

Insurance Coverage For Natural Resource Damage

New Jersey recently announced it would pursue Natural Resource Damages (“NRDs”) from businesses deemed liable.

Natural resources are defined as “land, fish, wild life, biota, air, water.” NRDs are defined as “the dollar value of the appropriate degree of restoration necessary to

assess, restore, rehabilitate, replace or otherwise compensate for the injury to natural resources as a result of a discharge.”

New Jersey’s initiative likely

will have important implications for other states. To date, NRDs have traditionally been the province of United States Environmental Protection Agency (“EPA”) and its enforcement at specific sites involving major spills.

New Jersey businesses that caused NRDs could be exposed to significant liabilities – some of them decades old, and inherited from predecessor companies. At the same time, liability insurance policies – particularly historic policies, which contain fewer potentially-applicable exclusions – may provide coverage for NRD claims. This is true even where environmental coverage actions previously have been brought and resolved. NRDs differ

from government “response costs” to address more immediate environmental crises. The semantic distinction between costs and damages has been used by the insurance industry in the past to argue against coverage for “response costs” as opposed to “resource damages.” This distinction, however, may also allow policyholders to argue successfully that prior coverage settlements address only environmental clean-up or response “costs” and do not operate to preclude previously untapped or additional coverage for NRDs going forward.

Timing

In addition to these issues, three factors will likely determine whether historic insurance coverage for NRDs is available. First, the timing of the actual coverage-triggering occurrence is crucial. The “occurrence” or events giving rise to environmental property damage likely must have taken place before 1985, when the so-called “absolute pollution exclusion” became a standard part of virtually all Comprehensive General Liability (“CGL”) insurance policies.

Second, the timing of a policyholder’s notification of a covered “occurrence” under liability insurance almost inevitably will be an issue. NRDs are not assessed in every case and, to date, have been the exception rather than the rule. Insurance companies faced with coverage claims for NRDs

likely will argue that the policyholder should have foreseen an action for NRDs and that NRDs are directly linked to other environmental response costs already incurred – and possibly covered.

The counterargument to a late notice allegation, of course, is that insurance companies likely have not suffered any prejudice. This is true, in part, because NRDs merely reflect an after-the-fact assessment of existing harm to natural resources generally. Nonetheless, late notice defenses are to be expected because insurance companies reflexively deny any claims even remotely relating to the environment under virtually all forms of occurrence-based policies for every and any possible reason. In fact, most major insurance companies have entire organizational groups whose priority is to obfuscate payment regarding certain categories of claims such as “environmental,” asbestos or “mass torts.” Certain companies farm these activities out to Third-Party Administrators (“TPAs”) adept at avoiding potential liability or at taking advantage of the time-honored claim-handling practice: “just say NO!” Reflexive denial and obfuscation, however, actually work to the advantage of policyholders because it makes it difficult to legitimately argue prejudice.

Third, if past history is any guide, the specifics of how NRDs are assessed scientifically and legally will



JOHN G. NEVIUS, ESQ., P.E.

give rise to coverage issues and arguably implicate some sort of policy "fine print." Accordingly, Policyholders should expect a fight from their insurance providers when they seek coverage for NRDs. They should not be deterred, however, because even past coverage settlements or judgments generally do not expressly encompass NRDs. Policyholders have much to gain and little to lose in pursuing insurance coverage for NRDs.

Natural Resource Funding

EPA or a duly authorized equivalent state environmental agency may seek damages for harm to "natural resources resulting from the release of hazardous substances or the discharge of oil." Hazardous substances can be almost anything. Natural resources are held in trust for everyone. An appointed trustee (or panel of trustees) must make a showing of NRD causation and then reduce such NRDs to a specific monetary amount, often in conjunction with the requirement to implement specific mitigation projects.

The "Superfund," created in 1980 by a special environmental tax to fund cleanup, has not been renewed and effectively went bankrupt as of October. Budget constraints have decreased the availability of other cleanup resources as well. As a consequence, government agencies charged with protecting the environment increasingly are looking for alternative sources of environmental funding. This fiscal imperative may at least partially explain New Jersey's NRD initiative.

The latest wave of creative government efforts to recoup cleanup costs underscores the value of historic (pre-1985) CGL insurance as a means to offset environmental costs, as opposed to the alternatives – your profits and/or tax dollars.

Regulatory Estoppel

Under *Morton International, Inc. v. General Accident Insurance Company*, New Jersey has led the way in holding insurance companies to their historic promises. The doctrine of regulatory estoppel first set down in *Morton* holds liability insurance companies to the positions reflected in their original regulatory filings which explained what was intended to be covered at the time new standard-form policy contract language was introduced. Accordingly, in New Jersey, pre-1985 CGL insurance policies should cover NRDs. Companies hit with a "suit" seeking damages for NRDs (or more likely a trustee's demand letter) should immediately notify their brokers and liability insurance companies. Insurance companies should defend against any legal claims or threats, and investigate the scope of any alleged environmental liability and also should indemnify you against NRDs.

Conclusion

All the elements necessary to obtain insurance coverage for NRDs exist, especially in New Jersey. Existing case law on insurance coverage for NRDs is mixed but encouraging. A great deal depends upon the jurisdiction. If the NRD police come knocking, always give notice of a potential

claim to your brokers and insurance companies, whether or not you have successfully pursued an environmental claim in the past. Many New Jersey businesses may view NRDs as an inappropriate second bite at the apple by environmental regulators. Insurance companies likely will take a similarly dim view of NRD claims even though they have sought to distinguish between environmental costs and resource damages in the past. No one anticipated this kind of liability – which is exactly why liability insurance was purchased and why it should now be available to off-set the costs of remedial damage to the nation's natural resources.

John G. Nevius is a shareholder in the New York office of Anderson Kill & Olick, P.C. and a member of Anderson Kill's Petroleum and Chemical Industry Insurance and Real Estate & Construction Group. John successfully has resolved and litigated numerous insurance coverage actions on behalf of policyholders and provides advice and technical expertise on a wide range of environmental and litigation matters. John also is a registered Professional Engineer and co-author with Eugene R. Anderson of a treatise on Brownfields Law and Practice involving clean up and redevelopment of contaminated real estate and the use of environmental insurance. He is a Senior Consultant at Anderson Kill Insurance Services (AKIS), a non-legal subsidiary of the Firm.

Anderson Kill also has offices located in Washington, D.C., Newark, NJ, Chicago, IL, Philadelphia, PA and Greenwich, CT.

For more information about our services please visit us at www.andersonkill.com.

