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Practitioner Insights: Coal Ash Poses Slew of Coverage Issues

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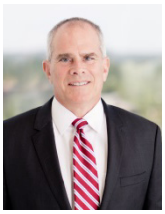
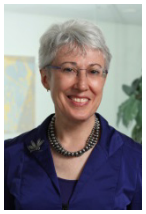
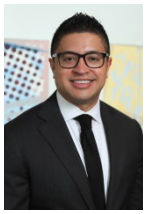

Environmental groups are raising the stakes for power companies facing allegations of coal-ash liability. Power plants that burn coal to produce electricity also create byproducts in the process, known as "coal combustion residuals," or CCRs. CCRs go by several names, but are commonly known as "coal ash."

Historically, power companies have stored CCRs in settling ponds, also known as "coal-ash basins." Coal-ash storage and disposal can lead to allegations of groundwater contamination and environmental contamination claims. Environmental groups have sought to require companies to pay for remediation of disposal sites and alleged groundwater contamination; address alleged natural resource damages; and conduct extensive monitoring and sampling of onsite and offsite sediments, groundwater, fish, and other wildlife.

Power companies and other policyholders facing such claims should review both their liability and property insurance policies and give immediate notice of such claims.

Threshold Issues

Insurance companies may raise a host of defenses to a policyholder's coverage claims for coal-ash liabilities. As a threshold issue, it is important to remember that insurance is a state-law issue, and the choice of which state law applies to a long-tail, coal-ash insurance claim can often decide the outcome. However, the insurance programs purchased by utility and energy companies are complex, with contacts relevant to conflict-of-law determinations in many different jurisdictions. Careful consideration of this threshold issue can be crucial to the question of whether coverage ultimately may be found to apply to the issue of liability (if any). Policyholders should take care not to take positions on this issue before a full analysis is completed.

Many insurers that cover power companies belong to utility industry insurance cooperatives, with Associated Electric and Gas Insurance Services ("AEGIS") as one prominent example. Many insurers in energy company insurance programs use the Bermuda Form, which requires policyholders to arbitrate any coverage disputes in London under the substantive law of New York. Bermuda Form policies also contain "integrated occurrence" and other unique provisions that require a different analysis and often include the need to assess unique, fact-intensive issues about what underlying claims or allegations are included in a "batch" or in a "maintenance deductible" that must be absorbed by the insured. Expertise in handling coverage disputes under the Bermuda Form can enhance the prospects for success.

Coverage Issues

Companies facing such claims for liability by third parties often incur millions of dollars in attorneys' fees. Under the universal rule on the duty to defend, these claims at the least should activate the insurers' obligation to provide a defense, allowing companies facing these allegations to recover their defense costs. If an underlying claim alleges even the mere potential for coverage under power companies' insurance policies, those policies should pay for investigation and other defense costs.

The issue of the insurers' ultimate responsibility to pay for a policyholder's liability in such claims typically depends on the facts and may not be able to be resolved at the outset of a claim. In an effort to avoid paying, insurers often raise a host of coverage issues. The defenses that power companies seeking insurance coverage for coal-ash liability and cleanup costs may encounter include:

· Fraud in the procurement? This defense goes to contract formation, and insurance companies often raise it in an effort to create a complete forfeiture of coverage. This defense is very fact-specific and, like other fact-based defenses, does not preclude the applicability of the insurer's duty to defend. On the merits, the insurer must prove the information in question actually was false—and would have been material to the decision to insure. Policyholders can respond that their insurers knew the business they were insuring—the power industry—and its accompanying risks; and, in any event, the law presumes that insurers understand the risk they are underwriting.

· Trigger of Coverage. Alleged coal-ash contamination often takes place over many years—even decades. As a result, the issue of what event "triggers" coverage under liability and property insurance policies often arises. Because occurrence-based Commercial General Liability ("CGL") and property insurance policies are triggered by damage or injury that took place during the policy period, many years or decades of coverage from such policies—and their limits of liability—should be available to pay for the policyholder's liabilities (if any).

· Property damage? Even if wastewater from a settling pond slowly seeps out over time, it may cause only a minimal amount of environmental contamination. In a recent decision, the court noted that, even though coal-ash wastewater had been leaking into nearby waters, the plaintiffs had shown that only a small amount of contamination had taken place. See Sierra Club v. Va. Elec. & Power Co. , No. 2:15–CV–112, 2017 BL 91848, at *10 (E.D. Va. Mar. 23, 2017). The surrounding body of water was so large that it diluted the amount of contamination to minimal levels. See id. As a result, insurance companies may argue that an insured power company cannot prove that "property damage" took place within the meaning of either its CGL or property insurance policies. However, if the policyholder is required to pay moneys to correct alleged contamination, that should be considered "property damage," often defined as either "injury" or "physical injury" to property. In addition, if coal-ash wastewater leaches into a large body of water nearby or causes other contamination, natural-resources damages, loss-of-use, or other damage may result, presenting another form of covered "property damage."

· Expected or intended injury. Many CGL or property insurance policies include language about injury or damage that is "neither expected nor intended from the standpoint of the insured." In pre-1986 CGL policies, these "expected or intended injury" provisions were included as part of the definition of "occurrence," and it was only in 1986 and thereafter that the "expected or intended" provision was made a true exclusion. Despite its placement, courts have found that this language had exclusionary effects—requiring insurers to bear the burden of proof. In addition, despite the "from the standpoint of the insured" language, policyholders also have had to fight arguments that an objective standard applies to this issue. Under the subjective standard supported by standard CGL policy

language and favored by policyholders, insurance companies often have difficulty proving that the insured actually intended to cause harm. Even under an objective analysis, policyholders may find success when litigating such issues because, for example, the alleged contamination often takes place over many years, and no one understood in decades past that substances like coal ash could cause the kinds of contamination alleged in plaintiffs' lawsuits today. Thus, such damage could not be considered to be "expected" or "intended" under standard-form CGL policies.

· The pollution exclusion. Many insurers often rely on this obvious ground for denying coverage in long-tail environmental damage claims. However, the "sudden and accidental" pollution exclusion did not become a standard feature in standard-form CGL insurance policies until the early 1970s, and the insurance industry did not obtain regulatory approval of the "absolute" pollution exclusion until 1986. Under the "sudden and accidental" pollution exclusion, state law varies about whether the standard should be a temporal one or, based on insurance industry analyses, should be subject to the subjective intent standard used to address the "expected or intended" issue. In addition, many courts have refused to apply the "absolute" exclusion under the facts of a particular insurance program or case. For these reasons, policyholders should not assume that an insurer's effort to use the "pollution exclusion" as a defense to coverage will necessarily prevail in all cases.

· Owned property exclusion. Insurers often argue that the "owned property" exclusion also precludes coverage on the ground that there is no damage or injury to third parties, but only to the policyholders' own property. However, courts have refused to apply this exclusion to preclude coverage when there is actual damage, or the threat of such damage, to another's property, to groundwater, or to natural resources.

Risk-Management Tips

A company facing allegations of environmental contamination stemming from coal-ash operations should:

· Review all potentially applicable insurance policies. Companies should take stock of all potentially applicable insurance policies and review them in detail, identifying those CGL, pollution legal liability ("PLL"), property, and other insurance policies that may apply.

· Consider other people's insurance. Many companies are entitled to coverage under contracts that name them as additional insureds on vendors' and others' insurance policies, or by operation of law. This insurance often provides important additional protection when a significant claim arises.

· Give notice to insurers immediately. Insurance is a matter of state law, and the law varies from state to state on the standards applicable to the timing of notice. Because "late notice" can void insurance coverage, insurance companies often try to negate coverage for environmental liabilities by arguing that the policyholder's notice was "late." Policyholders can avoid this defense by providing prompt notice of possible claims under all potentially applicable coverages, including other people's insurance. In some situations, it may be advisable to give notice of potential claims or "circumstances." Notice can be a factor in triggering coverage also under certain kinds of insurance policies like Bermuda Form policies, providing additional reasons for giving immediate notice. It is important also to ensure that the notice given complies with the provisions in each policy. Because questions about insurance notice can be complex, with different considerations arising under different kinds of policies and coverages, policyholders often are well-advised to seek advice from sophisticated coverage counsel.

· Demand a defense under liability policies. As discussed above, many insurance policies require insurers to provide their insureds with a defense. Under the broad standard courts apply, it is likely that the insurer's duty to defend will apply to paying for defense costs in alleged environmental claims. In seeking a defense, policyholders should use the "magic word" and "demand" that all insurers whose policies include the duty to defend provide a defense and pay for the policyholder's defense costs.

· Address contractual limitation provisions. Property insurance policies typically include provisions that specify a time within which the policyholder must submit a sworn proof of claim or initiate coverage litigation, or both. The times specified can be very short, and courts have held these provisions to be contractual limitations periods. Therefore, policyholders must be aware of the existence of such provisions and either request in writing an extension of those periods or comply with them, to avoid application of a contractual limitations period.

· Consult coverage counsel. Coal-ash and other environmental claims can trigger multiple years and layers of coverage and raise complicated issues. Coverage counsel can help policyholders navigate these complex issues and help ensure that all applicable insurance provides the protection that a company facing these kinds of claims deserves and may need.

Potential liability stemming from coal-ash operations presents a growing source of risk. Insurance can protect against the exposure posed by allegations about coal ash and CCRs and pay for both the defense costs, which can be significant, and liability (if any). Power companies would be wise to ensure that they have the appropriate insurance coverages in place to guard against this exposure and that they give notice to appropriate insurers.

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