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Law Practice Focused on
Environmental, Health & Safety (EHS)

THE CUBICAL

September 23, 2021 - ***Focus on Environmental Insurance***

ENVIRONMENTAL INSURANCE: A PRIMER

by Brian Murdock, special guest author

Since the first monoline environmental insurance policies were offered in the 1980s, coverage for pollution liabilities has evolved tremendously. The first policies written by AIG were for site pollution coverage. Since that time, over 40 carriers have joined the marketplace and coverage representing over $4 billion in premium is now in place. Coverage has expanded to contractors pollution (CPL) which protects individual contractors on a blanket basis or all contractors on a specific project. The addition of Professional, General Liability, and Products Pollution coverage to pollution policies has become available to manufacturers, distributors, and environmental entities (such as environmental contractors, recyclers, landfills, scrap dealers, and waste treatment facilities).

The scope of the pollution exclusion within general liability (GL) policies has been extensively litigated, resulting in a varied body of case law across different states and uncertainty for insureds. The insurance industry's definition of what constitutes a "pollutant" has evolved. Many environmental liability policies have included substances such as mold, legionella, silt, sedimentation, odors, electromagnetic fields and methamphetamines in their definition of pollutants as the environmental market has sought to fill the gap in coverage created by the GL pollution exclusion.

The quantity of buyers of environmental insurance has been growing over time. In years past, a hotel, an apartment, or an office complex would have never contemplated having pollution exposure. Yet, with mold and legionella becoming a major concern, these industries are considered exposed if they do not buy coverage.

Contractors are purchasing CPL even if they do not believe they have environmental liabilities because their clients are requiring such coverage in contracts. Concerned landlords are including requirements for pollution liability policies in their leases for manufacturer and distributor tenants more frequently.

As with all coverages, underwriting appetites in the environmental insurance space are continually changing. With respect to capacity of coverage, carriers are reducing the amount of limits being made available. Environmental insurance programs with $25 million in coverage limits are now being cut back to $10 million or $15 million. With respect to the scope of coverage, perhaps the exposure of greatest concern is the family of substances known as per- and polyfluoroalkyl substances (PFAS). PFAS are found in, or used in the manufacture of: Teflon, Scotchgard, certain firefighting foams, cosmetics, food packaging, and a variety of other products. Research on the health impacts attributed to exposure to PFAS is on-going. Federal, state, and local governments continue to establish regulatory thresholds. As a result, exclusions for these chemicals are appearing in environmental liability policies where there is any potential for PFAS to be on site or in the insured's products.

Pollution liability policies are also being used to benefit productive land use beyond just contract and lease compliance. Industrial sites which would remain unused can see new life. Even with brownfield law, many lenders and potential purchasers would not consider developing an abandoned site with a history of environmental impact. Pollution policies can transfer the risk to a financially sound insurance carrier and therefore give comfort to all with an insurable interest. Coverage for these historical liabilities is available with policy terms of up to 10 years.

More About Special Guest Author, Brian Murdock and Synapse Services

Brian Murdock is a Vice-President with Synapse Services (for a description of the firm and its services, click here), and has over 25 years of experience in the insurance industry. Synapse Services is one of the largest environmental insurance specialty brokers in the country seeing over 16,000 submissions and securing coverage for $250 million in premium each year. Brian assists brokers and clients with consulting and placing environmental insurance of all levels of complexity. He can be reached at bmurdock@synapsellc.com, or by telephone at 404-987-4966. Brian's LinkedIn profile can be found by clicking here.

ENVIRONMENTAL INSURANCE & ENFORCEMENT ACTIONS

Environmental insurance is not often thought of as a means of transferring the risk of liability associated with enforcement actions. While coverage for liabilities associated with fines arising out of environmental enforcement actions may not necessarily be excluded, such liabilities are not necessarily explicitly *included* within the scope of coverage, either. Having said that, environmental agencies pursuing enforcement actions against regulated facilities often seek more than just large monetary fines. In particular, when such enforcement actions lead to consent decrees or other forms of settlement, these agencies will also seek injunctive relief or supplemental environmental projects that require anything from the installation of new pollution control equipment to the performance of assessment and remediation of on-site or off-site pollution or contamination conditions. In such a case, a regulated facility with operations covered by a pollution liability policy may want to consider whether coverage might be available, or at the very least, whether the facility is entitled to a defense.

If the possibility of such coverage exists, it is important for the regulated facility to identify and address the issue early. The insured should review the potential for such coverage with its counsel and insurance brokers. If the insured determines that indemnity or a defense may be available under the pollution liability policy in question, then the insurer should be put on notice as soon as possible. The last thing that the insured would want to have happen is for coverage that would otherwise be available to be extinguished because of a failure to timely notify the insurer.

Pollution liability coverage in the context of environmental enforcement actions can be a complex issue. Such coverage is not necessarily worth pursuing in every instance. Both the language of the policy in question and the case law of the applicable jurisdiction can vary considerably when it comes to the availability of such coverage. In addition, there may be plenty of types of enforcement actions where the nature or scope of any injunctive relief is such that insurance coverage issues are very unlikely to come into play. Finally, there may also be plenty of enforcement actions where the anticipated total liability - in terms of both fines and injunctive relief - is expected to be well below the applicable deductible or retention level.

It is important to keep in mind that under the ramped-up enforcement efforts of EPA under the current administration, EPA is likely to rely more on its authority under statutory provisions such as RCRA § 7003 to issue orders to prevent imminent and substantial endangerments to human health and the environment. Although the issuance of such orders are often punitive with respect to the intent of the regulator and the impact to the regulated facility, the underlying statutory provisions are primarily designed to assess and remediate pollution or contamination conditions. Thus, a regulated facility with a site pollution liability insurance policy will probably want to consider the availability of coverage under such a policy if it ever finds itself on the wrong side of such an order.

ENVIRONMENTAL INSURANCE & FINANCIAL ASSURANCE

In an article in the March 2021 edition of The Cubical entitled*Providing Assurances: Letters of Credit,* I noted that the usage of letters of credit to demonstrate compliance with the financial assurance requirements for hazardous waste management facilities (HWMFs) can negatively impact an organization's liquidity position. (A link to this article can be found here.) This in turn may place pressure on EHS and financial personnel to find ways to minimize this impact. Insurance can be an attractive alternative for the financial assurance requirements associated with liability for releases from hazardous waste management units (HWMUs). (An HWMU is an individual hazardous waste treatment, storage, or disposal unit such as a storage tank or a container storage area, whereas an HWMF is a contiguous operating facility which operates one or more HWMUs.)

The use of insurance to demonstrate compliance with the financial assurance requirements associated with liability for releases from HWMUs is commonly accomplished by securing one or more site pollution liability policies. The insurer providing the required coverage issues its standard site pollution liability policy along with an endorsement that essentially strikes all of the insuring terms (and associated provisions) in the main body of the policy form and replaces them with language stating that coverage is provided to the full extent required under the financial assurance regulations.

Because such coverage has a more limited scope than the standard pollution liability insurance policy, the associated premiums are usually considerably less than premiums associated with the standard pollution liability coverage. Such costs are usually within the ballpark of costs associated with letters of credit. More importantly, such coverage allows for the avoidance of collateral obligations, thus benefiting the organization's liquidity position.

The insurance option is usually not viable for financial assurance obligations associated with closure and post-closure care of HWMUs. The reason for this is that insurance is designed to protect against contingencies that may never occur. And, while a release from an HWMU may never occur, every HWMU will eventually close.

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