

Top 10 Technical Fouls to Avoid When Filing Environmental Claims

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Claims are where the rubber meets the road for an insurance policy. For some lines of coverage, like workers' compensation, the protocol for filing claims is routine and automated, with incidents emailed or faxed into a central insurance company location. For others, like environmental policies, claims are infrequent and usually severe. This can present a hurdle to insureds that may be unsure how to begin to file a claim.

Environmental insurance policies are a specialty insurance and, unlike workers' compensation policies, are nonstandard with every carrier having unique policy language and reporting provisions.

Here are the top 10 areas that merit careful attention when a client must file an environmental claim.

1. Late Reporting/Notice (Late Tender)

Although it may seem obvious, when confronted with an emergency response, teams very often neglect to involve or belatedly inform risk management or the insurance manager. A simple solution could be to add the risk manager to the emergency response telephone tree (usually contained in Spill Prevention Control and Countermeasures plans) so you can immediately put the carrier on notice. All policies contain instructions on how to do this by mail, email, phone or fax.

In addition, many carriers offer emergency applications for mobile telephones, for instance, Chubb Environmental Incident Alert. If the carrier has such an app, then have the

Environmental Health & Safety (EH&S) personnel use the app and reap additional benefits such as claims reporting and emergency contractor deployment.

Emergency or not, risk management should be in lock step with EH&S to avoid proceeding and incurring costs before putting the carrier on notice.

2. Consent

Proceeding without consent to remediate or engage counsel can be risky. Many insurance policies contain consent clauses — even property, auto and general liability contain a “voluntary payments” condition. It is relatively easy to get a carrier to consent, particularly

with experienced service providers or other experienced vendors, and the rates charged are reasonable. There may be some discussion as to what is reasonable. However, it is better to know upfront what a carrier is willing to pay and perhaps negotiate a more reasonable rate than to try to survive a challenge that the insured has violated the voluntary payment provision of the policy by proceeding without consent. In that case, there will be little if any leverage to negotiate.

3. Remediating Before Reporting

This is unfortunately an all-too-frequent situation. Just as one would not repair a car before the insurer approved repairs, why would someone expect to remediate before the insurer approved the remedial approach and expenses? However, if acting in a situation that presents an imminent threat to human health or the environment, most carriers make an exception to the consent requirement. In these situations, there are usually timing requirements, such as reporting to the carrier within 72 hours after the pollution condition giving rise to the emergency is discovered. These emergency exception provisions must be carefully evaluated. Coverage and policy wording negotiations are where an environmental specialist can be a valuable asset, as they can modify these clauses to provide broader time spans and definitions of emergency costs. In addition, working with a specialist broker can help guide the insured to make timely notification to the carrier so that the remediation is proceeding with the carrier's involvement and required consent.



4. Who Has 'Knowledge'

A policy is generally intended to provide coverage for unknown pollution conditions discovered or triggering a claim regarding an unknown pollution condition during the policy period. Limiting that knowledge to the right personnel can be important.

This is not about concealment, but rather, looking at the practicalities of the insured's organization and the policy. Environmental policy forms can broadly include every employee within the scope of the definition of an insured, from the groundskeepers to the CEO. If the policy is triggered by discovery of a pollution incident by an "insured," then something that is discovered by the groundskeeping staff could be deemed as knowledge to the organization. If that staff member does not inform the risk management team of the incident, the organization may have a fundamental issue about triggering coverage as well as an issue with a known pollution condition in a subsequent policy term.

Specialists can work with the insured to tailor knowledge clauses to the appropriate persons within the organization.

5. Forgetting to Include an Insured

There have been many battles with insurers on this point. Unfortunately, some insureds purchase a policy, put it in a drawer and dust it off when they think they need it (often after the pollution has been remediated). This can be particularly true for environmental policies that are often written on a multiyear basis of three, five and increasingly rare, 10-year durations. Mergers, acquisitions, joint ventures and other contractual obligations sometimes require policy modifications. Remember that an environmental policy is a dynamic asset that deserves attention whenever there is a change in an insured's operations or ownership structure.

6. Inadequate Documentation of Damages

The quantum of backup documentation requirements varies by carrier. At a minimum, carriers will be looking for a scope of work for a remediation and litigation strategy for a lawsuit. Carriers will be looking for a budget of the expected cost of the remediation or litigation. Documentation supporting the source of the pollution conditions (in the circumstance of a remediation) and any correspondence with the claimant (in the circumstance of litigation) will be a necessary part of the claim. As with any prudent business, maintaining records will be critical to avoid parts of a claim being denied because the insured cannot show the worker was in the field doing what they said they did.

7. Not Understanding What Coverage Is Provided by the Environmental Policy

Insureds want an environmental policy to cover what their other property and casualty

policies exclude, plus more. An environmental policy may provide some of this coverage. However, it may not completely dovetail with other property and casualty policies, particularly in regard to pre-existing pollution conditions, off-site operations or ancillary operations. There are many misconceptions of the liabilities an environmental policy can cover, including asbestos litigation, Superfund Potential Responsible Party (PRP) information requests, disposal operations, product liability, business interruption and restoration costs. Many of these coverage gaps may be addressed by environmental liability policies, but some, especially remediation of known actionable conditions or asbestos liability associated with a product or historic operations, cannot be addressed.

A specialist broker is a key advisor and EH&S colleagues, and like risk managers, should understand what risk transfer they can expect from an environmental policy. The more information provided to the insurance company, the better the opportunity for more expansive coverage. If the information is limited, carriers may only be willing to provide coverage for conditions resulting after the policy inception date.

8. Forgetting to Involve a Specialist Broker

There are trusted advisors for many different issues, including legal, financial, engineering and consulting. An environmental insurance broker should be in that group, because when involved from the outset of a claim, they can help make a difference in whether a claim is accepted, denied or settled for more or less money.

9. Not Questioning a Reservation of Rights or Not Responding

The most likely first response by an insurance company to a reported claim is a reservation of rights letter. This is supposed to let an insured know that the insurer is willing to investigate a claim and may deny coverage at some point in the future. Do not ignore these letters or an outright denial of coverage letter. Instead, consult with advisors and respond in a cooperative manner without giving up any rights under the policy.

Many environmental policies contain specialized wording tailored by an environmental insurance broker to match specific negotiated coverage. Brokers and attorneys are advocates

for coverage, so involve them in a response to a carrier and keep records of the information provided.

10. Unscheduled Assets

Like forgetting to add an insured or additional insureds, do not forget to add acquired assets or other business elements that require coverage. Confusion with addresses can also lead to a carrier claiming that a particular location is not included for coverage. When policies are negotiated, look to the broadest description of a covered property or asset as is available and ask for the legal description to be included in policy documents and underwriting submissions. 