

# Environmental Risk Trends

by John G. Nevius and Joshua Gold

With a new administration in Washington, environmental regulatory enforcement is expected to increase. While the insurance industry has responded with new specialty insurance products aimed at environmental risks, the utility of these products and the framing of potential claim disputes remains the subject of speculation. This will likely cause conflicts between corporate policyholders and the insurance industry as insurers struggle to properly underwrite these risks under the shadow of new regulations and a shifting set of national priorities. Certain key areas merit specific attention:

**Asbestos.** Asbestos remains an environmental risk issue, but several specialty insurance products have emerged to manage the risk of residual liabilities. The insurance industry will claim that it has various creative solutions to address asbestos perils, but many specialty policies are not customer friendly. Sound risk management also requires determining what existing and historic insurance assets in the business' portfolio could be used to cover the expenses of asbestos-related injury or damage.

**Environmental specialty products.** Many newer environmental coverage products involve surplus lines insurance companies, but traditional insurance companies still remain in the mix. Liberty Mutual has retrenched and laid off employees in the wake of its purchase of Safeco last year, and its appetite for environmental risks appears to have diminished. AIG Environmental remains open for business, but its free-wheeling days may be over with the recent departures of its long-time chairman and president. Quanta Holdings, which consisted largely of a former Chubb underwriting team and styled itself as a Brownfield redevelopment facilitator, has been bought by Catalina Holdings and is no longer writing business. XL, ACE and Zurich remain in the environmental coverage business, but continue to be selective about underwriting coverage and paying claims.

**Historic insurance assets.** There is still value in old policies. The various forms of the polluter's exclusion continue to represent a significant issue in insurance policies circa-1970 or later, with insurance companies regularly arguing that their general liability policies do not cover environmental damage or injury. Decisions around the country, however, have rejected blanket efforts by insurance companies to reduce or eliminate their coverage obligations. In March, the California

Supreme Court decided an important case, ruling that when a loss results from both covered and noncovered causes (but the policyholder is unable to identify how much damage resulted from noncovered losses), the policyholder is entitled to coverage for the entire loss up to its policy limits.

The court also ruled against the insurance companies regarding a qualified "polluter's exclusion" in their policies. To deny coverage based on a polluter's exclusion, held the court, an insurance company must prove that the policyholder not only meant to place waste into a site, but also expected or intended that it would then leak out or be discharged to pollute the environment.

**Climate change.** In the context of anticipated climate change litigation, insurance companies may try to argue that policyholders intended to affect the environment. As claims relating to climate change pick up and potentially gain traction, additional attempts at stretching the application of the polluter's exclusion and marketing new specialty insurance coverage policies are likely. In fact, one key case is pending in California federal court involving an Inuit Native American community that was damaged, in part, by rising sea levels. Other recent California cases of note identified umbrella coverage as an antidote to administrative environmental actions. Umbrella coverage may become significant in the event that the Environmental Protection Agency focuses policies and enforcement against entities it asserts have caused climate change.

**MTBE and petroleum products.** For many years, methyl tert-butyl ether (MTBE) was added to gasoline to boost octane levels as a replacement for lead. The asbestos plaintiffs' bar continues its efforts to make an issue out of the use of this product and to tag the petroleum industry with class action liability. Just as with asbestos, a big issue here will be the duty to defend and any exclusions on coverage, including alleged prejudice arising out of untimely notice. ■

