

## PLAYING "GOTCHA!" - KEY NOTICE PROVISIONS YOU CAN'T AFFORD TO MISS

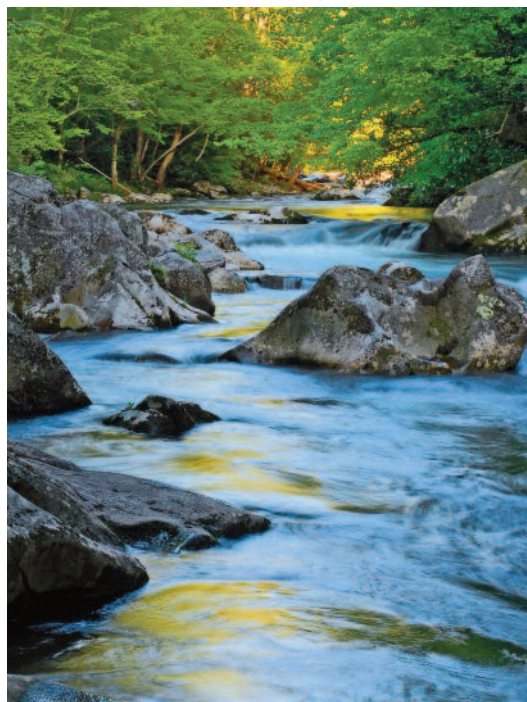
In the sea of manuscript endorsements, environmental nomenclature and legal jargon included in many environmental policies purchased today, several standard provisions are often overlooked as run-of-the-mill contractual provisions of no particular importance. In the event of a claim, however, an insured who runs afoul of the notice provisions of their environmental insurance policy does so at great risk.

### LATE NOTICE AND CHOICE OF LAW

For the most part, environmental insurance policies are written on a claims-made basis, meaning notice of a claim and relevant supporting information must be made to the carrier within the policy period or within a specific time after a loss. States differ in how they treat situations where an insured has not notified its insurer in a timely manner after a loss. While the majority of states apply the "notice prejudice" rule (which requires an insurer to show that the Late Notice prejudiced it before it can disclaim coverage), a minority of states, including New York, applies the "no prejudice" rule, which allows an insurer to disclaim coverage after Late Notice, regardless of whether it has been prejudiced.

Not coincidentally, many environmental carriers have Choice of Law provisions embedded in their policy form specifically identifying New York State law as controlling. As a result, New York's application of the no-prejudice rule can leave an insured without coverage for seemingly insignificant delays.

While it is true that New York State recently passed legislation changing its approach to Late Notice, it appears that pure claims-made policies are exempt from the new legislation. As such, it is important to review the policy to see if there is a standard Choice of Law provision. If there is and it references New York law, serious consideration should be made to negotiating the removal of that provision in its entirety, thereby leaving the policy "silent." Or, one may determine, with the consent of the insured's counsel, an alternative preferred jurisdiction for Choice of Law purposes.



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### VOLUNTARY PAYMENTS

A corollary to a carrier's Late Notice defense is the Voluntary Payments provision found in many environmental policies. A typical Voluntary Payments provision states that the insured may not voluntarily make any payment or incur any expense or charge, or assume any remediation without the insurance company's written consent. Typically, a very limited exception is made for emergency response costs associated with remediating a pollution condition.

**How far must an insured go to satisfy the obligation to mitigate? What is sufficient? The law relies on the somewhat nebulous concept of “reasonableness.” An insured’s conduct in the mitigation of its damages is judged on the basis of what an ordinary prudent person would have done under the same or similar circumstances. The burden is typically on the insurer to show how further loss could have been avoided through the insured’s reasonable efforts to mitigate damages. What may be considered reasonable will be fact-specific to each particular claim, but generally speaking an insured is not required to engage in heroic acts.**

As an alternative to relying on the policy’s notice provisions to deny a claim, a carrier may argue that they are relieved of the duty to pay certain claim expenses, such as defense costs or clean up costs, because they were incurred prior to the insured tendering the claim to the carrier.

It is therefore imperative that risk managers, and anyone else dealing with pollution matters, be aware of this key policy provision, and remember that it includes less obvious potential pollution issues (such as water intrusion which can lead to mold). In order to preserve the right to an insurance recovery, carriers should be notified immediately if there is a lawsuit, claim or pollution release that will require the insured to spend money to address. Even with a large deductible, carriers take a dim view of a notice of claim presented alongside a stack of invoices for work that has been completed, or pollution that has been remediated prior to their knowledge of the matter, even if the claim and associated costs were made and incurred during the policy period.

When an environmental incident occurs, the focus may be on responding quickly to the pollution condition and trying to mitigate or control the situation. While that is an admirable goal, over-zealous policy holders must be cognizant of the impact of decisions made prior to notifying an insurance carrier. Failure to abide by the Voluntary Payments provision could possibly result in a forfeiture of otherwise available insurance coverage. Accordingly, it is essential that insureds are aware of, understand and comply with this very important provision.

## **DUTY TO MITIGATE**

In addition to Late Notice, Choice of Law and Voluntary Payments issues, there is another concept that insureds must be mindful of when a pollution claim occurs – the duty to mitigate (sometimes referred to in legal circles as the “doctrine of avoidable circumstances”). It requires an insured to minimize the effects and losses resulting from the occurrence or incidents which give rise to their claim. The rationale is to discourage the insured from abdicating their responsibilities in the event of a claim by allowing a pollution condition to continue or intensify.

The duty of the insured to mitigate damages may be found in either or both of two places: the policy itself or the common law. Many, though not all, Environmental insurance policies contain provisions which expressly require the insured to mitigate damages upon the occurrence of a pollution condition. Where the policy does not contain an express provision requiring the insured to mitigate its damages, the duty may be imposed upon the insured by the common law. Unlike Late Notice and Voluntary Payments issues, an insured’s failure to mitigate damages may not, in and of itself, result in a complete bar to recovery, but rather may reduce the amount of damages an insured can recover.

How far must an insured go to satisfy the obligation to mitigate? What is sufficient? The law relies on the somewhat nebulous concept of “reasonableness.” An insured’s conduct in the mitigation of its damages is judged on the basis of what an ordinary prudent person would have done under the same or similar circumstances. The burden is typically on the insurer to show how further loss could have been avoided through the insured’s reasonable efforts to mitigate damages. What may be considered reasonable will be fact-specific to each particular claim, but generally speaking an insured is not required to engage in heroic acts. The good faith effort made, expense involved and level of expertise required to mitigate a pollution condition, as well as what may be necessary to comply with environmental laws may all be factors in determining if an insured’s efforts to mitigate were reasonable. Typically, the costs

associated with mitigating the damages are covered by the Environmental insurer under the insuring agreement itself, as an emergency expense or as an exception to the Voluntary Payments exclusion. However, if litigation is involved, particularly in the construction defect/water intrusion/mold context, the insured must also be mindful of the need to preserve evidence while trying to mitigate damages. In such instances rapid and frequent communication with the claim adjuster is critically important.

## OTHER ISSUES TO CONSIDER AND GENERAL COMMENTS

The above serves as a reminder that these policies are *contracts* with specific coverage nuances and claim provisions built into the form and/or further modified by endorsement. These provisions must be understood and followed as closely as possible to reduce the potential for coverage disputes. There are also different policy-specific requirements associated with different types of policies to consider.

For instance, *Cost Cap/Cost Overrun* policies typically require:

- Monthly or quarterly progress reports
- Notification of any changes in the remedial plan
- Notification of any increased quantities, concentration or dispersion of pollutants
- Notification of the discovery of pollutants beyond the boundaries of an insured property or work plan area
- Notification of the discovery of pollutants different from those identified in the remedial plan
- Provisions that require that the insured only perform work as outlined in the definition of clean-up detailed in the policy.

*Site Pollution Liability* policies typically require notification of:

- Any acquisition, sale or transfer of an insured property
- A change in intended/future site use

Always remember that it's best practice to provide immediate written notice during the policy period. If it's gnawing at you, it is probably a problem. Always err on the conservative side, and if you are not sure about reporting a claim – report it anyway (insurers can deny coverage for failure to timely report). And, of course, if you have questions, contact the Willis Environmental Practice.

## NANOTECHNOLOGY - SMALL PARTICLES, BIG EXPOSURE?

In layman's terms, nanoscience and nanotechnology are the study and application of extremely small things that can be used across all the other science fields, such as chemistry, biology, physics, materials science and engineering where unique properties enable novel applications. Nanotechnology has resulted in sunscreens you can't see, clothes that don't wrinkle, paint coatings that don't scratch, bicycle frames that are lighter and stronger, and many other product advancements. By 2015, nanotechnology will likely impact \$3.1 trillion worth of products across the value chain, from consumer products to food and medicine, according to Lux Research.

With any new technology and product application comes the potential for liability. The environmental insurance marketplace has been studying this area closely. We have not yet seen an affirmative coverage grant or specific exclusions relative to nanotechnology on pollution policies in general. However, some carriers have agreed to give it a serious look and possibly modify their definition of “Pollution Conditions” to include nanotechnologies (although many could argue that the current definition of Pollution Conditions is broad enough to include/encompass these particles). It’s an emerging issue/risk similar to what we’ve seen in the past with mold and Legionnaire’s disease. You will recall that these exposures/risks weren’t specifically included or referenced in the Site Pollution Liability or Contractor’s Pollution Liability policies, then suddenly they were excluded. Soon after that they were specifically underwritten and covered with affirmative wording for additional premium (or explicitly excluded if there was specific underwriting concern).

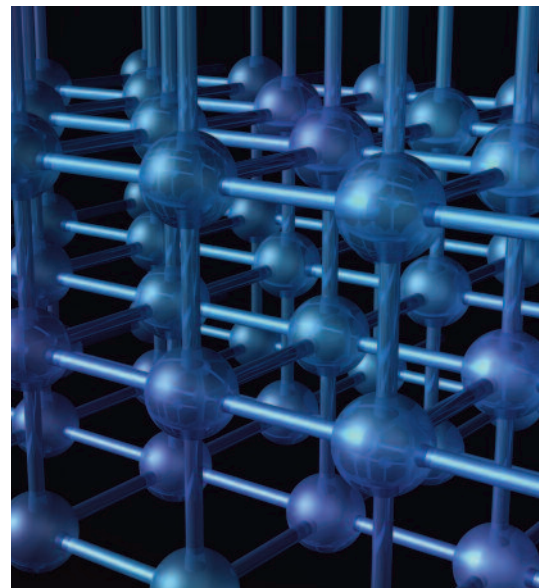
It would appear that the best fit would be under a combined CGL/Pollution policy, since the exposure is more akin to “products” and, in particular, “products pollution” and, plausibly, “products recall.”

It appears that only Chartis, via Lexington, has developed a product (Nanoshield) designed specifically for companies with nanotechnology exposures. It is currently being marketed to address both products pollution and products recall under one policy. Willis closely monitors the insurance markets and their appetite in this area so stay tuned for more information as the markets continue to define their underwriting appetite and respond with coverage offerings.

## NEW U.S. STANDARD FOR MERCURY POLLUTION

In March of this year, the U.S. EPA proposed the first-ever national standards for mercury, arsenic and other toxic air pollution from power plants. This new Power Plant Mercury and Air Toxic Standards would *“require many power plants to install widely available, proven pollution control technologies to cut harmful emissions of mercury, arsenic, chromium, nickel and acid gases, while preventing as many as 17,000 premature deaths and 11,000 heart attacks a year. The new proposed standards would also provide particular health benefits for children, preventing 120,000 cases of childhood asthma symptoms and about 11,000 fewer cases of acute bronchitis among children each year. The proposed standards would also avert over 12,000 emergency room visits and hospital admissions and 850,000 fewer days of work missed due to illness”* according to the EPA’s 3/16/11 Press Release (for more information, go to <http://www.epa.gov/airquality/powerplanttoxics/>). This could also have a wide reaching impact beyond utilities.

New regulatory environmental standards, requirements and enforcement activities accompanied by science and media attention, always bring a heightened sense of awareness and the potential for new litigation and exposures. As a result, we’ve seen an uptick in interest from our clients for environmental insurance with the intention of protecting against third-party bodily injury, property damage, cleanup costs and legal defense as insurance becomes ever more important in managing their environmental liabilities and risks.





## EVENTS

### UPCOMING EVENTS

- **UNEP FI** Willis Environmental Practice Leader Rick Hawkinberry will attend the United Nations Environment Programme Finance Initiative (UNEP FI) Principles for Sustainable Insurance (PSI) in Guelph, Ontario, June 12-13. The UNEP FI is a strategic public-private partnership between the United Nations's designated entity for addressing environmental issues at the global and regional levels, and the global financial sector. While attending the North American regional consultation meetings Rick will participate in interactive workshops, brainstorming sessions and roundtable discussions to offer input for the draft principles of PSI.

### RECENT EVENTS

The Environmental Practice has been busy this spring participating in many regional and national events:

- **ASSOCIATION OF DEFENSE COMMUNITIES WINTER FORUM** Brian McBride and Cliff Yeckes both attended this conference in February and Cliff presented as part of a panel on Formerly Used Defense Sites (FUDS).
- **EPA'S BROWNFIELDS CONFERENCE** The Practice was an exhibitor at this April conference in Philadelphia and several Practice members were in attendance. In addition, Rich Sheldon moderated a panel on "Emerging Developments in Environmental Insurance: Challenges, Trends and the Impact on Brownfield Development," which included speakers from different environmental insurers and was very well attended. The Practice also co-sponsored a networking event during the conference.
- **WILLIS ENERGY CONFERENCE** Also during April, Keith Jurss presented "Energy Industry Environmental Risk: Environmental Risk Management/Risk Transfer Issues" at Willis' first Energy Conference.

- **2011 SME ANNUAL MEETING & EXHIBIT AND COLORADO MINING ASSOCIATION 113<sup>TH</sup> NATIONAL WESTERN MINING CONFERENCE** Cliff Yeckes presented "Obtaining Hard Rock Financial Assurance – The State of the Marketplace" at this Denver conference in March.
- **THE ABA'S 40<sup>TH</sup> ANNUAL CONFERENCE ON ENVIRONMENTAL LAW** Cliff Yeckes was part of a panel of speakers that presented "A New Brownfield Economy – Recognizing the Risks and the Market" at this March event.
- **RIMS 2011 IN VANCOUVER, B.C.** Rick Hawkinberry attended RIMS 2011 and presented four workshops at the Willis Capabilities Buffet at the Willis booth in the Exhibit Hall. Topics included Global Environmental Liability, Distressed Assets & Environmental Insurance, and Environmental Risk in the Health Care Industry.
- **RTM COMMUNICATIONS CONFERENCE IN SAN FRANCISCO** Anthony Wagar, Carole Carretta and David Orleans attended this early May conference: "Sustainable Property Transactions: Managing Distressed Assets and Renewable Energy Opportunities." Anthony moderated a panel session on "Distressed Asset Deals and Environmental Risk Management Strategies for Getting the Best Value."

If you would like additional information on any of the events or topics mentioned above, please reach out to your local Environmental team contact.

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We also invite you to visit our [website](#) for past publications or other information about environmental issues.

*The observations, comments and suggestions we have made in this publication are advisory and are not intended nor should they be taken as legal advice. Please contact your own legal adviser for an analysis of your specific facts and circumstances.*

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