not provide employers' liability coverage. Since the employers' liability coverage of the standard policy only extends to states designated in the contract, a potential uninsured exposure exists. This is not a serious area of concern for most ports since the exposure may be eliminated by extending the employers' liability coverage of the policy to cover all states including monopolistic states; or, if the insurer is unwilling to grant this extension, "stop-gap" coverage can be secured under the general liability policy.

### **In Rem Endorsement**

In non-marine losses, any action taken by an injured employee or third party would be filed against the person or organization causing the injury. In marine liability, however, a master or member of the crew can bring a claim against the vessel from which the loss occurred as if it was an entity unto itself.

If an action is filed against the vessel, it can be seized regardless of registry or ownership until the claim is resolved. Due to court backlogs, resolution of a claim may take considerable time during which the vessel could sit idle. To prevent the vessel from being seized and possibly idled for a considerable period of time, a port can endorse its workers' compensation policy with an "In Rem" Endorsement. This endorsement provides that such an action would be covered as if against the port and not against the vessel.

### **Workers' Compensation Acts**

In addition to workers' compensation obligations imposed by state statutes, ports may be subject to workers' compensation obligations created by Federal statute. Specifically, ports may be subject to workers' compensation claims under the U.S. Longshore and Harbor Workers' Compensation Act (USL&H), the Jones Act, or the Federal Employers Liability Act.

#### **U.S. Longshore and Harbor Workers' Compensation Act**

This federal act provides statutory benefits for employees engaged in maritime employment

including longshoremen, harbor workers, ship repairers, and boat builders from injuries occurring on the navigable waters of the United States including adjoining piers, wharfs, dry docks, terminals, marine railways or other adjoining areas customarily used by an employer in unloading, repairing or building a vessel. On average, benefits payable under this Act are substantially higher than those under state compensation acts. While political subdivisions are specifically exempt under USL&H, some ports have voluntarily become subject to or pay the same benefit levels as specified in the Act due to negotiated labor contracts. In addition, ports may be subject to the contingent-liability of contractors and others who fail to maintain appropriate insurance coverage for their employees. Standard workers' compensation policies do not extend to obligations created by federal acts. Coverage can be obtained under the standard policy, however, by the addition of a U.S. Longshore and Harbor Workers' Compensation Act Endorsement.

#### **Jones Act**

This federal act specifies the rights of American sailors, masters, and members of crews for injuries sustained in the course of their employment. Unlike state workers' compensation statutes, this Act does not provide statutory limitations for injuries or medical benefits. It is a negligence type of act without restrictions to recovery from the employer. Ports may be subject to the provisions of this Act when police, fire, maintenance, or other vessels are operated by the port. Coverage for this exposure can be provided by one of several methods. The normal and most common method is to insure the exposure under a protection and indemnity policy (P&I). For a further discussion on this policy, see the discussion under Marine Insurance. Insurance for this exposure can also be provided under the Employers' Liability Coverage B of the standard workers' compensation policy attaching "Amendment to Coverage B Endorsement-Maritime." This endorsement broadens the territorial limits of the policy and permits separate limits for maritime exposures. Coverages can also be provided in a voluntary compensation endorsement which is amended by the addition of an "Amendment of Voluntary Endorsement - Maritime Coverage".

## **Federal Employers' Liability Act**

This federal act specifies the rights of interstate railroad employees. Like the Jones Act, it does not provide statutory limitations for indemnity or medical benefits. It is a negligence type of act that does not restrict the recovery from an employer.

Ports subject to this exposure can obtain coverage under the standard workers' compensation policy by specific endorsement and reporting of appropriately classified payrolls. Because this is a negligent act, without statutory benefit level provisions, the \$100,000 limit for employers' liability coverage found in the standard workers' compensation policy should be increased either to \$500,000 or \$1,000,000 and applying the port's umbrella policy as excess insurance protection. Voluntary Compensation coverage is a valuable supplement which may avoid litigation by making statutory workers' compensation benefits available on a "no-fault" basis.

## **MISCELLANEOUS INSURANCE COVERAGES**

### **Management Information Systems (MIS)**

MIS equipment plays an integral role in managing and coordinating the operations of ports across the country. While limited coverage is available under standard property and boiler and machinery policies, the unique, specialized and critical nature of MIS functions makes the purchase of specific insurance coverage advisable.

Special MIS insurance is available to protect a port from:

- Physical damage to or destruction of hardware, media, and data.
- Extra expense involved in utilizing alternative facilities, emergency repairs to damaged facilities, additional personnel, overtime wages to resume or sustain MIS operations.
- The cost of recapturing or reproducing lost data.
- Loss of business income resulting from interruption of MIS operations.

Coverage is available on an "all risk" basis including electrical breakdown. The risk manager will have to consider a number of factors.

- In selecting the limit for physical damage, the purchase price of owned equipment should not be used because it may be insufficient to cover the cost of prudent upgrading in view of technological advancements or the unavailability of identical equipment. The contract obligations for leased equipment will determine the appropriate limit, which may exceed the purchase price or current market value of the equipment involved.
- Estimates of all costs of operating at alternative facilities for the period of time required to rebuild present facilities would be the measure of Extra Expense limits.
- If adequate periodic duplication of data is practiced and the duplicate copies are stored off premises, the reproduction costs should be minimal. However, if some data must be reconstructed from source documents, material expense could be involved.
- The determination of an adequate limit for loss of business income will require the combined efforts of operations, MIS, and financial personnel.

Risk management action before a loss can play a major part in minimizing the loss arising from interruption of MIS operations. Pre-loss planning for the use of an off premises "hot site" or reciprocal agreements with local organizations having compatible equipment to allow use of facilities during non-working hours are practical loss mitigation actions. Daily or weekly duplication of computer data for safe storage at an appropriate off premises site will minimize recapture and reconstruction functions. Periodic reevaluation of potential business interruption from loss of MIS operations will assure adequate limits for this exposure.

### **Non-Owned Aircraft**

Most ports do not own aircraft. However, a contingent liability exposure does exist if a port charters aircraft for port sanctioned trips. While coverage carried by the aircraft owner is primary, a port could be joined in a suit with the owner as a result of the operation or use of the aircraft. Non-owned aircraft liability coverage is excluded from primary general liability policies. Many um-

umbrella liability policies exclude coverage for aircraft owned or chartered by or on behalf of the insured. Coverage is further excluded for employees who operate an aircraft in the course of their employment.

A port can purchase a primary non-owned aircraft liability policy to protect itself from this loss exposure. The umbrella carrier may then be willing to amend its policy to include this exposure so as to provide added limits of insurance protection. A final alternative is to attempt to amend the port's umbrella liability policy to respond to all non-owned aircraft claims, regardless whether or not there is primary coverage. This alternative, of course, would make the port responsible for the umbrella's retention. Because of the catastrophic nature of this loss exposure, it is important that ports subject to non-owned aircraft exposures secure insurance protection through one of the alternatives discussed.

### **Special Events Liability**

From time to time, a port will sponsor activities or make port facilities available to individuals or organizations for events not usual to a port's operations. The events can include parties, outings, special tours, or off-site activities, such as golf outings, employee outings, boat charters, sporting events, etc. Underwriters accept certain activities as normal to a port's operations, but will

treat others as unacceptable or beyond the scope of accepted risk for which premium has been charged.

There are two options available to a port to handle these situations. First, to have the port's policies endorsed to specifically grant coverage or, second, to purchase a special events policy to insure an event outside of existing coverage. The latter insulates existing insurance from losses which could adversely affect future coverage and pricing. Also, coverage not otherwise available under existing policies can be obtained, i.e., hole-in-one insurance, athletic participants accident insurance.

Under special events policies, coverage can be specific, limited in time, place and amount with premium charged for the event only. Blanket insurance for a facility or types of events occurring with some regularity is also available at pre-agreed rates, limits, deductibles, etc.

It is recommended that the purchase of special events insurance be weighed against the future effect on existing insurance if the risks arising from special events were to be included as "usual operations."

In any case, both the port and the sponsoring organization(s) should be named as insureds under insurance policies covering special events.