

TECHNICAL BULLETIN NO. 5
MARCH, 1995



The Reinsurance Research Council
Le Conseil de Recherche en Réassurance

POLLUTION EXCLUSION - GENERAL LIABILITY

Summary

There has been some activity within IBC during the last 18 months on the issue of Environmental Liability, including the extent to which coverage should be available under recommended IBC policy forms. In view of the above, RRC has reviewed its current RRC Pollution Exclusion - General Liability to determine if changes might be required.

It was decided that no changes will be made to the RRC clauses at this time for the following reasons.

1. IBC has expanded coverage to include clean-up costs arising out of any governmental direction or request if consequent upon bodily injury or property damage covered by the policy. This additional coverage requires further study and discussion.
2. IBC is currently reviewing the Environmental Liability exclusion and is expected to make additional changes during 1995.

This situation will be monitored and reviewed again once IBC has completed its project to develop new wordings. RRC is involved in the development of these new wordings. For a more detailed commentary, see the attached report prepared by the Underwriting Research Committee.

RRC POLLUTION EXCLUSION - GENERAL LIABILITY

On March 4, 1994, IBC issued Bulletin No. AMSP94-04 enclosing two newly amended endorsement wordings:

AMENDED POLLUTION LIABILITY EXCLUSION LIMITED POLLUTION LIABILITY COVERAGE (IBC 2313, 2/94)

(This bulletin itself amended an earlier Bulletin No. 93-03 dated December 29, 1993 which had contained some brief explanatory notes for these changes.)

The RRC Casualty Subcommittee has reviewed the current RRC Pollution Exclusion to determine what changes would be necessary to continue to offer concurrent coverage to that provided by primary insurers that adopt these new IBC wordings. The following points are numbered for ease of reference:

1. IBC currently has three “standard” wordings to deal with the pollution exposure in the Commercial General Liability policy:
 - a) Pollution Liability Exclusion (found in the CGL policy)
 - b) Amended Pollution Liability Exclusion (adds cover for smoke)
 - c) Limited Pollution Liability Coverage (IBC 2313)
2. The subject of our discussion is the recent change to 1 b) and 1 c) above.
3. IBC states that “The main purpose of the amendments is to further clarify what has always been the Insurers’ intent, namely to exclude pollution at a location owned or used at any time by an insured.” To a large extent, the wordings were made more explicit in an attempt to close any loopholes that might exist. Your Subcommittee supports these changes.
4. IBC has traditionally adopted pollution wordings introduced by ISO in the United States. Indeed, these latest changes are in response to changes made by ISO.
5. However, IBC has added coverage for clean-up costs arising out of any governmental direction or request if “consequent upon bodily injury or property damage covered by this policy.” This coverage is not contained in the ISO wordings. IBC recognizes that this may be an expansion of coverage and provides the following word of caution to insurers:

“The Committee recommends, if insurers wish to provide separate aggregate limits for clean-up costs, that such provision be clearly stated in order to avoid any confusion with the aggregate limit of the policy applicable to damages. It should clearly indicate whether the aggregate limit for clean-up costs is included or not in the policy aggregate.”

6. Although the IBC Committee recommends that government mandated clean-up costs, monitoring, remedial expenses, etc. should be covered if consequent upon bodily injury or property damage, reinsurers have reservations about the perceived weakening of the exclusion. The additional coverage may lead to massive claims that the industry had sought to contain. *The IBC Committee points out that these wordings are intended for non-hazardous risks only and that hazardous risks should be insured through the use of a completely separate policy.*
7. IBC's role is to recommend policy wordings for use by its member companies. It is the insurance company's decision which wordings it will employ. At this point, it is difficult to predict how many insurers will wish to adopt the new clause. *In fact, IBC is currently re-visiting this topic to implement the coverage recommendations found in the "Report of the Environmental Liability Committee" of August 1994 (see Attachment No. 1). This is expected to lead to further changes to IBC's pollution wordings during 1995.*
8. Historically, RRC has played an integral advisory role in coverage matters. In the pollution area, RRC has sought to recommend clauses concurrent with IBC wordings:
 - (a) When the Amended Pollution Liability Exclusion was introduced in 1986 to deal with "smoke from a hostile fire", reinsurers were concerned that this coverage might not be appropriate for all occupancy classes (eg. plastics manufacturers, tire plants, etc.). Nevertheless, RRC amended its March 1986 wording to provide the additional cover in its November 1986 wording, cautioning members of potential exposures.
 - (b) When IBC introduced IBC2313, Limited Pollution Liability Coverage, RRC responded by producing a new RRC Pollution Exclusion in March 1990. Again, reinsurers were aware that this additional limited coverage might not be appropriate for all operations. Coverage was sometimes withheld, or provided with a limitation on its use (to, say, PLA Classes 1 to 4), where cedents were able to demonstrate their ability to price and underwrite the exposure adequately.

However, due to the uncertainty associated with the inclusion of government clean-up orders, and the fact that IBC is expected to produce revisions in its wordings during 1995, we do not feel that it is appropriate for RRC to revise its recommended Pollution Exclusion at this time.

We suggest that reinsurers review the IBC Report of the Environmental Liability Committee and become involved in coverage discussions prior to the adoption of new pollution wordings by IBC. As respects treaties that provide limited pollution coverage for specified classes of risks, *we suggest that underwriters consider replacing references to PLA classes with classifications described in the IBC Environmental Hazard Guidelines for Commercial General Liability (August 1994), and that reinsurers be completely familiar with the cedent's application of these guidelines.*

Recommendations

1. Review and update the current pollution exclusions used in the IBC Commercial Liability and property forms to ensure reasonable consistency with ISO wordings in the United States.
2. Specific coverage for environmental risk should be an option to be purchased in the property or liability sections of the policy with a separate premium charge. This should be done in one of two ways:
 - a) For businesses exhibiting minimal environmental exposure or low pollution hazards (see IBC Environmental *Hazard Guidelines*, Categories 1 and 2 - Appendix III) coverage should be provided by endorsement or rider, clearly stating what is included or excluded in the policy and on the face sheet.
 - b) For businesses characterized by medium and high pollution hazards (Categories 3 and 4) coverage would be specified in a separate section of the policy (e.g., "Section 6: Pollution"), either to be accepted or declined.

Environmental insurance coverage, as specified above, should be written only on a claims-made basis (to ensure that the reporting of the pollution incident and any related claim takes place within a specific period of time).

3. There should be a separate and distinct limit for any environmental coverages added by endorsement or otherwise to the Commercial Liability or Property policy. Indemnity coverage should be subject to an annual aggregate. Defence costs would be in addition to the policy limit. Some Insurers may still decide to include defence costs within the overall policy limit, depending on the nature of the risk (however, this is not allowed in Quebec under the Civil Code).
4. For first-party clean-ups, the use of a sub-limit may be appropriate. For third-party clean-ups, coverage should be allowed up to the total environmental liability limit because the problem is essentially one of "damages" (bodily injury or property damage).
5. In addition to the above, IBC's Standards and Practices Committee should investigate and make recommendations as appropriate concerning:
 - (a) coverage ambiguities and issues that may result from combining claims-made and occurrence wordings (e.g., as described in 2a, above); and
 - (b) the issue of possible "stacking" of policy limits.