



# Storm Water Runoff Courses Into An Expanding Gap In CGL Insurance Policies

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New case law suggests that environmental policies may be needed to fill widening gaps in the primary insurance held by most businesses (i.e., Commercial General Liability “CGL” policies). CGL policies typically contain a “pollution exclusion” that excludes coverage for losses relating to “pollutants,” and the definition of pollutants in standard CGL policies is extremely broad. In fact, a federal court of appeals recently held that storm water runoff qualifies as a pollutant, and, thus, no coverage exists under a CGL policy for damage relating to such runoff. While certain jurisdictions, including New Jersey, may interpret this exclusion more narrowly, businesses should carefully consider their insurance portfolios to ensure they have appropriate coverage for their operations.

As noted, the United States Court of Appeals for the Eleventh Circuit determined a few months ago that storm water is subject to the pollution exclusion contained in CGL policies. Centro Dev. Corp. v. Central Mutual Ins. Co., 720 Fed. Appx. 1004 (11th Cir. 2018). The pollution exclusion at issue defined pollutant as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, soot, fumes, acids, alkalis, chemicals and waste.” In reaching its decision, the Eleventh Circuit referred to a prior decision in which it found that storm water qualified as a pollutant under the exact same language. The circuit court also considered that, under the Clean Water Act “[w]hen rain water flows from a site where land disturbing activities have been conducted, such as grading and clearing,” it qualifies as a pollutant. Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1525 n.1 (11th Cir. 1996). As a result, the CGL policy did not provide coverage for the damage from the storm water runoff.

While many courts across the country are likely to reach a similar conclusion, see, e.g., Devcon Int'l Corp. v. Reliance Ins. Co., 609 F.3d 214 (3d Cir. 2010) (finding that CGL policy excluded coverage relating to dust and fumes from a construction site), it is not clear whether more policy-holder friendly jurisdictions would reach the

same result. For instance, the Supreme Court of New Jersey, which generally tends to be more protective of policy holders than other jurisdictions, has interpreted the pollution exclusion considered by the Eleventh Circuit as applying only to “injury or property damage arising from activity commonly thought of as traditional environmental pollution,” that is, those hazards that were historically thought of as “environmental catastrophe(s) related to intentional industrial pollution.” Nav-Its Inc. v. Selective Ins. Co., 183 N.J. 110, 124 (2005). Storm water runoff would not seem to be related to “intentional industrial pollution,” but there have been few cases applying this standard in New Jersey. In one recent case, the District Court of New Jersey applying New Jersey law determined after extended motion practice that a CGL policy did not provide coverage for cleanup of accumulated construction debris. Castoro & Co. v. Hartford Accident and Indem. Co., 2018 WL 3217409 (D.N.J. March 16, 2018). The accumulation of construction debris similarly does not seem tantamount to intentional industrial pollution, so New Jersey may, at least in this instance, be expanding the breadth of the pollution exclusion.

Nonetheless, these cases, and many others on this same topic, highlight a gap in CGL policies. Environmental insurance policies, e.g. Pollution Legal Liability policies, have traditionally been purchased in more limited instances when there are substantial environmental risks at play, but such policies may provide a broader range of coverages that apply to more every day risks, such as in the examples note above. In fact, Pollution Legal Liability policies often provide express coverage for “pollution conditions,” and this term generally is defined to include those items excluded as pollutants in a CGL policy. Businesses should carefully consider their insurance portfolios to determine whether their operations may trigger the pollution exclusion in their CGL policy such that additional environmental coverage is worthwhile.

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