

2021 Environmental & Energy Law Section Committee Report



Committee Name: Environmental Insurance

Committee Co-chairs: Gerard Cavaluzzi and Michele Schroeder

Date of Report: February 24, 2021

Committee Activities: The Committee did not put on its in person Fall 2020 half day seminar “Emerging Issues in Environmental Insurance” because of the pandemic conditions. In the past, this program has been well-attended and continues the series of programs hosted by our Committee every two years. Under advisement from the NYSBA, the Committee will consider the date appropriate for this in person seminar likely to take place in 2022. However, the Committee has planned and secured a 1.5 CLE credit webinar to take place April 29, 2021 from noon to 1:15 pm via zoom platform. The webinar is titled: “Hot Topics with Underwriting Environmental Insurance: Marketplace Updates and Current Case Law”. Two members of the committee will serve as facilitators and be joined by three environmental insurance industry experts to discuss issues associated with environmental and pollution liability insurance policies including additional insureds, stakeholders such as lenders, available coverage for mold, legionella, new regulated contaminants, virus and other biologics. Panelists will further cover critical aspects of obtaining environmental insurance coverage as a risk management tool for operational exposures, property ownership and transactions, and environmental cleanups and litigation.

Topics for Panels and/or Webinars: “Emerging Issues in Environmental Insurance” – Market Trends and Case Law Updates.

Publication: Hot Topics in Environmental Insurance (Planned)

Judicial or Administrative Decisions: The Committee is focused on the extent of decisions finding environmental insurance policies provide business interruption coverage associated with the COVID - 19 virus, pandemic and associated government shut down. Recent decisions as to whether coverage exists in environmental insurance policies for COVID – 19 related damages has been inconsistent. This has caused widespread discussion in the environmental insurance industry about the extent of coverage, if any, for virus’ and other biologics as a pollution condition, and what constitutes property damage under these policies; specifically focusing on the terms and conditions of Business Interruption Coverage offered in the markets today. Markets are receiving many claims for economic damages resulting from business interruption coverage due to the pandemic conditions and consequential business / operation shut downs by local and state regulators. Environmental insurers for the most part have been reserving rights

under investigation of the claim facts and many are denying coverage on the basis that there is no pollution condition alleged by the pandemic conditions and other issues such as no property damage or specific terms of the business interruption offered. The Committee also notes that there is no standard language in the environmental insurance policies concerning the terms of business interruption offered and as such, a decision by one insurer may not apply to another insurer. Further, the Committee notes that some insurers offer limited coverage for Disinfection of Biologics coverage with a sub-limit which could provide coverage for pandemic related cleanups of COVID-19 at insured premises subject to the terms and conditions of those coverages. To date, the Committee is not aware of this coverage as being a significant source of recovery for pandemic related losses.

The Committee is also focused on decisions arising from increased claim activity for site re-opener claims due to development of the site or changes in land use at sites, modification of cleanup standards, “new” media or pathway concerns with respect to closed sites (ie: vapor intrusion within structures), emerging or new chemicals and contaminants (i.e.: PFOs, PFOAs etc.), natural disaster activity such as severe, extreme or wet weather and other effect of “climate change”.

Legislation: The Committee remains focused on rulemaking aimed at addressing recent emerging contaminants such as 1, 4 Dioxane, PFOAs, PFOs, Glyphosate (“Roundup”) and a variety of thousands of related chemicals that are resulting in local regulations requiring mandatory inspections, monitoring, and cleanup of groundwater, drinking water supplies, soils, air and other media. Some rulemaking includes causes of action for medical monitoring from exposure to certain emerging chemical contaminants and cleanup of media at very low detection levels.

Regulations: Rulemaking around PFOs and PFOAs and the approximate 4,000 other varieties of such chemicals to be treated as a “hazardous chemical” under EPA rules. The predominant use of such chemicals has been in firefighting foam and waterproofing chemicals, however, the chemical combinations are also prevalent in industrial operations and our environment. Compulsory inspection, monitoring including medical monitoring for exposure will greatly impact the pollution liability underwriting process.

Diversity & Inclusion: We are reaching out to a diverse group of lawyers at more junior levels of experience inviting participation on the committee and our activities. We are encouraging new participants to facilitate and speak at our seminars and to submit writing materials in order to widen scope beyond those committee members that have consistently participated in the past. For seminars, we are seeking a diverse group of panelists outside the committee including experts working with environmental insurance companies.

Climate Change: The Committee is focused on possible innovation for new environmental insurance products, especially if there is a recognition of a “climate change tort” in litigation. Otherwise, environmental insurance policies are including “Green” endorsements wherein the scope of damages includes adaptations to accommodate climate change policies ie; energy

efficiencies, building changes, green technology including green remediation technology for clean-ups.

Guidance Documents: The Committee has not identified such guidance documents at this time.

Membership: We are reaching out to new lawyers associated with participants on the committee.

Other: Can be anything which benefits our section which your Committee would like to undertake.

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