Environmental Liability Insurance: What You Need to Know

Introduction

Environmental Liability coverage—often referred to as ‘pollution’ coverage—is a seldom understood and greatly underutilized tool in risk management. In the current insurance marketplace, unless a company specifically purchases a policy to cover environmental liability, they are not covered for such exposures under their policies. This creates a problem for various types of businesses and it’s often unknown. This is further exacerbated by the fact that many insurance professionals do not understand environmental liability cover and how it is best utilized.

This white paper will provide a business owner, or individual within an organization who coordinates insurance, a better understanding of why this topic needs to be addressed by specifically designed coverage, why they may not be familiar with the coverage, and why this can be an important addition to a company’s risk management strategy.
Environmental Liability Insurance Issues

For decades, typical insurance policies have “excluded” coverage that would address environmental liability and pollution events. Most recently, carriers have used either “absolute” or “total” pollution exclusions (or sometimes both) to ensure that they would not be responsible for covering an environmentally related claim. One can easily decipher from the terms “total” and “absolute” that the intent of the carrier is to be certain, and proven so in a court of law, that they will not be responsible for covering losses their insurers incur due to environmental and pollution related events and conditions. These exclusions can vary from carrier to carrier in their verbiage, but the intent is always the same: to absolve their liability to pay a claim arising out of a pollution event or condition. Many court cases have upheld the wording and intent behind these exclusions. The result is that insurers have an extremely tenable position when it comes to not having a duty to pay claims and represent their insured in these scenarios.

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Over and above the fact that the coverage does not exist in most policies business owners carry today, the problem is that business owners fail to truly understand that they could have a pollution related claim...and often so do their trusted insurance advisors. Environmental liability is very specific and the market place for business owners to purchase this type of insurance is limited. Depending on the type of business and services provided, purchasing environmental liability can be done on a stand-alone basis or in conjunction with other policies and cover. Often, these types of policies are modular and can be customized to the specific needs of business. These polices essentially give back the cover that is excluded by the ‘absolute’ or ‘total’ pollution exclusion(s). Therefore, these polices can be essential in completing a business’ risk management strategy.
Not Just for Environmental Industry Businesses

Often, environmental liability coverage is seen covering environmental oriented businesses: recyclers and waste managers, contractors, environmental consultants and etc. A major issue is, however, that numerous businesses outside of this scope of work have the potential to suffer an environmental liability claim. Many organizations like schools, hospitals, warehouses and manufacturers have an exposure to pollution events. Many of these industries have products or processes that contribute to this. The most common environmental policies are site pollution policies. These would cover pollution events at specifically named sites, i.e. an insured’s place of business. Fully understanding the risk and covering it properly is often comparable to the cost and complication found in general liability policies. It is simply just a different type of policy.
Implementing Environmental Liability Insurance

Adding environmental liability does not mean that a business needs to give up any of its existing liability coverage. Generally, environmental liability is written in conjunction with general liability. Therefore, a business is simply improving on their existing cover, rather than completely changing how they address their risks. Each portion of the policy would respond to the events they are intended to cover. So, general liability would still cover a slip and fall, while the environmental liability would cover a pollution event. Often, the insured can place this coverage for a comparable cost. Most of the businesses that do not carry such cover do not do so because of the expense. It is simply because they do not know about it and an insurance professional has not suggested to them. All businesses should evaluate the potential for an environmental claim against them and weigh this against cost and coverage.

Businesses are becoming legally compelled to insure against this type of risk.

Every risk management program should consider how a business is prepared to deal with a possible future claim or loss regardless of the safety measures in place. Environmental liability coverage can complement and complete a quality risk management program. Most environmental risks are latent and, therefore, take a great degree of professional knowledge and experience to recognize and evaluate them. Most purchases of environmental liability insurance are voluntary. As the rules and regulations continue to change however, especially in California, businesses are becoming legally compelled to insure against this type of risk. Contractors are being required to carry this cover by developers and municipalities. Electronics recyclers are seeing these requirements in their contracts with manufacturers. Property owners are requiring site pollution of their tenants. Although this insurance product has been greatly unknown and widely underutilized, today’s legal environment is aiding in making this coverage a more common requirement. The knowledge of environmental liability and the ability to combine this with the more common general liability cover should be something every business seeks in an insurance professional and organization.
Environmental Case Studies

Pollution risk is traditionally perceived as a problem faced by industrial companies that use or generate hazardous materials that could contaminate soil or water resources and potentially injure or impair surrounding populations and businesses. Remember, for the purposes of insurance coverage “pollution” and “pollutants” are defined differently than they may be for a regulatory body. So, even though the EPA or some similar organization does not regulate the industry or products, Environmental Liability may be the only place to find insurance coverage for certain claims. Here are some examples of “everyday” businesses, not related to the environmental services industry, that have experienced a pollution related claim.

A plumbing contractor is denied coverage by their insurance carrier under the Total Pollution Exclusion (TPE).

A plumbing contractor was hired to replace a faulty water heater at a private residence. During the installation, the plumbing company’s technician failed to properly reconnect the natural gas line to the water heater. The elderly couple in the home died from carbon monoxide poisoning and their heirs and estate sued the plumbing contractor for $3,000,000 in damages alleging negligence. The plumbing contractor immediately filed a claim with their General Liability carrier, with whom they had been insured for more than 25 years. Eventually, the carrier denied the claim under the Total Pollution Exclusion, claiming that what had actually caused the bodily injury—in this example death—was the release of a pollutant, natural gas. Per the terms of the insurance policy, this was excluded. The court found in favor of the insurance carrier and an appeals court upheld the ruling. The plumbing company incurred nearly $250,000 in legal fees and was required to pay approximately $1.5 million in damages. There was no insurance to help pay for these costs. A contractors pollution liability policy would have added coverage for the release of pollutants arising from the plumber’s work in addition to the General Liability portion of the policy. This would have covered the defense costs and damages up to the policy limits.

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A property developer/owner has no insurance coverage after needing to shut down due to vapor intrusion.

A property developer had converted an older building into a mixed-use retail center with a restaurant, retail shopping center and condos. After several months of occupancy, the employees of the restaurant and stores as well as the residents began to notice increased nausea, headaches and etc. The developer/owner originally suspected a natural gas leak but the local fire department confirmed that was not the case. After further investigation, the state environmental agency and an environmental engineer determined that the problem was vapor intrusion. This was due to gasoline vapors from contaminated groundwater originating from a leaking underground storage tank from a gas station next door. While taking care of the problem, the entire building’s operations were shut down. Therefore, the property developer/owner was out-of-pocket hundreds of thousands of dollars in lost income, living expenses for displaced residents, clean-up and property improvements as well as the alleged bodily injury to those exposed to the harmful vapors. A well written Environmental Liability policy would have covered the bodily injury, property damage and clean-up costs.

A self storage facility owner pays out of pocket for clean-up and testing.

A self storage facility reposed a unit after it’s renter missed several payments. Upon gaining control of the rented space, the facility’s owner found evidence of hazardous materials. They immediately contact local officials. The county and state officials demanded that the necessary steps be taken for proper removal and disposal of the hazardous materials. The renter of the facility could not be located so the facility owner was required to pay for the costs of the clean-up and disposal. The facility owner’s claim on their General Liability policy was quickly denied without many legal proceedings. The clean-up entailed contracting with a EPA certified and licensed haz-mat hauler. In addition, soil and groundwater investigations were ordered and the findings resulted in the need to excavate several tons of impacted soils. The storage facility owner had to pay out of pocket for all the clean-up and removal of materials as well as ongoing testing to the soil and groundwater for years to come. Resultant costs approached $600,000. A well written site pollution policy would have covered the clean-up costs and the ongoing testing.

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