STRATEGIC INSURANCE CONSIDERATIONS FOR EMERGING COAL ASH BODILY INJURY CLAIMS

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Many utilities with historical coal-fired power plants are confronting increased regulatory scrutiny relating to the storage of coal combustion residuals (CCRs, also known as coal ash).[1] Now, those utilities (and other companies who have stored CCRs) are facing a new liability exposure in the form of bodily injury litigation. This alert offers some thoughts on how insurance may provide coverage for CCR-related bodily injury claims and the steps that a utility may take to maximize this asset.[2]

ALLEGATIONS OF CONNECTIONS BETWEEN CCR IMPOUNDMENTS AND BODILY INJURY

Utilities have seen increased allegations of environmental damage relating to their storage of CCRs over the last few years. These allegations relate to hundreds of active CCR impoundment sites around the country, with allegations by environmental groups of groundwater contamination at the vast majority of those sites.[3] Many other inactive CCR impoundments exist as well.

Now the plaintiffs' bar appears to be turning its attention to CCR-related bodily injury claims. For example, on 29 July 2020, several plaintiffs filed a lawsuit against Georgia Power Company alleging a variety of bodily injuries—including cancer; disorders of the cardiovascular, immune, and other systems; neurological, thyroid, liver, and other damage; and developmental disorders—purportedly resulting from drinking water allegedly contaminated by CCRs discharged from Plant Scherer, a power generating station opened in 1982.[4] According to the complaint, ingestion of CCR-related contaminants over the years has caused those injuries.

Utilities and others who own or operate CCR impoundments (or who previously owned or operated such sites) should be aware of the potential of insurance coverage for CCR-related bodily injury claims.

INSURANCE COVERAGE CONSIDERATIONS

Potential Sources of Coverage

A utility's pre-1986 general liability policies are sources of potential coverage for CCR-related bodily injury claims. Most “occurrence-based” general liability policies issued through the mid-1980s provide coverage for liabilities arising from bodily injury that occurred during the policy period, regardless of when the liability is actually asserted. Starting in the 1985/1986 period, most insurers began inserting so-called “absolute” pollution exclusions in their general liability policies. Such insurers will likely argue that these exclusions preclude coverage for CCR-related bodily injury claims.[5] However, pre-1985 liability policies typically did not have such exclusions and may provide significant coverage for bodily injury claims allegedly arising from exposure to CCR constituents that were in the environment by the time that the policies were issued.[6]

Historical general liability policies, however, are not the only sources of potential coverage for alleged CCR-related bodily injury claims. Current “claims-made” or occurrence-based specialty policies, such as environmental impairment liability or pollution legal liability insurance, often include bodily injury in the covered damages and may insure some costs.[7]

Separate Limits for Bodily Injury and Property Damage

Many insurance policies provide separate coverage, and a separate set of limits of liability, for bodily injury and property damage. Consequently, utilities may be able to obtain coverage for bodily injury claims under policies that have already exhausted their limits for property damage claims, depending upon the language of the policies and any prior insurer settlements (as discussed below).

Likely Insurer Defenses to Coverage

Insurance companies often respond to large environmental coverage claims by asserting a laundry list of alleged defenses and reserving their right to deny coverage. In response to a demand for coverage for CCR-related bodily claims, insurers may decide (regardless of the merits) to assert some of the same defenses that they often rely on in environmental property damage coverage cases. For example, an insurer may contend that coverage is precluded because the utility purportedly “expected or intended” the injuries for which it is seeking coverage. To rebut this defense, a policyholder should develop a thorough understanding of its relevant historical operations and the historical context of those operations. Many activities that may be thought today to present a risk to human health were not so understood historically; indeed, some such activities were consistent with best practices during the relevant periods.

Similarly, even if an insurer's policy does not contain an absolute pollution exclusion of the type discussed above, it may contain a so-called “qualified” pollution exclusion. Such exclusions purport to bar coverage if certain criteria are met, including that the escape of the pollutant was not “sudden” or “accidental.”[8] The interpretations given to these words, and particularly the word “sudden,” vary significantly from jurisdiction to jurisdiction. Specifically, some courts have adopted the insurer-preferred interpretation of “sudden” as meaning “instantaneous.” Based on this interpretation, insurers often argue that any release or damage that occurred over time is not covered. Other courts have held that “sudden” means “unexpected”; utilities may argue based on this interpretation that coverage must be provided, regardless of how long the release or damage was occurring—even over decades—so long as the policyholder did not expect it.

Insurers may also attempt to avoid providing coverage by contending that their policies are not “triggered” by bodily injury claims. Pre-1986 occurrence-based policies are usually triggered by bodily injury that happens during the policy period. As a result, utilities may need to establish that the claimants suffered, or at least allege, injury during the relevant policy periods. Depending upon the nature of potential claims, policyholders may be able to rely upon allegations (without conceding the truth of such allegations) that a claimant was first injured at the time of his or her initial exposure to the CCR-related contaminants and those injuries continued throughout a latency period from initial exposure to manifestation of the disease.

In contrast, post-1986 claims-made policies and specialty policies are generally triggered (assuming no relevant exclusions of coverage) if a claim is first asserted against the policyholder during the policy period.

Whether the policies from which a utility seeks to obtain coverage are pre-1986 occurrence based policies or current claims-made policies, the policyholder should pay attention to the notice requirements in policies that may

provide coverage. Notice provisions may vary from policy to policy, but insurers may assert a late notice defense as a way to try to escape their coverage obligations.

POSSIBLE NEXT STEPS FOR CONSIDERATION

In light of the possibility of future CCR-related bodily injury claims, utilities and others with CCR impoundments may wish to consider the following actions:

- *Identify potential sources of coverage.* Utilities should review their historical and current insurance policies to identify those that may potentially provide coverage for CCR-related bodily injury claims. The review should identify potentially relevant terms and conditions, exclusions, and limit of liability provisions. In addition, policyholders may also consider (i) whether any predecessors had operations that may be encompassed by the alleged liability, and (ii) whether those predecessors had their own insurance policies. Policyholders may also wish to engage an insurance archeologist to identify and obtain evidence of any missing insurance policies.[9]
- *Review past insurance settlements*. Utilities may have reached settlements in the past with their insurers regarding other claims, including environmental claims. Policyholders will want to determine whether these settlements purport to release the insurer from environmental-related bodily injury claims. Even if a settlement included an environmental claim release, that release may apply only to property damage claims and not to bodily injury claims. Releases may also be limited to certain sites. A review of past settlements can clarify the coverage still remaining under historical insurance policies.
- *Analyze potential legal issues.* Insurance coverage claims often involve many disputed legal issues, such as the meaning of "occurrence," trigger, allocation, and number of occurrences. Policy language and applicable caselaw are crucial to resolving these issues.
- *Consider strategic options for pursuing coverage.* If a policyholder faces a claim for CCR-related bodily injuries, options would presumably run the gamut from negotiation with insurers all the way to coverage litigation, with different alternatives in between. To the extent that litigation is an option, a utility should weigh various litigation strategies, including its preferred venue and the claims and parties to be included.
- *Attend to notice requirements.* As discussed above, if a utility determines that one or more policies may provide defense or indemnity coverage for CCR-related bodily injury liabilities, the policyholder should give due consideration to the notice requirements in those policies.

We hope that the foregoing provides a useful guide for any utilities or other companies facing actual or potential claims for alleged CCR-related bodily injuries.

FOOTNOTES

[1] We addressed the availability of insurance coverage for CCR-related environmental property damage in a prior alert. *See* John M. Hagan, Michael J. Lynch & Paul E. Del Vecchio, *Identifying and Preserving Coverage for Alleged Coal Ash Liability*, K&L Gates (March 20, 2019).

[2] This article's discussion of insurance issues should not be misconstrued as a suggestion that any CCR-related

bodily injury claims have merit.

[3] *See* Env't Integrity Project, *Coal's Poisonous Legacy – Groundwater Contaminated by Coal Ash Across the U.S.*(March 4, 2019).

4 *See* Arwood v. Ga. Power Co., Civil No. __, Complaint (July 29, 2020 Ga. Super. Ct. Fulton County); *see also* Max Blau, *Lawsuit says Plant Scherer coal ash is 'poisoning' locals*, GA. Healhealth News (July 29, 2020).

[5] *See*, *e.g.,* Headwaters Res., Inc. v. Ill. Union Ins. Co., 770 F.3d 885 (10th Cir. 2014) (applying an absolute pollution exclusion to a CCR-related property damage claim resulting in a denial of coverage).

[6] Pre-1986 historical general liability policies also often provide coverage for the costs incurred to defend and investigate environmental claims.

[7] Furthermore, to the extent that the facts relating to the operation of a particular CCR impoundment permit a policyholder to argue that CCRs are a “product,” product liability insurance may also be a source of coverage. CCRs have been used in a variety of products, including by way of example only, wallboard, concrete, roofing materials, bricks, and fill material. *See* U.S. Env't Prot. Agency,*Coal Ash Reuse.*

[8] Insurers may argue that these pollution exclusions apply to bodily injury in addition to property damage claims. With some variations between policies, the qualified pollution exclusion typically purports to exclude coverage for:

"bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gasses, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any water course or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental."

[9] Similarly, although we know that many utilities have achieved substantial insurance recoveries for prior environmental and other liabilities, we also know that many policyholders (including utilities) have significant remaining unexhausted historical limits of liability (applicable to bodily injury and/or property damage claims). Even if the generalized view within a company is that its historical insurance program has been exhausted by prior settlements or insurer payments, we suggest that a utility review that premise so that it does not inadvertently relinquish a valuable asset.

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