Environmental Liability – Picking up the Cost

By Paul Reay, Associate Director Liability

With climate change at the forefront of so many news stories, companies are being forced to behave in a greener and more environmentally ethical way than ever before.

This is commercialising a global problem of pollution and contamination, which has progressively developed over the past two hundred years, since the early days of the industrial revolution.

High-profile catastrophic events, such as the 2010 BP Deepwater Horizon oil spill and the collapse in 2015 of the Samarco Dam, highlight the potentially huge financial implications for corporations. Both incidents are reported to have cost the companies in excess of $50 billion in fines, compensation and clean-up costs.

This is brought into sharp focus in the World Economic Forum’s recently published ‘The Global Risks Report 2020’, where for the first time, the top five economic risks are highlighted as environmental, which includes ‘Human-made environmental disasters’.

In this article, we explore the extent to which corporations’ insurance policies may respond to provide some financial protection in this atmosphere of environmental awareness.
The public appetite to accept any pollution is diminishing, and this is reflected in the Authorities’ approach to environmental clean-up. Throughout the EU, legislation has been introduced enforcing the Environmental Liability Directive 2004, which was enacted in the UK by the snappily titled Environmental Damage (Prevention and Remediation) Regulations 2009.

The Regulations firmly establish a framework for environmental liability, based on the ‘polluter pays’ principle, to prevent and remedy environmental damage. In terms of enforcing the clean-up, the Authorities will now often press for a mix of:

- Direct clean-up costs, that is removing the pollutant, plus
- Restoration of the habitat, including the restocking of the affected flora and fauna, and/or
- Restoration/improvement of alternative complementary habitats. The Environment Agency is now making widespread use of ‘enforcement undertakings’. These are in lieu of prosecutions and seek to press corporations to make ‘voluntary payments’ to local environmental organisations to enable them to improve other habitats.

There is a raft of other Statutes in the UK introducing in effect a regime of strict liability for pollution, including the Environmental Protection Act 1990. This ultimately renders the current owner of land responsible for historic pollution.
Pollution and environmental incidents present some significant challenges to traditional First Party Property and Third Party Public Liability (PL) covers. Traditional Liability insurances have evolved to broadly deal with claims from individuals and organisations, as part of the Common Law. In contrast, environmental matters are increasingly dealt with through Statutes such as those mentioned earlier.

This issue was highlighted in the Bartoline v RSA (2006) case. The Environment Agency (EA) incurred significant costs in clearing two water courses in the aftermath of a fire and subsequent environmental contamination. An indemnity was sought by Bartoline under its PL policy, but failed on the grounds that the claim from the EA was held to be a ‘statutory charge’ as opposed to ‘damages’ – with the latter being covered, but not the former.

In the intervening period, there have been various efforts made by underwriters to amend and extend traditional PL covers, with a view to providing some cover to deal with the above limitation. These extensions are frequently referred to as ‘Bartoline Extensions’.

Limitations remain, which are highlighted by two typical examples of recent claims handled:

1) Gradual escape of diesel fuel from an underground steel pipe.

The pipe linked two 20,000-litre tanks to a delivery pump within a transport hub. The installation was appropriately bunded to contain the contents of the tanks. However, the gradual leakage of fuel from pinholes in the short underground section of pipe went unnoticed until fuel began to enter a large storm water holding tank some distance from the site.

The Authorities were heavily involved, with a major clean-up of the tank owner’s own site, together with water treatment to prevent the contamination of a nearby water course.

Despite much debate, the Underwriters maintained their initial stance that there was no cover under either the First Party Property insurance and there was no damage to any building structure. Further, the PL policy provided no cover for ‘own site’ clean-up costs and, in any event, the gradual pollution exclusion operated.

How will insurance policies respond?
2) Post fire contamination.

Similar issues arose when a large battery recycling plant was destroyed by fire, contaminating the site as well as ground water as pollutants leached from the ground.

The operator of the depot should have dealt with all of the losses, but it went out of business and its insurers declined an indemnity.

The Authorities pursued the landlord to clean up the site and treat the contaminated ground water. Its traditional PL insurance provided neither cover for cleaning up its own site nor the costs incurred by the Authorities, which were deemed a Statutory Charge.

There are serious challenges for traditional first-party and third-party insurances in effectively dealing with many pollution incidents. Particularly as Statutory Regulations become more onerous and with the Authorities taking a harsher approach to their implementation, the financial consequences for a polluter are often serious. Both incidents mentioned above involved costs in excess of £500,000.

It is into this void that specialist environmental policies are now routinely offered by underwriters – often referred to as Environmental Impairment Liability Insurances (EIL). These are bespoke policies but are typically a mix of first-party and third-party covers. They will often include cover for:

- Gradual as well as sudden and accidental incidents – it can be frequently far from clear as to whether an incident is sudden or otherwise.
- Own site clean-up costs – hugely valuable cover for all types of property owner.
- Third Party Liability [including gradual incidents]
- Statutory Liabilities [Bartoline-type cover, including gradual incidents]
- Historic Pollution [subject to a retroactive date].

Conclusion

Environmental claims are often difficult and complex to resolve. Whilst EIL covers don’t make the clean-up any easier, they certainly limit the often-extended debate on policy coverage where there are only traditional covers in place.
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