Insurance Coverage for Environmental Liabilities

Businesses operating in the United States have faced significant and evolving risks relating to environmental hazards for more than 40 years. Insurance coverage can help with the costs of defending and paying environmental claims.

Environmental claims may seek to recover millions of dollars either for alleged contamination from operations over decades or from new risks arising from Environmental Protection Agency (EPA) or other agency enforcement actions that address soil, air or water pollution. Insurance policies can be a critical asset to protect against the increasingly expensive costs of defending against, those claims and paying any resulting settlements or judgments. Below are questions we typically hear from clients facing such claims:

- *What if EPA issues new regulations limiting greenhouse gas emissions and my business receives a letter alleging noncompliance?*
- *What if I purchased a property but didn't know that there was a hidden underground storage tank leaking oil or other contaminants?*
- *Will my insurance company pay if my employees get sick from breathing unknown fumes on the job?*

HOW CAN YOU PROTECT YOURSELF?

Businesses have always relied upon general liability insurance to protect against third-party claims alleging property damage or bodily injury. In fact, through its industry drafting committees, the insurance industry created and revised standard comprehensive (later "commercial") general liability (CGL) policy language to protect policyholders from all liabilities except those that are specifically excluded. One such category is environmental liability. When the insurance industry introduced its 1966 CGL policy form, it widely promised that the "occurrence based" coverage in CGL policies would protect policyholders from environmental liabilities. Things began to change, however, with significant changes to environmental laws as a result of the environmental movement in the 1970s and 1980s. In 1970, the Environmental Protection Agency was formed, and, thereafter, regulators and courts began to focus more increasingly on environmental hazards. The Federal Superfund statute (CERCLA) was passed in 1980, creating strict liability for environmental contamination resulting from disposal of hazardous waste —and far-reaching exposures for a wide variety of businesses across the country.

The insurance industry responded to these expanded environmental liabilities by drafting the so-called qualified pollution exclusion, which the insurance industry first added to standard-form CGL insurance policies in the early 1970s. That exclusion sought to limit coverage to damage from "sudden and accidental" releases of pollutants, language that led to a body of case law around the country seeking resolution of the issue of whether "sudden" meant "instantaneous," or, consistent with insurance industry drafting documents, "unexpected" and "gradual" contamination. By the mid-1980s, the insurance industry modified its standard CGL policies further by drafting the "absolute pollution exclusion" (APE). Since that time, many court decisions have found that the APE applies to preclude coverage only for true industrial pollution, and not liability from a company's products (broadly conceived) or operations. Given the state of the law interpreting pollution exclusions, variations in policy language, and the breadth of CGL coverage, general liability policies remain an incredibly valuable asset to cover environmental liabilities from historical operations.

As law regarding environmental liabilities and application of pollution exclusions and CGL coverage evolved, insurance companies developed additional insurance products for environmental risks. For example, the insurance industry developed more specialized

products, including what was originally called "Environmental Impairment Liability" insurance in the early 1980s. The earliest forms of this insurance were expensive and still contained restrictive exclusions, including the pollution exclusion.

Today, the range of insurance options for environmental risks is much broader. Those options include the following:

- **Pollution Legal Liability (PLL) Insurance** - Coverage for cleanup or protection against claims relating to pollution events at a site.
- **Cost Cap Insurance** - Protection against cost overruns in contamination cleanup projects.
- **Contractor's Pollution Liability Insurance** - Coverage for pollution liability associated with contractor's operations.
- **Errors and Omissions Insurance** - Protection for environmental consultants and other service providers.
- **Underground Storage Tank (UST) Policies** - Protection against unforeseen cleanup and costs relating to USTs.

Even if your business does not use hazardous substances, insurance companies may argue to void coverage based on the "fine print." Companies buying insurance against such risks should consider other products designed to protect individuals or businesses from environmental risks, such as lender liability policies, property transfer policies, indemnification provisions and additional insured provisions under another entity's or person's insurance (OPI—"other people's insurance").

DO YOU REALLY NEED EXTRA INSURANCE FOR ENVIRONMENTAL RISKS?

Any business that manufactures products or provides services that might be subject to environmental regulations at the federal, state or local level could be subject to an environmental claim. Under CERCLA, for example, any owner or operator is potentially liable for hazardous substances. If your business owns property, and you do not know what operations took place before you owned it, you could get stuck with a hefty cleanup bill or other liabilities. And even if you can deflect liability, you still might get stuck investigating and defending against a claim.

WHAT SHOULD YOUR BUSINESS DO?

- Retain all general liability policies, no matter how old. Coverage under an "occurrence-based" policy never expires because coverage is activated, or "triggered," by injury that took place during the policy period. A policy from past years may be a critical asset, particularly if any operations predate1973 before the advent of the pollution exclusion.
- Discuss new environmental insurance products with your insurance broker or lawyer if you fear any risk that future operations might be subject to an environmental enforcement action, or if you will be acquiring assets, such as real property. Scrutinize new environmental insurance products very carefully upon receipt (which can be months after purchase). If you face an environmental claim, review all available insurance policies to determine whether coverage, broadly read, may apply.
- Beware of purchasing property or other assets "as is" without some protection—for example, requiring indemnification provisions and demanding that sellers have their own insurance on which you are added. The law on transferability of insurance for acquired assets varies from state to state. Review the provisions of all contracts relating to an acquisition with a coverage lawyer to ensure that the acquired entity's coverage will apply to the operations once they are acquired or merged.
- Give notice of all potential claims immediately. Analyze all potential insurance and indemnification agreements. Provide notice and tender claims, marshal facts and promptly select the right legal forum if a dispute is inevitable and informal negotiation is unsuccessful.

Perkins Coie's Insurance Recovery practice has experience in every step of this process. We have vast experience in analyzing, preserving and enforcing environmental insurance coverage of all types.