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What Every Environmental Consultant Needs to Tell Its Clients about Environmental Insurance

You've just discovered that your client has an environmental problem. It's unfortunate for your client but good for you. There's going to be a fairly expensive investigation and cleanup and you are likely to get the business. You give the client the news: "Your property is contaminated, with hazardous substances; you are going to have to spend a considerable amount of money to investigate the property; and, if you find any significant contamination, you are probably going to have to spend a considerable amount of money to clean it up. We look forward to working with you to address this problem."

But the client, of course, is concerned about the costs. If litigation is pending or a lender or regulatory agency is requiring investigation and cleanup, the client may have to proceed with the work regardless of its financial condition but will certainly continue to be very concerned about the costs. If not, the client may decide not to proceed with the work either because it does not have the financial resources to do the work or because it simply wants to delay as long as possible. If your client decides not to proceed, your new business will evaporate.

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In either case, you need to tell your client that it (1) may have insurance that could cover all, or at least a substantial portion of, the costs, (2) should immediately attempt to locate evidence of old insurance policies, (3) should carefully evaluate whether it has coverage, and (4) should seriously consider consulting counsel with experience obtaining insurance coverage for environmental claims. If you help your client find insurance coverage for its environmental problem your client will be forever grateful and there will be a source for funding the required investigative and cleanup work.

When you first mention this, the client will probably respond that it is pretty sure that its insurance doesn't cover this or that it contacted its insurance broker and the broker told him that there isn't any coverage. While these answers may be correct with regard to current policies, they may not be correct with regard to prior policies issued for the benefit of the insured.

Most commercial general liability ("CGL") policies issued over the past sixty or so years provide coverage for "property damage" which includes damage to the environment including, for example, damage to neighboring properties or to ground-

water caused by releases of hazardous substances. Unfortunately, since about 1986, most CGL policies included what is often called an "absolute pollution exclusion" clause which bars coverage for most environmental claims Therefore, it is correct that most current or recent policies will not cover environmental claims.[1]

However, as a general matter, any insurance policy which was in existence when the initial release of hazardous substances occurred or which was issued after that release occurred, may provide coverage. Thus, for example, a release of a hazardous substance that occurred in 1970 has the potential to trigger coverage in any policy that was in existence in 1970 or which was issued subsequent to that date. Most policies issued prior to about 1972 did not contain pollution exclusions at all. Therefore, they are likely to provide coverage and the carrier is likely required to pay for site investigation and cleanup.

In the early 1970s, insurance carriers started to include what is often referred to as a "sudden and accidental" pollution exclusion clause in CGL policies. This exclusion barred coverage for releases of hazardous substances unless the releases were "sudden and accidental." There has been considerable litigation regarding the meaning of the phrase "sudden and accidental" which will not be addressed here. However, the bottom line is that if there were any "sudden and accidental" releases, whatever that term means, prior to or during the policy period, then the carrier may well be required to pay for investigation and cleanup.

Moreover, as long as there is a possibility that there was a "sudden and accidental" release, the carrier is required to provide the insured with a defense. This is very important because, at least in California, the costs of investigation are considered costs of defense. Therefore, even if a "sudden and accidental" release cannot be documented, the carrier may well be required to pay for the site investigation if that investigation is also necessary for defense. Such investigations can be very expensive and as a general matter, there is no limit on the amount a carrier is required to defend its insured. Therefore, a carrier which is required to defend must pay the full cost of the investigation even if the cost of the investigation exceeds the policy limits. Thus, if the client purchased insurance coverage at any time prior to about 1986, it is likely to have insurance coverage that could cover the investigation or cleanup.

Indeed, even if the client did not purchase its own coverage, it may be able to access insurance coverage purchased by others. For example, if the client was a landlord, it may have been an additional insured on policies which were issued to its tenants. Or, if a tenant had insurance and agreed to indemnify the landlord, the tenant's insurer may be required to indemnify the landlord under the "insured contract" provision of the policy.

Even if the client was not an insured at all, other parties including tenants, former tenants, neighboring property owners, or others who caused releases of hazardous substances may have coverage which could cover the costs of the investigation and cleanup. In such a case the client should consider how it can obtain the benefits of those policies.

The following example may be helpful. A client owned a shopping center in which there was a dry cleaner. During a routine Phase II investigation performed to satisfy a potential lender, perchloroethylene was found in the soil. The landlord had its own general liability policies dating back several years which provided coverage. In addition, the current tenant had its own policies which named the landlord as an additional insured. Therefore, the landlord had coverage under the tenant's policies and the tenant, which caused some of the releases, had coverage as well. In addition, prior tenants had insurance coverage dating back to the 1970s under which the owner was named as an additional insured. Therefore, the landlord and those tenants had coverage under those policies as well. Because of the time span involved, some of the policies had absolute pollution exclusion clauses, some had sudden and accidental pollution exclusion clauses and some did not have any pollution exclusions at all. In the end, however, the carriers paid almost $4 million in in-

[1]We say that most post-1986 policies have absolute pollution exclusions because I have seen post-1986 policies without this exclusion. Every policy must be carefully reviewed by someone with the requisite expertise to evaluate the potential for coverage.

vestigation and cleanup costs and the client was fully reimbursed for all of its costs and expenses.

However, determining whether there is coverage and obtaining that coverage requires careful assessment and planning. The policies first have to be located. In many cases, the policies were thrown away many years ago in which case the client may need to locate other evidence of the policies such as receipts, checks used to pay premiums or other records. Once located the policies need to be carefully evaluated to determine the nature and extent of coverage and the potential impact of exclusions. We have already discussed the potential impact of pollution exclusion clauses. We also note that liability policies are generally designed to protect the insured against claims by third parties and do not cover damages to the insured or the insured's own property. Thus, most liability policies contain an "owned property" exclusion. At first glance this might appear to bar coverage for releases which occurred on the insured's property. However, if the releases threaten or affect groundwater, which is not considered property owned by the insured, or threaten or affect neighboring properties, the carrier should be required to provide coverage.

As a general matter, policies do not cover purely voluntary undertakings. The client must, therefore, be careful if it elects to proceed on its own or if the agency asks it to sign a voluntary cleanup agreement. Some policies require the carrier to defend both "suits" and "claims" against the insured. If so, the carrier is required to defend a claim by a third party, including a demand by a regulatory agency, even if no suit has been filed against the insured. However, most policies only require the carrier to defend if a suit is brought against the insured. If the regulatory agency demands cleanup, but does not sue, the defense obligation probably won't be triggered. However, there are steps that the insured may be able to take to trigger coverage. If the client who receives the demand sues a third party such as a former tenant that caused the release, that party's insurance may be triggered. Moreover, if that party then counterclaims against the client, the counterclaim may well trigger the client's insurance coverage. Thus, obtaining coverage requires careful planning and consideration of the risks that may be associated with any resulting litigation.

The bottom line is that many environmental investigation and cleanup costs may be covered by insurance, particularly if policies dating back prior to about 1986 can be located. Therefore, environmental consultants should advise their clients to:

1. **Search for all insurance policies and records that may evidence those policies;**
2. **Have policies which are located carefully evaluated by someone with the requisite expertise to determine whether there is potential coverage;**
3. **Work with a person with the requisite expertise to structure the proceedings in a way to maximize coverage; and**
4. **Avoid undertaking any actions which could jeopardize coverage.**

If the client is able to obtain coverage, your bills will be paid by the carrier, the client will be protected from many of the environmental risks and costs which it faces, and the client will be forever grateful for your assistance in obtaining insurance coverage.

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