Liability Issues in Waste Water Treatment and Bio-Solids Management

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In spite of implementing all best practices in your organization and in spite of best intentions, incidents occur whereby organizations become legally liable for damages because of bodily injury or damage to the property of others. For this reason, organizations, whether private or public entities, will purchase one or several forms of Third Party liability insurance to protect the organization, its shareholders, its directors and its employees from claims made against them for bodily injury, personal injury, and property damage. The Third Party, in this case is the one suffering damages.

In Canada, as in most countries, individuals and organizations are liable for their negligent acts.

We will be discussing insurance policies that protect organizations and individuals in the event they must compensate a Third party as a result of their negligent act or acts.

The insurance policy terminology I am using is based on Canadian policy wordings. Although these wordings may differ from country to country, the object of insurance remains essentially the same.

The basic policy of Third Party liability insurance is called the Commercial General Liability (C.G.L.) policy.

The basic insuring agreement of this policy reads as follows:

“We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage" to which this insurance applies.”

This insuring agreement defines the object of insurance as “bodily injury” or “property damage”.

Without one of these occurrences there is no coverage, even though the insured organization may be legally liable for damages. Later, we will discuss some of these elements and other policies or changes to the Commercial General Liability that will protect you against these eventualities.

Even when there is “bodily injury” or “property damage”, there also must be a “legal obligation” to pay in order for the policy to respond. Often times, an organization or individual may feel a moral obligation to pay, especially in circumstances of bodily injury. However, this is not sufficient to trigger coverage. A liability policy responds only to incidents where the law of the land holds you legally responsible.

Another important consideration in the insuring agreement is the fact that the policy will pay only for “compensatory damages”. The definition of “compensatory damages” because of “bodily injury” in the policy includes compensatory damages claimed by any person or organization for care, loss of services or death resulting from the bodily injury. “Property damage”, for its part, also includes the loss of use of tangible property that is not physically injured.

Another key element of the insuring agreement is that coverage is restricted to “compensatory damages”. In essence, this states that a CGL policy does not normally provide indemnity for an award of punitive damages.

The Insuring Agreement also imposes upon the insurer a right and a duty to defend any action seeking compensatory damages. This is a very important component of a C.G.L. policy. Often, allegations of legal liability must be defended in a court of law. Even if not legally liable, there can be substantial expenses incurred in defending an action.
The cost of defending an action is covered over and above the limit of insurance you carry in a C.G.L. policy. However, some other forms of policies include these costs in the limit of insurance. If such is the case, organizations should negotiate higher limits or a wording whereby defense costs fall outside of the policy limits.

As you can see, the C.G.L. Insuring Agreement is very broad in scope. However, the scope is narrowed by exclusions in the policy.

Exclusions form an important part of every policy, and must be fully understood. It is not my intention here to review all exclusions. Suffice it to say that exclusions are extremely important and should be studied closely.

I will, however, mention a few exclusions. The first is the one which pertains to liability assumed under contract or agreement. In effect, this assumption of liability in a contract is excluded with some types of contracts excepted. There also is no exclusion for liability that you would have in the absence of the contract or agreement. You should be looking to enhance your coverage by adding “blanket contractual liability” coverage or at the very least having your insurance broker review contracts for you.

Another exclusion of concern is that of “the rendering of professional services”. In effect, this is excluded from a C.G.L. policy. If you have individuals on staff with professional designations and who render professional services, these should be insured under what is called “Professional Liability” or “Errors & Omissions Liability” policies. These policies will respond to claims made against the organizations or those individuals as the result of exercising the functions of their profession.

Every C.G.L. policy contains some form of Pollution Liability Exclusion. This is perhaps the exclusion that can have the strongest impact on your types of organization. A standard C.G.L. policy wording excludes damage caused by “pollutants” 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, or any premises used by or for the insured for the handling, storage, disposal, processing or treatment of waste.

In your types of organizations, insurers will usually go a step further and impose a “Total Pollution Exclusion”, thereby excluding all losses “arising out of the actual, alleged or threatened discharge, dispersal, release, or escape of pollutants” arising out of all your operations, whether on-site or off-site.

Pollutants are defined in the policy as meaning “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapour, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed”.

To counter this exclusion, handlers of pollutants must purchase “pollution liability” policies or “environmental impairment liability” policies. These policies are specifically designed to address the needs of handlers of pollutants. Policies can cover damage or injury arising out of pollutants on your premises, or in a broader sense, arising out of your operations, wherever they may be. With certain conditions, coverage can also be extended to cover not only damage to others but also damage to your own premises.

Another relatively new exposure in your industry is the recycling of biosolids. While recycling, biosolids are on your premises and could contaminate the environment, thereby justifying the need for some form of Pollution Liability insurance as described above.

Once recycled, however, you now have a Product that you will distribute or sell. By law, you have a duty to ensure that your product is safe, and you owe a duty to consumers to give proper warning of dangers which can occur in using the product.

Although Products Liability insurance is included in a C.G.L. wording, I believe you will find the insurance industry reluctant to assume risks where waste water or biosolids become a usable product. It is imperative that your industry be able to show that the use of your product is relatively safe and poses no undue exposure to insurers, if you expect the insurance marketplace to provide coverage for these products.
For all of your exposures, what limits of insurance do you require? That is a question clients ask us all the time. It is very difficult to answer.

The courts seem to be granting higher awards in the event of injury or damage.

If you are a public entity, you are often seen as an organization with deep pockets, increasing your risks of being involved in lawsuits.

No two organizations have the same needs in terms of limits of insurance. With the assistance of your broker, you should be determining what limits you require. I do suggest that more is better than less when it comes to limits of insurance. The cost of purchasing those higher limits diminishes quickly after a limit of $1,000,000 or $2,000,000.

Everything we have discussed above relates to claims for bodily injury or property damage. However, organizations are exposed to liability hazards where no bodily injury or property damage occurs, but where you may be held legally liable to pay compensatory damages, and I would like to highlight some of those exposures.

You are liable for injuries to the person, such as cases of libel, slander, defamation of character, and similar occurrences. What is required here is Personal Injury coverage. This is usually included in a C.G.L. wording, but you should ensure it is part of your insurance program.

If you are a Director or Officer of an entity, the law holds you liable in carrying out your duties with due diligence. You may be held liable for compensatory damages without having caused bodily injury or property damage. An example of this is the inadvertent mismanagement of funds of the organization. All directors or officers of organization, whether for profit or not-for-profit, are exposed to these risks.

In order to insure against these types of risks, your organization should have in place a Directors’ and Officers’ Liability policy. The insuring agreement of such a policy provides coverage for Directors and Officers against “Wrongful Acts” in the exercise of their duties, and actually excludes “Bodily Injury and Property Damage” as these are found under the coverages provided by the C.G.L. As you can see, the intent is to cover against financial loss, not bodily injury or property damage, with a Directors’ and Officers’ Liability policy.

As stated earlier, professionals are held to a higher standard of duty in the rendering of their professional services. The purchase of a Professional Liability or Errors and Omissions Liability policy will protect the professional. Coverage does include Bodily Injury and Property Damage, but goes further to insure against other types of claims where there is no Bodily Injury or Property Damage, such as errors in design, failure to meet expectations, failure to perform, etc.

The issue of Liability insurance can be quite complex. In closing let me state that the best approach is to ensure you have a competent broker professional who can counsel and guide you in the purchase of your insurance program.