

Can Insurance Help You Pay for Coal-Fired Power Plant Decommissioning?

Environment, Energy & Insurance Alert

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The environmental remediation costs of decommissioning a coal-fired power plant can be chillingly high—in one proposal we recently reviewed, the environmental costs of a 45-year-old plant with four ash ponds approached \$30 million. As more and more rational business actors pull the plug and decide to shut down, is there somewhere besides the rate base to pay for it? The answer may surprise you: insurance. Your policies—not the ones you bought last year, but the ones you bought 35, 40 or more years ago—may provide needed financial assistance. Below we answer some questions that may help coal plant owners and operators navigate the successful pursuit of pollution coverage under their historic policies.

Our plant is scarred by years of unintentional, gradual contamination, not by catastrophic accidents. Is that covered?

In 1965, the insurance industry changed from coverage for “accidents” to coverage for “occurrences.” The “occurrence” definition is almost a mantra to those in the industry: “an accident, event or happening, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.” A letter from a prominent broker at the time described the new scope of coverage as follows: “all policies now cover injury or damage which results not just from ‘accident’ ... but from gradual happenings such as pollution of streams, emanation of effluent from stacks, disposal of waste products, and so forth.” You can see how gradual pollution would fit right into the “continuous or repeated exposure to conditions” language.

I have been told for years that pollution isn’t covered by virtue of the pollution exclusion. Is that wrong?

There are exclusions, sometimes known as the “total pollution exclusion” or the “absolute pollution exclusion,” that may well preclude coverage. Those terms became prevalent around 1985. Before that, policies typically included “sudden and accidental” pollution exclusions (or similar provisions), and before the early 1970s, pollution generally was not excluded at all. Thus, if you can locate policies from the 1950s, 1960s or early 1970s, you may not even have to worry about a pollution exclusion.

For policies from the early 1970s to 1985, the sudden and accidental pollution exclusion may not be a bar to coverage. The

way the exclusion is written, pollution is excluded except if it is “sudden and accidental.” In other words, if there is pollution and its release was “sudden and accidental,” there is coverage. The meaning of “sudden” has been litigated in many jurisdictions, and, notwithstanding insurer arguments that “sudden” means “abrupt” (i.e., gradual pollution is excluded), policyholders have been successful many times in demonstrating that “sudden” is an ambiguous term because it can mean “unexpected.” In that case, gradual releases of contamination are covered as long as the pollution was not expected. (This understanding was recently applied in New Mexico’s highest court, where the author successfully urged the court to apply the interpretation favorable to the policyholder.)

We don’t have copies of policies from decades ago. Is there anything we can do?

Much can be done. Insurance companies often maintain their files and can turn up policy information from many years ago. Private parties have established repositories of information. There is an entire warehouse of Lloyd’s policies resting in Norwich, England. Old contract documents may identify insurance policy numbers. Project files may contain certificates of insurance. Accounting records may identify premium payments and the payee. There are also “insurance archeologists” that make a living locating ancient policies.

The contamination is on our own property; won’t the “owned property” exclusion knock us out?

It certainly could, but the facts need to be examined rigorously before you reach that conclusion. First, you may not “own” the property, but only lease it. Unless the exclusion addresses property in your “care, custody and control,” rather than just property you “own,” the exclusion would not apply. Second, in most states, courts have ruled that if there is groundwater contamination, even if it is on property you own, the exclusion does not apply because the groundwater is owned by the state. Third, if the pollution on your property threatens the property of others, courts have held that the exclusion cannot defeat coverage.

When do I have to give notice?

Many policies require notice to be given as soon as practicable. If you fail to give timely notice, your insurer may argue that you have breached your insurance contract and forfeited coverage. Fortunately for insureds, most states require the insurer to prove prejudice arising from any allegedly late notice. That is a difficult burden.

You should conclude that coverage for pollution arising from the operation of coal-fired generating stations over decades is available. But you should also conclude that your insurers are not going to fall over themselves to write you a check. You will have to work at it.