



Environmental Insurance and the Coronavirus (COVID-19) Outbreak

As so many commercial policyholders grapple with the economic and social impacts of the coronavirus (COVID-19) outbreak, there have been a flood of questions regarding the availability of insurance coverage to mitigate some of the losses being incurred due to the virus. Several recent articles have discussed the uncertainty surrounding coverage for coronavirus-related claims or losses under standard insurance programs.

We at Synapse Services want to address the issue from the perspective of the environmental insurance market – a unique market featuring policy language that may apply to certain components of coronavirus-related losses.

The bespoke nature of environmental insurance policies has created substantive differences among Carriers and policy forms in terms of coverage, scope and structure. Policies tailored to a particular risk or industry vertical prevent one from making sweeping statements as to coverage availability for claims or losses arising out of the recent coronavirus pandemic.

That said, there are a series of uniform considerations that may be applied to review of a pollution policy in evaluating potential coverage for coronavirus-related losses. Synapse encourages our Retail Partners and their clients to utilize this guide to review their environmental insurance coverage and evaluate potential avenues for financial recovery. We also encourage policyholders to carefully review notice of claim or reporting obligations under their environmental policies, and comply with any applicable reporting requirements in order to preserve their coverage rights.

POLICY REVIEW CHECKLIST

The following is intended as a checklist or guide for reviewing your environmental insurance policy when it comes to coronavirus coverage questions. These elements are generally common across the various types of pollution coverage (i.e. site-specific Pollution Liability, blanket Pollution Liability coverage, Contractors Pollution Liability, Pollution/Professional), although with decidedly different approaches market-by-market:

1. Definition of “Pollutants”

The first step in evaluating coverage for COVID-19-related claims or losses would be to review the policy’s definition of “pollutants.” Certain environmental forms and markets specifically include viruses within their definition of “pollutants,” while others identify viruses within ancillary terms such as “biological agents” or “microbial matter” that may attach to the definition of “pollutants.”

One policy’s definition of biological agents reads as follows:

“Biological Agents means any:

- a. Bacteria (including legionella pneumophilia) or Fungi;
- b. Viruses or other pathogens; or
- c. Other microorganisms;

whether or not such are living.”

Even if your policy’s definition of “pollutants” is silent as to viruses, that does not necessarily mean no coverage. There may be arguments that viruses are included within the generic definition of “pollutants” as “any solid, liquid, gaseous or thermal irritant or contaminant,” depending on the jurisdiction and applicable caselaw.

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2. Definition of a “Pollution Condition”

Separate from a policy’s definition of “pollutants” is a “pollution condition,” often the triggering event for coverage under environmental insurance forms.

“Pollution conditions” may be defined as a “discharge, dispersal, release or escape” of a pollutant, and may be tied under certain forms to specific insured locations. An insured should confirm that the event generating the claim or loss can be traced to a specific dispersal or release of coronavirus. The existence of a contaminant (coronavirus), how it got there, and how the exposure occurred are relevant in determining potential coverage.

3. Identify Potentially Applicable Insuring Agreements and Note the Scope of Coverage

Once a policy’s classification of viruses has been determined, the next step would be to identify potentially applicable Insuring Agreements within the policy. Applicable Insuring Agreements may be either those providing first and/or third-party coverage for losses arising out of “Pollution Conditions,” or separate Insuring Agreements specific to “Biological Agents,” “Microbial Matter,” or “Disinfection Costs” coverage.

Certain insurers limit the scope of coverage for virus-related claims to direct disinfection/remediation expenses incurred by the insured in responding to the presence of the virus. The potentially applicable Insuring Agreement may not extend coverage for third-party claims for bodily injury or property damage arising out of virus exposure. The governing Insuring Agreement should be carefully reviewed to see what if any limitations may apply specifically to coverage for viruses. For those that do provide coverage for third-party bodily injury claims, this may include medical monitoring expenses, an element of coverage that may be relevant in coronavirus exposure scenarios.

A sample definition of “bodily injury”:

“Bodily injury means sickness, disease, mental anguish, emotional distress or physical injury sustained by any person that is a third party. Bodily injury shall also include medical monitoring costs.”

Finally, we frequently see sub-limits applied to virus coverage, so those should also be identified.

In the Contractors Pollution Liability (CPL) context, if it can be established that viruses are included within the definition of a “pollutant,” coverage should be examined under the Insuring Agreements relative to “covered operations” or “your work.” We are beginning to see environmental contractors engaged to perform remediation /decontamination of virus-affected locations, and these contractors should be aware of potential coverage under their CPL forms in the event of third-party liabilities caused by contracting operations in response to coronavirus.

4. Don’t Forget About Business Interruption/Contingent Business Interruption Coverage

Many environmental insurance forms include coverage for business interruption losses. In the midst of the COVID-19 outbreak, this may be a primary concern for commercial policyholders facing business shutdown, supply chain concerns, and more.

The triggering language for Business Interruption coverage under an environmental policy is significantly different than standard Business Interruption language, and should be carefully reviewed to determine if a pollution policy’s virus coverage extends to these types of losses.

Many environmental forms that include Business Interruption condition the coverage on the presence or release of a pollutant at a covered location. This means that the cause of a particular location’s shutdown, closure or suspension of operations must be tied to the presence or release of coronavirus at such particular location. This may present a coverage hurdle when business closures are related to the outbreak as a whole.

Additionally, certain forms then require that the release or presence of a pollutant result in “clean-up costs” or remediation expenses to the insured. This condition brings in considerations around the applicability of environmental laws or regulations to virus exposure events, government mandate triggers, or how environmental professionals/ industrial hygienists may be involved in recommending response actions in the wake of coronavirus exposure. There would appear to be several unanswered questions about how these conditions may apply in the coronavirus context.

Contingent Business Interruption coverage may also be included within a pollution form (although typically only seen in manuscripted forms or within targeted industries), and where applicable may extend coverage for events affecting an insured's business within a specified radius (i.e. 5 miles) of a covered location. As precautionary shutdowns become more widespread, establishing whether this meets the definition of a "pollution condition" to trigger this coverage will be a particular area of focus and could present challenges, depending on the specifics of the claim/vicinity. There also may be additional requirements that the suspension of business operations due to the off-site event be by governmental mandate. As government-mandated business closures expand, this may provide a clearer path to Contingent Business Interruption coverage under such policies.

Due to uncertainty about its application to the COVID-19 outbreak and the potential value in securing coverage, policyholders should carefully review Business Interruption coverage under their pollution policies and consider notifying their Carrier in the event of Business Interruption-related losses.

5. Review Potentially Applicable Exclusions

Identifying potential coverage for viruses within a policy's Insuring Agreement does not end the analysis. Environmental policies often include their own unique exclusions, and each policy should be reviewed to identify exclusions potentially applicable to virus coverage.

Certain forms and markets employ a Communicable Disease Exclusion, excluding coverage for "communicable diseases" (may or may not be defined within the Policy), or alternatively exclusions for viruses transmitted via "human-to-human" contact as opposed to "facility-borne" viruses.

The terms within these exclusions are often not defined by the policy, leaving open for interpretation how the COVID-19 outbreak may be classified.

- > Another important consideration in analyzing a policy exclusion is the shifted burden of proof back to the Carrier. Once coverage under an Insuring Agreement is established by the insured, caselaw in many states shifts the burden of proof back to the Carrier to establish that a particular exclusion applies and unambiguously excludes coverage.

REPORTING AND NOTICE REQUIREMENTS

Immediately upon learning of a potential claim or loss relating to coronavirus exposure, or upon the discovery of coronavirus at an insured location or location otherwise included with a policy's coverage, Insureds should carefully review any applicable reporting or notice requirements within their policy.

- Regardless of potential limitations or exclusions to coverage, failure to promptly report a pollution condition, claim or loss to a Carrier in accordance with the policy terms may result in forfeiture of otherwise available coverage;
- Notice requirements within environmental forms are often more stringent than with standard liability policies. There are likely requirements to notify Carriers promptly upon discovery of a pollution condition, even if no claims have been filed. There may also be requirements to provide notice of potential claims or losses, or notice of a suspension of business operations under Business Interruption;
- Note that certain environmental policies include Emergency Response Coverage, coverage that responds to emergency situations and often includes strict notification requirements within a certain number of days after discovery of a pollution condition;
- This should not be limited to just an environmental policy; notice should be considered under an insured's entire insurance program. Given potential uncertainty about the applicability of coverage for coronavirus-related losses across the insurance industry as a whole, it would seem prudent to provide timely notice under all potentially applicable policies.

Prompt notice of claims or losses preserves important rights for a policyholder to assert and contest coverage as coronavirus-related claims test the interpretation and extent of coverage provided under environmental policies.

SUMMARY

The question of whether an environmental insurance policy will respond to claims or losses arising out of the coronavirus (COVID-19) outbreak depends on the language and structure of the particular policy form or endorsement(s) in question. There are frequently important limitations or exclusions imposed by the environmental markets on the extent of virus coverage in general, but that should not preclude a careful review of your policy to identify potential coverage. Environmental insurance may be uniquely positioned to respond to situations like the coronavirus pandemic, and existing policyholders should take note of their policies and consider submitting claims to their Carriers.

Disclaimer: This overview is not intended to provide legal or coverage advice with respect to your insurance policy(ies). Please refer to your actual policy documents for the definitive terms and conditions of coverage. Also, please note that Synapse does not report claims on an Insured's behalf. Notices of claims or losses should be submitted directly to the applicable Carrier(s) pursuant to the terms and conditions of the policy.

Synapse makes no representations or warranties regarding the applicability of these coverage considerations to any particular policyholder or policy.



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