

Hidden Liability from Environmental Risks

PRESENTED BY

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Agenda

- Why is Environmental Risk Insurance Not Taken Seriously?
- What is a Pollutant and a Pollution Incident?
- Known Environmental Risks at Water-Related Entities
- Hidden Environmental Risks at Water-Related Entities
- Does a Comprehensive GL Insurance Program Provide Coverage for Pollution?
- What are the Shortfalls of Relying On Pollution Coverage via a Comprehensive GL Insurance Program?
- Reasons to Consider Purchasing Full Site Pollution Policy?
- Conclusion & Q&A

Why is Environmental Risk Insurance Not Taken Seriously?

- The biggest reason that commercial and public entity insurance buyers are uninsured for environmental risks, in my opinion, is that many insurance or risk managers are unable to easily explain to their board members the effects of pollution exclusions on their comprehensive GL Policies and the resulting need for environmental insurance in a convincing manner.
- The underlying causes of these situations continues to be the persistent belief that pollution exclusions are limited to hazardous waste.
- Often insurance agents/brokers who also have limited understanding of these matters but are concerned nonetheless will push to have a limited pollution coverage added to the GL policy. However, is this enough?

What is a Water-Related Entity?

- For this presentation, Water-Related Entities mean:
 - Water Districts
 - Sewer Districts
 - Irrigation Districts
 - Community Service Districts
 - Reclamation Districts
 - Special Districts
 - Park Districts if these entities have any Water Reservoirs, Water Storage, Beach Management or Wetlands/Conservation Lands under their ownership, operations or management.

What Is A Pollutant?

➤ GL Definition of Pollutant

- ✓ Any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed

➤ Environmental Policy Definition of Pollutant means:

- ✓ Any solid liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, chemicals, hazardous substances, petroleum hydrocarbons, low-level radioactive material and waste, medical or infectious or pathological waste, waste materials, electromagnetic fields, Legionella pneumophilia, and microbial matter.

What Is A Pollution Incident?

➤ Pollution incident means:

- ✓ The discharge, emission, seepage, migration, dispersal, release or escape of any pollutant into or upon land, or any structure on land, the atmosphere (including indoor air) or any watercourse or body of water (including groundwater), provided such conditions are not naturally present in the environment in the concentration or amounts discovered

➤ Pollution incidents can also include releases of:

- ✓ Nonhazardous waste and goods
- ✓ Food grade materials (milk, rum, whiskey)
- ✓ Clean soil or sand
- ✓ River/creek sediment
- ✓ Chlorinated potable drinking water (in certain jurisdictions)

Pollution Incident Examples

- In March 2014, 200 gallons of non-hazardous blue dye was spilled into an on-site floor drain during soap manufacturing equipment cleaning. The drain connected directly to a stormwater sewer that flowed into a creek. Dozens of people sued for alleged bodily injury, property damage and cleanup costs. Claim costs were in excess of \$100K.

- In May 1991, in Madison, WI a massive fire burnt down a dairy warehouse complex. The fire sent a burning river of melted butter into the streets.
 - ✓ 6 stories of butter melted. Butter popped doors open and flowed down the street into storm drains and creek
 - ✓ 3000 citizens evacuated, including 200 residents from a nursing home
 - ✓ Major highway closed. Many adjacent businesses with interruption losses.
 - ✓ Total Damage estimated at over \$50M for GL, property, contents and environmental claims
 - ✓ Numerous citizens sought medical assistance due to acrid burnt cheese smoke/odor

Known Environmental Risks for Water-Related Entities

- Pollution Incidents from:
 - Sewer Backups, Overflows and Bypasses
 - Odor Complaints (sewer gas and methane fumes)
 - Clarifier / Settling Tank Failures with resultant sewage/sludge spills
 - Sewer & Water Main and Lateral Breaks
 - Vehicle Accidents that Result in Spilled Cargo
 - Contractors Excavation Accidents
 - Chlorine Gas/Liquid Releases
 - 3rd-Party Business Interruption Caused by Pollution Incidents
 - Fuel Releases from Active Underground Storage Tanks

- Most of these are 3rd-Party Claims Focused

Hidden Environmental Risks for Water-Related Entities

- Pollution Incidents from:
 - Fuel and Waste Oil Underground Storage Tanks Releases at Water & Park Entity Facility Equipment and Vehicle Maintenance Facilities
 - Fuel and Waste Oil Releases from Loading and Unloading at District-Owned Facilities including at Emergency Generator Locations
 - Tank Containment Failures when Stormwater collects into these units nullifies the capacity if a spill were to occur
 - Mercury Spills from Old Metering Equipment Left in Equipment Boneyards that contaminate soil, air & groundwater
 - Leaded Pipe and Old Asbestos Water/Sewer Piping Joints and Section Waste in Equipment Boneyards that contaminate the soil
 - Leaded Paint in Soil at Base of Potable Drinking Water Tanks. Third-party Bodily Injury is also a concern at historical locations where these tanks used to reside if now is in a developed residential area.

Hidden Environmental Risks for Water-Related Entities

- Pollution Incidents from:
 - Water-Related Entities' waste disposal at 3rd-Party Owned Waste Disposal Sites (Landfills, Recycling Facilities, Incinerators)
 - Mold, Indoor Air and Vapor Intrusion Into Water-Related HQ Locations and Satellite Offices
 - 3rd-party Bodily Injury from Legionella
 - ✓ HVAC System Condensation failures
 - ✓ Bacteria Laden Splash from Stagnant Water used during Truck/Equipment Wash Services
 - ✓ Coolant Tower Exposures
 - ✓ Park District Kids Sprinkler systems or from Stagnant Park Ponds
 - Silt and Sediment Contamination from Dam Failure
 - Natural Resources Damage where a Pollution Incident impacts resources
 - 1st-Party Business Interruption from a Pollution Condition

Hidden Environmental Risks for Water-Related Entities

- Pollution Incidents from:
 - Historical Pollution Incidents that are under building foundations that are found when plants are expanded, replaced, or demolished
 - ✓ Plant Expansion built over historical sludge landfills
 - ✓ Parks built over former sludge disposal lagoons
 - ✓ Recycling Facility Transfer Stations built on sludge landfill buffer land
 - Historical Pollution Incidents in the ground from prior owners that are acquired through purchases, eminent domain, tax default, donations or willed to the organization
 - Pollution Events from off-site sources that migrate through water-Related Entities

Hidden Environmental Risks for Water-Related Entities

- Pollution Incidents from:
 - ✓ Contaminated Soil Remnants during Water/Sewer Main Repairs that Could Not Be Reused at repair location and is taken back to the District's Yard for Future Reuse. This results in Soil & Groundwater Contamination of Insured's Own Location
 - ✓ Liquid/gaseous chemical releases used to treat the water from underground process tanks or pipelines over a gradual period of time
 - Chlorine, Fluoride
 - Anhydrous Ammonia, Sulfuric Acids
 - ✓ Air Emission Scrubber Failure which releases Catalyst into the air that deposits material on residents downwind of facility
- DEFENSE EXPENSES – Specialized legal services on long duration claims results in more expensive defense expense costs

Do General Liability policies offer complete coverage?

- NO - Comprehensive General Liability Policies for Water-Related Entities typically offer very limited pollution coverage, via exclusion exceptions such as:
 - ✓ Bodily Injury claims from a pollution release from the HVAC system
 - ✓ Bodily Injury or Property Damage Claims from a Hostile Fire, unless the hostile fire occurred or originated:
 - ❑ At any premises, site or location which is or was at any time used by any insured or others for the handling, storage, disposal, processing or treatment of waste
 - ❑ At any premises, site or location on which any insured or other contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations to test for, monitor, clean up, remove, contain, treat, detoxify, neutralize or in any way respond to, or assess the effects of, "pollutants" except to the extent coverage is provided with the coverage.

Do General Liability policies offer complete coverage?

- ❑ Bodily injury or property damage claims which occurs or takes place as a result of your operations provided the bodily injury or property damage is not otherwise excluded in whole or in part and arises out of the following:
 - Potable water which you supply to others;
 - Chemicals you use in your water or wastewater treatment process;
 - Natural gas or propane gas you use in your water or wastewater treatment process
 - Your application of pesticide or herbicide if such application meets all standards of any statute, ordinance, regulation or license requirement of any federal, state or local government

Do General Liability policies offer complete coverage?

- Fuels, lubricants or other operating fluids needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of “mobile equipment” or its parts, but only if:
 - ❖ The fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them; and
 - ❖ The fuels, lubricants or other operating fluids are not:
 - Intentionally discharged; or
 - Brought on or to a premises, site or location with the intent to be discharged as part of the operations being performed by an insured, contractor or subcontractor

Do General Liability policies offer complete coverage

- ❑ Bodily Injury and Property Damage arising out of the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of pollutants if such bodily injury or property damage is sudden and accidental and neither expected nor intended by an Insured.
 - However, no coverage is provided under this exception for petroleum underground storage tanks; or
- ❑ Bodily injury or Property Damage if such is caused by the escape or back-up of sewage or wastewater from any sewage treatment facility or fixed conduit or piping that you own, operate, lease, control or for which you have the right of way, but only if property damage occurs away from land you own or lease.

Optional Limited Clean Up Costs Coverage

- Carriers will in select cases offer Clean-Up Costs coverage as an exception of the pollution exclusion by endorsement as follows (excerpt):
 - ✓ BI or PD arising out of a 2-day pollution event, including any clean-up costs associated with the 2-day pollution event, provided the 2-day pollution event would not have taken place but for a named peril having occurred and you notify us as soon as practicable, but no more than fourteen (14) days after its ending. However, this subparagraph (e) does not limit any coverage to the extent that such coverage is specifically provided elsewhere in this exclusion. This exclusion only applies if the discharge is accidental, unintended and stopped as soon as possible.

Optional Limited Clean Up Costs Coverage

- Cleanup Costs means expenses for the removal or neutralization of pollutants.
- Named Peril means:
 - ✓ Lightning, windstorm or earthquake;
 - ✓ Explosion, implosion, collapse, puncture, bursting, rupture, collision, or overturn of a tank, a vessel, machinery, equipment, or other similar apparatus or device (other than an "auto"), including any attached piping, pumps or valves, if the explosion, implosion, collapse, puncture, bursting, rupture, collision, or overturn is not caused by deterioration, corrosion, erosion, decay, rotting or wear and tear.

Pollutant GL Exclusions

- Lead Exclusion
- Asbestos Exclusion
- Fungi/Mold and Bacteria Exclusion
- Communicable Disease Exclusion
- Silica Exclusion
- Government Claims Ordering Sampling, Investigation and Cleanup

GL Pollution Coverage - Shortcomings

- These policies provide coverage on Your Premises for:
 - ✓ Third-Party Clean-Up Costs of Pollution Conditions from Named Perils with Time Element Triggers if on a Sudden and Accidental Basis Only
- Time Element triggers restrict Pollution Incidents to a short duration such as 2, 5, 10 or 30 days (Expanded S&A coverage only). However, many claims happen over longer stretches of times, especially if the leak location is underground, within vessels or structures, where the incident does not manifest itself instantly. In these cases, where leaks may exceed the set number of days there would be no coverage.
- If the Named Peril is from deterioration, corrosion, erosion, decay, rotting or wear and tear there is no clean-up coverage
- No 1st-party Trigger for Clean-Up Costs is covered.

GL Pollution Coverage - Shortcomings

- Limited Pollution Coverage often excludes claims or loss from damages if Governmental Agency files a claim or suit against them. This is significant because most releases are required to be reported to environmental agencies. These agencies often demand investigations and remediation.
- Many exclusions in the policy can nullify the environmental coverage offered under other exclusion exceptions
- GL policies do not cover unknown pre-existing pollution incidents
- GL policies exclude coverage at third-party owned waste disposal sites

GL Pollution Coverage – Shortcomings Conclusions

- When a pollution incident happens, an insured must wait for the carrier to decide whether the pollution claim will be covered or not.
- The carriers must decide whether any other exclusions will void coverage under an exception
- Is the claim sudden and accidental? Was something leaking for 2 days, 10 days, months or is it unknown? If the spill was gradual – over a long duration – beyond the time element or not from a named peril, then no coverage may exist.
- Just what most risk managers do not want – uncertainty of whether coverage really exists or not

Reasons to Consider Purchasing a Monoline Site Pollution Policy

- Contract certainty of coverage as environmental policies utilize Insuring Agreements to state what is covered.
- Insuring Agreements for:
 - ✓ **First** & Third-Party Clean-Up Costs from Unknown Pollution Incidents
 - ❑ New Pollution Conditions
 - ❑ Pre-Existing Conditions
 - ✓ Third-Party Bodily Injury & Property Damage from Unknown Pollution Incidents
 - ❑ New Pollution Conditions
 - ❑ Pre-Existing Conditions
 - ✓ Third-Party Bodily Injury, Property Damage and Cleanup Costs for Unknown Pollution Incidents at Non-Owned Waste Disposal Facilities
 - ✓ Third-Party Bodily Injury, Property Damage and Cleanup Costs for Pollution Incidents from Goods / Cargo Transported by 1st or 3rd-party carriers

Reasons to Consider Purchasing a Monoline Site Pollution Policy

- Broader Clean-up Costs Definition
 - ✓ Clean-up costs means reasonable and necessary expenses (including restoration costs and legal expenses), incurred with our prior written consent, which consent shall not be unreasonably withheld or delayed, to investigate, abate, contain, treat, remove, remediate, monitor or dispose of soil, surface water, groundwater or other contaminated media, but only:
 - a. To the extent required by environmental law;
 - b. For those costs actually incurred by the government or any political subdivision of the United States of America for which you are legally liable; or
 - c. In the absence of a. or b. above, to the extent recommended by an environmental professional.

- On a GL policy - Cleanup Costs means expenses for the removal or neutralization of pollutants. Investigation costs are NOT included.

Reasons to Consider Purchasing a Monoline Pollution Policy?

- Legal Defense Coverage within the Policy Limits with some defense sublimit outside the policy available in many cases
- Coverage is for sudden, accidental, and GRADUAL coverage. The ambiguity of gradual or not is removed by the all-encompassing coverage afforded.
- Coverage includes in most cases mold/fungi and legionella
- Coverage includes the removal of meth labs chemicals and cleanup of resultant pollution left in a pump house or shed by vandals
- Coverage includes affirmative Midnight Dumping/illicit abandonment cleanup costs
- Coverage includes Catastrophe Management / Environment Public Relations Support for Pollution Incidents to aid an insured during environmental crisis'
- Coverage includes affirmative 1st-party emergency cleanup costs at the start of a pollution incident

Reasons to Consider Purchasing a Monoline Pollution Policy

- Coverage is afforded either within the Policy or via Endorsements for the following:
 - Green restoration costs – Use of environmentally friendly materials as part of restoration of a pollution incident within offices
 - Mold/Fungus coverage in office occupancies
 - Excess coverage over a UST State Tank Fund or Financial Responsibility Tank Policy
 - Excess over a GL, Auto and Excess Policy to allow pollution coverage afforded in those policies to be primary so that sublimits of coverage can be used first (often without a retention).
 - Coverage for EMF, silt, sediment, low-level radioactive wastes
 - Coverage for 3rd-party BI & PD from known pollution conditions that may still exist at a site is often offered where a state environmental agency has issued a No Further Action Letter.

Reasons to Consider Purchasing a Monoline Pollution Policy

- Policies are available for Up To 3-year Policy Terms
- Aggregate Limit is shared over the Policy Term (Not reinstated annually)
- Claims are Not Frequency Driven But Rather Severity Driven thus the reason a long term can be offered
- Most water-related entities purchase limits of \$1M to \$5M in limits. Larger entities can purchase limits up to \$25M.
- Surplus Lines/non-admitted form, which allows customized manuscript endorsements to be utilized to fit the individual needs of each entity.

Conclusions

- There are many Environmental Risks associated with Water-Related Entities, not all are readily acknowledged by the Water-Related Entity Industry.
- Water-Related Entities often have blinders on by concentrating on 3rd-Party Bodily Injury and Property Damage Claims due to threat of lawsuits and public relations concerns. However, Clean-Up Costs are almost never fully covered by GL Policy due to the number of overlapping exclusions, and small sublimits of coverage
- If the focus is only on 3rd-Party Claims that leaves 1st-Party Claims to be uninsured or underinsured by Water-Related Entities. First-Party Claims that are uninsured can result in sizable remediation costs that will fully be the responsibility of the Water-Related Entity and its customers who will have to foot the bill via increased rates.
- Property Policies may pay contaminated building materials damaged by a hostile fire or other covered loss under a Debris Removal Coverage. However, property policies will never respond to cleanup of soil or groundwater which is often a much larger cost than debris removal.
- Standalone Environmental Policies offer the broadest affirmative coverage for pollution coverage. Knowing you have such coverage in place when an incident happens allows one not to worry whether the GL carrier will or will not cover the incident and did it pass through all the exclusions that may nullify the very limited cover.

Conclusions

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