

Farm Liability & Pollution

It's More Than Just Dicamba

- **Black's Law Dictionary, 2nd edition online**

- The presence of harmful substances (either physical or gaseous), noise or energy (radiation), within a certain area, that causes harm to the surroundings, altering the natural environment around which it has been excreted.

Pollution Defined

- **CGL & FLCF – current editions**
- The emission, discharge, release or escape of pollutants into or upon land, the atmosphere, or any watercourse or body of water.
- “Pollutants” defined as: any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis and waste. “Waste” includes materials to be recycled, reconditioned or reclaimed.

Pollution Defined

- **Environmental Liability Coverage Form**

- The discharge, dispersal, release, escape or illicit abandonment of any solid, liquid, gaseous or thermal irritant or contaminant, including, but not limited to, smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, hazardous substances, low level radioactive material, electromagnetic fields, medical waste and waste materials.

Pollution Defined

Risk Characteristics

	High Frequency	Low Frequency
High Severity	OUCH!	Insurance
Low Severity	Retention & Reduction	WHAT, me worry?

- Identify Potential Exposures
 - Ag ops at risk
 - Consequences of an event
 - Potential damages
 - Imposition of liability
 - Strict or absolute – does it matter?
 - Statutes & regulations relating to Ag pollution

Risk Management Perspective



Federal Regulations to Consider

- Clean Air Act of 1963
- Resource Conservation & Recovery Act of 1976 (RCRA)
- Comprehensive Environmental Response, Compensation & Liability Act of 1980 (CERCLA)
- Superfund Amendments & Reauthorization Act of 1986 (SARA)

USC of Federal Regs, Title 40

- Set national emissions standards for hazardous air pollutants
- Established EPA in 1970
- Clean Water Act of 1972
 - Regulates water discharges
 - Requires states to establish water quality controls

Clean Air Act of 1963

- Applies to treatment, handling, storage, and disposal of hazardous wastes
- Cradle to grave responsibility
- Regulates solid and liquid wastes
- Non hazardous solids left to states/locals

- Amended in 1984 – Hazardous & Solid Waste Amendments (next slide)

Resource Conservation & Recovery Act of 1976 (RCRA)

- Regulates USTs
- Includes financial responsibility regulations for USTs
- Technical regs too – must meet certain structural integrity issues
- Financial Responsibility – demonstrate an ability to respond in a financially responsible manner

Amendments to RCRA

- Provided for:
 - Prohibitions & requirements concerning closed and abandoned hazardous waste sites
 - Provided for liability of persons responsible for release of hazardous waste at those sites
 - Established a trust fund to provide for cleanup when no responsible party could be identified or found

Comprehensive Environmental Response, Compensation & Liability Act of 1980 (CERCLA)

- Multiple laws subsequently passed
 - Federal, State, Local during past 30 years
- EPA oversees ALL Federal programs
- EPA oversees ALL Federal impact guidelines & implementation thereof

Today's Issues

- EPA ordered clean-up
- EPA can undertake the clean-up and then file to recover incurred costs
- EPA does send letters to PRPs – notifying them of their responsibilities

Potential Damages Under CERCLA

- Potentially Responsible Party (PRP)
- Current owners/operators of hazardous waste facilities
- Past owners/operators
- Generators of hazardous waste
- Transporters of hazardous waste

Don't Be A PRP !

- Liability is JOINT & SEVERAL
- **Joint** – all parties together are held liable
- **Severable** – each party is individually liable (or only a select few may enjoy liability, but not necessarily all of them)

Liability

- Remediation is mandated to restore air, land or water to safe levels
- May not have a coverage trigger for traditional liability policy response
- Even if endorsed – gaps in coverage remain between exposures and coverages

Clean-Up & Containment

- There are THREE:
- Innocent landowner
- Bona fide purchaser
- Adjacent property owner

CERCLA Exemptions

- Did not contribute to the hazardous substances
- Did not know or have reason to know
- Property acquired by inheritance or bequest
- Completion of AAI (All Appropriate Inquiries)
- NO protection for the current property owner when hazardous substances are released

Innocent Landowner

- Ownership acquires after Jan. 1, 2005
- Release happened prior to purchase date
- No connection with the PRP other than the purchase
- Completion of the AAI
- Proper handling of hazardous materials
- Cooperated with Agency's mandated remedial work, contractors, etc.

Bona Fide Purchaser

- No potential liability or connection with the PRP
- Must complete an AAI for their property
- Did not cause, contribute or consent to release of the substances
- NO knowledge and NO reason to know of the release

Adjacent Property Owner

- Inquiry & report filed by a qualified environmental professional
- Visual inspections of the property and adjacent properties
- Interviews with past and current owners, operators and the like
- Review performed of:
 - Historical sources back to the first obvious use of the property
 - Government records
 - Commonly known or reasonably obtained documentation

Final AAI Rule

- Evaluation of the information
- Data gaps and their significance
- Inquiry by the property purchase for
 - Environmental clean-up liens against the property
 - Purchase price as compared to fair market value of similar properties
- AAI conducted within 1 year of purchase
- If prior to 180 days of purchase – certain information will require a further update

Final AAI Rule

- Insurable vs. uninsurable losses
- Risk Management
- Risk Transfer

Environmental Site Assessments

- Losses must be fortuitous to be covered
- Insurance covers risk of loss
- Insurance does not provide coverage for certainties
- For first party losses – no coverage for losses in progress or one that has already occurred

Fortuity of Loss Doctrine

- Based upon an occurrence
- Depends upon the definition of occurrence
- Split in authorities between Federal and State courts as to what constitutes an "accident"
- Fortuity of loss doctrine applies
- Application of doctrine regarding losses in progress

Third Party Losses (Liability)

- Pollution could be deemed an intentional act
- Known loss doctrine – knowledge of past pollution may void coverage
- Loss in progress doctrine – may void coverage
- Developing area of liability...what we do not know may hurt us!

Third Party Losses (Liability)

- EPA-841-F-94-005, 1994
- NPS “comes from many diffuse sources. Nonpoint Source (NPS) pollution is caused by rainfall or snowmelt moving over and through the ground. As the runoff moves, it picks up and carries away natural and human made pollutants, finally depositing them into lakes, rivers, wetlands, coastal waters, and even our underground sources of drinking water.”

Non-Point Source Pollution

- Excess fertilizers, herbicides, insecticides
- Oil, grease, other toxic operating items
- Sediment from crops
- Sediment from forestlands
- Salt from irrigation practices
- Bacteria and nutrients from livestock, pet wastes, faulty septic systems...

Potential NPS Sources



Insurable Pollution

- **ISO and AAIS – Property forms**
- Under the named perils – both Basic and Broad Causes of Loss –
- Pollution is not a covered peril

Pollution Carve-Out and Liability Coverage Basics

Special Form

- Special causes of loss forms exclude:
“...loss or damage caused by or resulting from the discharge, dispersal, seepage, migration, release or escape of “pollutants” unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the “specified causes of loss”. But if the discharge, dispersal, seepage, migration, release or escape of “pollutants” results in a “specified cause of loss”, we will pay for the loss or damage caused by that “specified cause of loss”.

- Specified causes of loss: fire; lightning; explosion; windstorm or hail; smoke, including the emission or puffback of smoke, soot, fumes, or vapors from a boiler, furnace, or related equipment; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice, or sleet; water damage.

Pollution Carve-Out and Liability Coverage Basics

- **Conclusion:** pollution damage caused by a covered peril is covered; if pollution causes the covered peril, only the damage resulting from that peril is covered

Pollution Carve-Out and Liability Coverage Basics

Pollutant Cleanup and Removal Coverage

- FP 00 90 says insurer will pay expenses to extract pollutants from water or land
 - At an insured location
 - If the release was caused by or results from a covered peril
 - During the policy period
 - And expenses are reported to the insurer within 180 days of the loss
- Limit: \$10,000 per location and annual aggregate
 - Can be increased with Pollutant Clean Up and Removal Additional Aggregate Limit of Insurance endorsement (FP 04 22)

- Excludes
- “Bodily injury” or “property damage” arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of “pollutants”:
- (a) at or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any “insured”
- Does not cover monitor or clean up expenses
- No coverage for handling or processing waste

Farm Liability Coverage Form

- Exceptions to the pollution exclusion provide coverage for:
- BI or PD from a “hostile fire”
- BI from the breakdown of HVAC, dehumidifying or equipment used to heat water for personal use by the building’s occupants or guests – this loss has to be sustained within a building and be CAUSED BY these equipment items
- Some insurers add a total pollution exclusion that eliminates even these exceptions

Farm Liability Coverage Form

- Coverage for BI or PD caused by a fire set to burn off vegetation - Full policy limits apply
- Chemical drift coverage
- \$25,000 annual aggregate (may be increased w/UW approval)
- Coverage for Physical Injury to Crops and Animals Due to Certain Crop Dusting Operations Performed by Licensed Independent Contractor by Aircraft (FL 04 44)
- PD coverage with a \$25,000 aggregate limit (may be increased w/UW approval)

Amendatory Endorsement (FL 01 63)

- Same pollution exclusion as the Farm Liability Coverage Form AND The two FLCF endorsements are not available under the CGL
- If one is using the CGL to provide liability coverages for the Farming operations, may want to include:
- Basic Farm Premises Liability coverage form (FL 04 11) which then allows for the use of the Amendatory Endorsement (FL 01 63) to provide for the limited Chemical Drift coverage (\$25,000) AND the coverage for burning off vegetation if it is an approved practice.

The CGL

- Provides coverage to extract “pollutants” from land or water at “insured premises”
- Subject to the selected “cause of loss”
- Limited to \$10,000 in the aggregate
- Higher limits may be purchased
- No testing or monitoring once the clean-up has been completed
 - “Insured premises” means the location shown on the decs, other land you use for “farming” & new premises acquired or leased during the policy period.

AAIS FO-6 Coverage Basics

- BI/PD caused by a fire on the “insured premises” which becomes uncontrollable or breaks out from where it was intended to be
- Is set for the purposes of burning off crop stubble or other vegetation in normal and usual farming operations
- Crop dusting & Spraying Ops (GL-92 end.)
 - Must be applied by an independent contractor
 - Pays for BI/PD selected limit

AAIS GL-2 Coverage Basics

- Some may apply other sublimits
- Foreseeable environmental impairments are not included in coverage forms
- Sudden and accidental types of loss are the normal coverage triggers

Non-Standard Forms



Specific Coverage Forms - Pollution

- Pollution Legal Liability (PLL) aka Environmental Impairment Liability (EIL)
- These policies are designed to protect the insured against liability from unknown, pre-existing and/or known but not actionable as well as new pollution conditions on one's property

- Intended for ANY business with a pollution liability exposure
- ALL policies vary - Key things to review:
 - Who is an insured
 - How is pollution defined
 - What is a claim
 - What are the coverage triggers
 - Definitions of PD & BI
 - What clean-up costs are covered
 - Is transportation covered
 - Exclusions

Their Use

- “Means physical injury, illness, disease, mental anguish, emotional distress, or shock, sustained by any person, including death resulting therefrom, and any prospective medical monitoring costs that are intended to confirm any such physical injury, illness or disease.”

- ACE, PF-44887 (09/14)

BI – One Definition

- 1. Physical injury to, or destruction of, tangible property of a third party, including all resulting loss of use of that property
- 2. Loss of use of tangible property of a third party, that is not physically injured or destroyed
- 3. Diminished value of tangible property owned by a third party
- 4. "Natural Resource Damages"

Property Damage (ACE)

- “Means injury to, destruction of, or loss of, including the resulting loss of value of, fish, wildlife, biota, land, air, water, groundwater, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the USA..., any state, commonwealth or local government, or any Native American Tribe, or, if such resources are subject to trust restriction or alienation, any members of any Native American Tribe, including the reasonable costs of assessing such injury, destruction or loss resulting therefrom.”

“Natural Resource Damages”

- Asbestos
- Contractual
- Criminal fines & penalties
- Divested property
- Work Comp & Employers Liability
- 1st Party PD
- Fraud or misrepresentation
- Intentional issues
- **Known Conditions**
- Non-Owned sites
- USTs
- Material changes in risk
- Products liability
- Lead based paints
- PD to vehicles

Common Exclusions

- Virtually every farm, ranch, ag business has some pollution exposures – many of them are quite significant
- Most do not purchase coverage
- How often do you offer
- How do you document your offers

Some Final Thoughts

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Thank You All!