ENVIRONMENTAL INSURANCE COVERAGE: NOW YOU HAVE IT – NOW YOU DON'T

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In the transactional world, it has long been standard operating procedure to conduct due diligence and, should environmental conditions be found, contract around them through the use of indemnifications. With a booming economy, though, sellers in a seller's market have grown less willing to offer indemnification, pushing buyers into the realm of environmental insurance. Increased demand for their product, however, combined with the knowledge gained from a growing body of claims experience have lead insurance companies to "refine" their product to limit their risk. Tighter definitions combined with a new wave of exclusion endorsements requires environmental insurance buyers to be particularly cautious and aware of what they are purchasing and what they are not.

Take for example the potential landmines in the Definitions section of a typical environmental policy. Coverage could be lost here in a number of ways. To illustrate this, let's examine three common definitional pitfalls.

First, many policies will cover cleanup costs recommended by an "environmental professional." Purchasers who have conducted due diligence may get comfort from this definition since they have already retained an environmental professional to advise them. However, some policies define "environmental professional" to mean only a licensed professional designated by the insurer and, as such, a purchaser's professional's recommendations may be insufficient to insure coverage. The insurance policy may also require advanced authorization to incur such costs or strict time limits on reporting environmental conditions.

Second, many environmental insurance policies exclude coverage for known conditions that were not disclosed. The knowledge of an insured's officers, directors, employees and even managers may be imputed to the named insured. For smaller companies this may not pose a problem. For larger companies, though, a thorough vetting of the information known to all involved is required in order not to run afoul of potential definitional exclusions.

Third, some policies exclude conditions resulting from a material change in the use or operation of a location. For those purchasers who intend to rezone, remodel or otherwise use the property differently than the use on the date of the policy, this could be a non-starter.

Property owners should also pay close attention to the growing list of exclusion endorsements to environmental insurance policies. For example, some policies have been expanded exclude costs for soil and groundwater testing during development, as well as any increased costs of removal or disposal for impacted soils and groundwater that would otherwise have been left in place but for development. For purchases intent on redevelopment, the impact of this exclusion on the value of an environmental insurance policy is evident.

One of the newest exclusion endorsements on the scene is perhaps the most concerning. Voluntary site investigation endorsements exclude any actions not required by a governmental entity or law to determine whether and to what extent a pollution condition exists at or is migrating from a covered location, including the taking or testing of soil, groundwater or surface water. This means that the very act of engaging in responsible due diligence or site management, if not directed to do so by a governmental agency, could, in and of itself,

void insurance coverage. Setting aside the public policy concerns inherent is such an exclusion, purchasers should be aware that a fundamental shift in standard operating procedures may be required to maintain coverage.

Environmental insurance policies can still prove to be deal savers in a shifting economic environment. However, savvy purchasers are well-advised to read the fine print and understand all of the potential pitfalls to ultimately securing coverage.

Should you have any questions or concerns about environmental conditions impacting your property, please contact Dawn Meyers in our Government and Regulatory Team. If you have questions about your insurance coverage, please do not hesitate contact Gina Clausen Lozier in our Chambers ranked Insurance Litigation Team.

Related Team Member(s)

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