

by George B. Flanigan, Ph.D.

The last 40 years have seen a quantum leap in society's attitude toward environmental pollution. In the early 1960s, societal awareness of the problem had only started to develop. Only later did such consciousness permeate the business and insurance communities. This slow response cost American businesses billions of dollars. In the 1970s, the insurance industry developed exclusionary language designed to reduce its exposure to pay under the Comprehensive General Liability (CGL) policy, a standard created by the Insurance Services Office (ISO) and its forerunner organizations. The industry's response was poorly executed and ultimately ineffective, leaving insureds with the opportunity to recover even as the insurance industry intended otherwise. The industry did not truly amend the CGL until 1986 when, incidentally, it was renamed the Commercial General Liability (CGL) policy.

The new policy was a complete redesign. It contains an exclusion known as the absolute pollution exclusion, which specifically enumerates the sources of the pollution excluded: (a) from the premises, (b) from any other premises or location involved in the processing, treatment, storage or disposal of waste, (c) while it is being transported, stored or treated by someone the insured is liable for, or (d) off the insured's premises at a work-site, but only if the source (as opposed to the causation) of the pollution is the insured. In a separate part, it also excludes clean-up costs, mandated or otherwise. The only exception to the exclusion is for smoke from a hostile fire. In addition to the pollution exclusion, there is an aggregate that cuts off all recoveries from a policy once a total claims level is reached.

In 1996, the insurance industry gave back some helpful coverage for claims that had been previously excluded, although the absolute pollution exclusion remains. First it provided coverage for bodily injury claims arising from smoke, fumes, vapor or soot from heating equipment. It also expanded coverage available for additional insureds and for contractors.

Buying Environmental Insurance Today

The CGL's 1986 pollution exclusion and those that have come since have held up quite well in court. Unless one of the ex-



Insurance Coverage for ENVIRONMENT



ceptions to the exclusion applies, risk managers must assume that recovery will be difficult for claims caused by occurrences after 1986. It is not uncommon for insurers to use an even more restrictive exclusion, called the “total pollution exclusion,” that takes away any of the modest givebacks.

There are, however, several ISO endorsements that extend pollution coverage. CG 04 22 (Pollution Liability—Coverage Extension) provides coverage for bodily injury and property damage liability, leaving intact the exclusion for clean-up costs. CG 04 28 (Pollution Liability—Named Peril Limited Exception) extends cover for short-term pollution incidents caused by named perils. For example, coverage is afforded if a fire damages the utilities in the building and causes a concurrent pollution incident. The incident must begin at a plainly identified time subsequent to the fire and end within 48 hours.

CG 04 29 (Pollution Liability—Limited Exception) is an open perils version of CG 00 28. CG 04 30 (Limited Exception for Designated Pollutants) provides coverage for the discharge, release or escape of scheduled pollutants, such as chemicals used by a dry cleaner.

Also, there are CG 22 78 (Hazardous Materials Contractors) and CG 24 15 (Limited Pollution Liability Extension), which extend coverage to contractors working with hazardous products but not with regard to underground storage tanks.

More Options

Contemporary pollution-oriented insurance solutions, now known as Environmental Impairment Liability (EIL) insurance, comprise a fast-growing and innovative marketplace. In the non-ISO environmental insurance arena, a handful of companies offer a variety of coverages.

Contractors Liability Coverage. This provides off-premises bodily injury and property damage for pollution incidents or conditions arising from operations performed by the insured. A contractor’s CGL (with the absolute pollution exclusion) will attach provided the contractor did not bring the pollutants to the site. This coverage is written to attach worldwide. Because contractors are often exposed to contractual liability, forms

TAL CLAIMS

usually provide automatic additional insured status for others when required by written contract executed before the loss.

Professional Liability Coverages. These protect against acts, errors or omissions of architects, engineers, construction managers and contractors. They are typically written on a claims-made basis with a short automatic extended reporting period (tail) and an optional long tail. The policy also allows the reporting of events that may not become claims, otherwise known as circumstance reporting.

CGL with Contractors Pollution and Professional Liability Coverage. Combination liability policies have long been used to cover environmental impairment costs. One of the most successful examples is the combined professional liability/general liability policy that is a staple in the medical malpractice market.

Likewise, there are combination policies in the EIL market such as CGL/professional liability/pollution liability for contractors. This modified CGL extends coverage to include pollution exposures as well as professional exposures of contractors and consultants. Most respond to the insured's contractual liability exposures with automatic additional insured status when required by written contract.

A similar combination is the general liability/pollution policy (with no professional) on a claims-made or an occurrence basis. These policies are primarily marketed to environmental contractors, such as lead and asbestos abatement specialists.

Yet another variation is a combination professional liability and pollution liability without CGL. The policy targets design/build contractors, architects and engineers with field exposures, environmental laboratories and consultants, remediation contractors and general contractors who have CGL coverage elsewhere.

Environmental Liability Insurance Coverage. Most insurers have a more

general policy for owners and others who might have pollution-based losses originating from property they own or operate. Written for any party that has insurable interest, this plain vanilla coverage is designed to respond to third-party claims including those from government agencies or others for economic losses (damages and clean-up costs) resulting from pollution. The coverage is designed to comply with financial responsibility requirements and is usually written on a site-specific or scheduled basis.

Real Property Transfer Coverage. A concern for many risk managers is the possibility that the property they have purchased has environmental problems. Because of the 1976 Resource Conserva-



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tion and Recovery Act, if you own a property now or at any time in the past, you are liable for any future environmental losses that may develop. Real property transfer coverage protects against bodily injury and property damage, contractual and clean-up costs arising from past and future use. Insurers write this coverage as a package policy that combines property and liability coverages in one form. Such policies might cover legal defense in a separate limit, as well as business interruption and extra expense.

Storage Tank Coverage. This is a liability policy that will pay third parties' claims for bodily injury or property damage or other corrective action should underground storage tanks leak. Coverage is site specific with automatic coverage for newly acquired sites, subject to notice and underwriting, and can be written to include nonstorage tank pollution incidents. It can also be endorsed for first-party coverages, including business interruption and extra expense. The use of separate limits assures that Environmental Protection Agency (EPA)-man-

dated limits cannot be eroded by other covered losses. Underground storage tank policies are designed for smaller risks and are generally annual policies.

Brownfields Coverage. Brownfields are seriously polluted areas that the EPA is trying to restore for limited use. Contaminated land that could not be used as a school, for example, might be remediated and used for a parking lot. Thanks to the EPA's efforts, there are numerous such properties in industrial cities and elsewhere that are being used once more. But, these areas pose potential EIL problems to their owners.

Brownfields coverage has some features of a liability policy. It will respond to bodily injury, property damage, clean-up costs or contractual damages triggered by a pollution incident at specific sites with known environmental problems. Owners, potentially responsible parties (PRPs) contractors, consultants and other parties might purchase such a policy. The coverage has financial guarantee/finite

risk features that can, for example, cover cost overruns for a remediation project. It also has some first-party features including business interruption, extra expense and environmental clean-up costs.

Clean-up Cost Containment Insurance Coverage. This coverage is also known as a remediation stop-loss cover. It protects against cost overruns arising during the performance of a specific clean-up project caused by the discovery of additional amounts of contamination, newly discovered contamination or changes in regulatory requirements (such as adding contaminants to the clean-up list). The coverage is site specific. Remediation stop-loss is first-party coverage and has property insurance features. It might be written with coinsurance provisions to encourage insurance to value and is often written with buffer layers (self-insured retentions at various loss levels).

Likely users of this coverage include site owners and PRPs at Superfund sites that intend to carry out either voluntary or mandatory remediation. An interesting variation is for

the PRP to engage a contractor and transfer its liability directly to the contractor, backed up by a long-term insurance policy. These coverages are also useful in mergers and acquisitions, since they can remove uncertainty over future EIL liabilities from the transaction.

Closure Care Coverage. This coverage is designed for regulated facilities with financial assurance obligations. Often, seriously polluted sites are partially cleaned and then “bottled up” for long periods of time. Long-term guarantees of financial responsibility are required during this process to insure that the property owner finishes the clean-up job that it started. Traditional mechanisms for this include surety bonds, letters of credit and trust funds, which put up enough money to cover the remaining clean-up costs. If the property owner fails to complete the job, the money is released to pay someone else to do it.


This requires a great deal of money

up front, which not all property owners have or wish to allocate. Closure care coverage is an insurance alternative that provides the property owner with financial assurance without reducing its available financial resources. Closure care insurance is a first-party coverage that provides no liability protection.

Creditor Reimbursement for Environmental Damages Coverage. This covers secured creditors exposed to economic losses either directly as owners or operators of real estate or as lenders with collateral interests. The coverage protects lenders against credit risk associated with the devaluing effects of pollution at collateral properties securing the loans they hold. It also protects the insured for a covered loan upon default when caused by pollution-related economic losses. Variations on this type of coverage can be used to facilitate mergers and acquisitions. The discovery of previously unidentified pollution can bring

about a serious diminution in value.

Assess Your Resources

These are just a few of the major coverages available today in the large and diverse EIL marketplace. When seeking EIL coverage, carefully assess existing insurance resources before taking further action. If such resources are lacking, there are many effective solutions available in the marketplace to reduce the risk of surprises that can rock a company. 

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