

With DERF Deadline Looming, Old CGL Insurance can be Vital Protection

As most dry cleaners know, the deadline to enter sites into the Dry Cleaner Environmental Response Fund (DERF) Program is quickly approaching. Simply stated, if soil and groundwater samples are not collected at your site and you have not entered your site into the DERF program by August 30, 2008, you will not be eligible to benefit from the funding mechanism established with the Wisconsin Department of Natural Resources (DNR).

While this program is an excellent source of funding to address environmental investigations and remediations of dry cleaning solvents found in soil and groundwater, it may not cover all costs associated with the investigation and remediation process. The fund is capped at \$500,000 and while that is a significant amount of money, it may not cover the entire costs of remediation. Costs passed on to the dry cleaner include a \$10,000 deductible and a sliding contribution from the dry cleaner of 8% for costs between \$200,00 and \$400,000 and a 10% contribution for costs ranging from \$400,000 to \$500,000. The fund is capped at \$500,000. Additionally no legal fees, subcontractor "markup" fees, or costs for offsite access are included in the DERF program.

Finally, while the DERF program is set up to fund site investigation and remediation projects, the dry cleaner must incur those costs and wait for reimbursement. The estimated reimbursement time frame is somewhere between 1 and 10 years.

With all of that said, what options are available to dry cleaners after August 30, 2008? Well, there is good news and light at the end of the tunnel for many. For those sites that have been in operation before 1985, those dry cleaners can use their old comprehensive general liability (CGL) insurance policies to defend against claims made by governmental agencies or third parties. What that means is that policies issued to dry cleaners before 1985 can be an excellent source of funding to pay for site investigation costs—and even remediation—as well as legal fees. Thanks to a fairly recent decision by the Wisconsin Supreme Court (*Johnson Controls,*

Inc. v. Employers' Insurance of Wausau), which overruled earlier court decisions, environmental cleanup costs incurred in response to a third party or government demand are covered "damages".

This means that nearly every dry cleaner that has been in operation before 1985 needs to locate his or her old CGL policies. If your operation is newer than 1985, but you bought it from a person that operated before 1985, you can work with them to bring his or her old policies to "defend" the claim and address the environmental impairment.

EnviroForensics® is the only consulting firm in the nation representing clients' cases to insurance companies, lawyers, regulatory agencies, banks, landlords and property owners... while compelling insurance companies to pay for the many aspects of an environmental case. EnviroForensics's Stephen Henshaw, registered geologist with over 25 years of experience, has worked on more than one-hundred drycleaning sites, in addition to thousands of others businesses, to remediate contamination in the most cost-effective manner. He answers the most frequently asked questions.

Q. How Important Is Locating My Old Insurance Policies?

A. Old insurance policies are probably the single most important asset that any dry cleaner could have. Old policies can be worth millions of dollars and should be treated as such, by storing them with your most important documents in a safe deposit box or fire proof safe.

Q. What if I Can't Find My old CHL Policies?

A. If you can't find the old CGL policies, one solution would be to hire an insurance archeology

(Continued on Page 30)

DERF Deadline Looming...

(Continued from Page 29)

firm to locate those policies. An experienced Insurance Archeology firm knows where to look to reconstruct old insurance programs by finding the old policies or evidence of insurance such as payment records or other documentation.

Q. Do I Need To Find All Of My Old Insurance?

A. No. Often times one year of coverage can be enough for an insurance carrier to provide a defense against a claim. The insurance carriers defense obligation does not have a limit or set amount, unlike the indemnity portion of an insurance policy, which could be the policy limit amount. Remember that the defense includes conducting site investigation activities to asses your liability and legal fees.

Q. What Other Information Should I Know?

A. You should document how long you have been at your site, who you bought the business from (if applicable), the names of your insurance brokers, who you bought dry cleaning solvent from and how much, and any other historical business operation information.

Q. What Should I Do After I've Found My Old Policies?

A. If you know you have an environmental problem you should notify the Wisconsin DNR. Typically they in turn will send you a letter requesting further site characterization. At this point, contact an experienced professional to assist you in sending the DNR claim to all of your insurance carriers notifying them of the situation.

Q. What If I've Already Paid For Site Investigation Activities?

A. Our experience is that it is always better to have the carrier agree to defend a claim before moving forward with the site investigation. That being said, costs to conduct site investigation activities should be reimbursed by insurance carriers, unless the insurance company can show that they were prejudiced by not being notified of the claim. From a practical standpoint, costs incurred before insurance carriers are put on notice may not be reimbursed dollar for dollar.

Q. Why Hasn't My Environmental Consultant Used This Approach To Address My Environmental Liability?

A. Good question. EnviroForensics staff have been using old insurance policies to address environmental contamination since the early 1990's. We have an 85% plus success ratio at finding old policies and have successfully used old insurance policies to pay for site investigations and remediations on nearly 100 sites.

Q. Is There A Downside To Using My Old Insurance Policies To Address Environmental Contamination?

A. No. Your current CGL insurance policy is not likely to provide a defense against environmental claims and we have never seen an increase in current insurance premiums stemming from a claim against historical insurance policies.

Q. Do I Need To Find All Of My Old Insurance?

A. No. Often times one year of coverage can be enough for an insurance carrier to provide a defense against a claim. The insurance carriers defense obligation does not have a limit or set amount, unlike the indemnity portion of an insurance policy, which could be the policy limit amount. Remember that the defense includes conducting site investigation activities to asses your liability and legal fees.

For more answers to your questions, please feel free to contact Stephen Henshaw with EnviroForensics at 866-888-7911.

D The Rent You Pay
U For The Space You
E Occupy Within
S The Industry!