

ALERT

Insurance Coverage for the Animas River Spill

By Rhonda D. Orin and Marshall Gilinsky

On August 5, the Environmental Protection Agency acknowledged in a press release that, in the course of examining a gold mine that has been shuttered since 1923, the EPA “unexpectedly triggered a large release of mine waste water into the upper portions of Cement Creek.” Cement Creek is a tributary of the Animas River, a popular Colorado recreation spot. While the toxic nature of the waste water is currently unknown, what is known is that the waters downstream of the spill have turned an unnatural bright orange.

Many businesses may face losses as a result of the spill, either now or in the near future. As the discolored waters flow through Colorado and into New Mexico, Utah and Arizona, this is the time for all businesses that are potentially affected — whether directly or indirectly — to pull out their insurance policies, review their notice provisions and give notice immediately of potential future claims.

The EPA has published an Emergency Response to August 2015 Release from Gold King Mine, instructing those who have suffered personal injury or property damage to file a claim using Standard Form 95. Filing such a claim, however, should not prevent businesses from providing prompt notice to all insurance companies that have issued potentially responsive policies. It is not possible to know, at this early stage, which, if any, losses will fall under the responsibility of insurance policies and which, if any, of them will ultimately be compensated by the EPA.

What Types of Losses May Be Covered?

Business interruption is one type of loss that businesses may suffer in this unusual situation. The spill is deadly for the tourist industry, especially coming in the peak of vacation season. Its impact extends for hundreds of miles, as the orange-hued waters flow into the San Juan River in New Mexico, then head for the massive recreational center of Lake Powell, which borders Utah and Arizona. Up and down the river, businesses involving agriculture and livestock are also being affected.

Another type of loss that may take place is property damage. Growing crops that would ordinarily be harvested in the future may end up being destroyed, due to their exposure to the unknown substances. Moreover, some local entities, such as the Navajo Nation, already have announced their intentions to sue the EPA as well as the owners of the Gold King

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Mine near Silverton, Colorado, which is the shuttered mine that was breached by the EPA inspectors. Other defendants may end up being added to that list.

First-party property and business interruption insurance should provide coverage for many of these losses, to the extent that they are not compensated through other means. Liability insurance, both general liability and pollution liability policies, should provide defense and indemnity for any entities that find themselves embroiled in litigation, which can be expensive even if it turns out that the lawsuits were misdirected and baseless. Still further, if there are derivative lawsuits against directors and officers, directors and officers (D&O) insurance may provide protection against them as well.

First-Party Property and Business Interruption Losses

The massive spill may cause extensive property losses, business interruption losses and contingent business interruption to entities all along the affected watercourses. Such businesses could range from motels and hotels to recreational outlets to standard residential and business operations.

In addition to coverage for damage to tangible property, business owners should look to the business interruption coverage included in most business property policies. Business interruption or contingent business interruption coverage is designed to protect businesses from losses stemming from unavoidable interruptions in their daily operations. Business interruption coverage may apply in a variety of circumstances, such as a forced shutdown, a downturn in business due to the damage from the spill, or a substantial impairment in access to products, services, or a business' physical plant or premises.

Because the economic effects of the spill may extend from Cement Creek in Colorado all the way to Lake Powell in Arizona, if not beyond, businesses that service the directly affected businesses may also be eligible to file contingent business interruption claims. Contingent business interruption is also a standard coverage grant in many property insurance policies, though many small businesses are not aware of it.

Contingent business interruption covers policyholders that did not suffer physical damage but still lost revenue after a property loss crippled a major supplier or customer. For example, a food wholesaler or kayak manufacturer located elsewhere in the country may be safe from the waters of the spill, but nevertheless may suffer losses because of a decrease in business income.

Liability Insurance

The Navajo Nation's announcement of its intention to sue indicates that allegations of liability will come into play. Companies facing liabilities arising from the spill can look for defense and indemnity from their liability insurance coverage. Both general liability insurance policies and pollution liability insurance policies may respond to claims. In this unusual situation, where the fault appears to rest squarely on the EPA, the principal benefit of such insurance may



come from its dual purpose as “litigation insurance.” Liability policies should enable businesses to avoid bearing the defense costs that are involved in getting baseless lawsuits dismissed.

Directors & Officers Insurance

Although derivative actions are hard to imagine in this unusual situation, stranger things have happened. Since it is better to be safe than sorry, any business that is potentially at risk of being targeted by angry residents and/or visitors to the region should take the precaution of identifying and reviewing their D&O policies now. D&O insurance may be available to provide defense and indemnity of directors and officers who are wrongfully tagged with baseless claims.

Steps to Take

If you are at risk for any of these types of losses, please do the following:

- Locate all of your insurance policies;
- Evaluate your first-party property, liability and D&O coverage;
- Remember that property damage, business income, contingent business income and extra expense coverage may be available;
- Remember that coverage may be available even without direct physical loss or damage;
- Give notice to all levels of coverage;
- Secure tolling agreements with your insurance company to protect your rights;
- Undertake thorough emergency responses and preservation of property;
- Consider obtaining help in submitting your claim, *e.g.*, from your broker, public adjuster and attorney;
- Consider whether insurance coverage may be available under other insurance policies.

Taking these steps now should help you to secure the insurance coverage for which you paid precious premium dollars years ago — and which you may be entitled to receive tomorrow. ▲

