

## Supreme Court Restores Insurance Coverage for Some Environmental Claims

May 01 1997

Posted By: Michael P. Carlton

Practice Area: Environmental Law and Litigation

---

A pair of Wisconsin Supreme Court decisions decided April 22, 1997, *General Casualty Company of Wisconsin v. Hills Wisconsin Public Service Corporation v. Heritage Mutual Insurance Company*, have restored the ability of insureds to obtain coverage for a large class of environmental claims under Comprehensive General Liability and similar insurance policies. The decisions sharply narrow the applicability of the Court's 1994 *City of Edgerton* decision which held that government demands that private parties clean up contamination were not suits seeking "damages" for which coverage would be afforded.

The *Hills* case involved an insured's demand for defense of an action against it alleging superfund liability for the Arrowhead Refining site to which the insured's waste had been taken. The Court noted that liability policies are intended to protect insureds from negligent acts resulting in damage to third parties, and that the claim against Hills involved a claim by a third party seeking monetary relief to compensate for losses incurred at a contaminated site which the insured did not own, lease or control. Therefore, because a private party was seeking compensatory, monetary relief for losses due to the insured's alleged contamination of property not fitting within the owned property exclusion of the insured's policy, the action did indeed seek "damages" as defined in the policies. Therefore, General Casualty had a duty to defend Hills. The issue of indemnification was not before the Court since the extent of Hills' liability for the landfill clean-up costs had not been established.

In the companion case, *WPS v. Heritage Mutual Insurance Company*, the Court relied upon and extended the *Hills* case to find an indemnification responsibility to reimburse the insured for environmental clean-up expenses for which the insured was liable. The insured, a construction company, had cut a fuel oil pipe on property owned and operated by a school district. WPS, in response to an order of the Wisconsin DNR, investigated and remediated the property, and then sued Heritage Mutual directly, as insurer for the construction company which had caused the leak. Just as in the decision, the Court held that the WPS action seeking recovery for damages caused by the construction company at property that did not fit within the owned-property exclusion of the insurance policy was a suit for "damages" covered under the insurance policy. In addition, the Court held that a pollution exclusion in the insurance policy did not negate coverage since it did not apply to the actions of WPS in cleaning up the property, but only to the insured itself.

The *Hills* and *WPS* decisions, taken together, have eliminated the most significant defense of insurance companies against claims by their insureds seeking defense and indemnification for environmental clean-up costs at sites which the insureds do not own, lease or control. A common example of such a claim is a company's allocated liability for clean-up of a landfill to which its waste was taken. Other defenses to coverage obligations may continue to exist, such as failure to give notice to the carrier of a potential claim, and *City of Edgerton* continues to preclude coverage when an insured receives a letter from EPA or DNR requesting proposal of a remediation plan.

### **Approaching Compliance Deadlines**

The following are some of the more significant approaching environmental health and safety regulatory deadlines:

**July 1, 1997** - Annual toxic release inventory ("TRI" or "Form R") reports due from affected facilities. The revised Form R is available from our office and on the internet at <http://www.epa.gov/internet/oppts>. Please note that the TRI program has been expanded to include additional manufacturing sectors such as wholesale chemicals and wholesale bulk petroleum terminals, but TRI reports are not required from those newly covered manufacturing sectors until July 1, 1999.

**November 1, 1997** - Deadline for medical facilities generating between 50 and 200 pounds of medical waste per month to prepare and implement a medical waste reduction plan in accordance with DNR regulations.

**December 22, 1998** - Federal EPA/Wisconsin DILHR deadline for underground storage tank owners and operators to upgrade, close or replace tank systems in accordance with federal regulations.

**June 21, 1999** - Deadline for compliance by affected facilities with EPA's chemical accident release prevention regulations. While this deadline may appear to be distant, facilities with more than threshold quantities of listed chemicals need to evaluate applicability of the program and begin compliance efforts. The EPA program is similar to the OSHA process safety management program for which compliance dates have already passed.

**May 1, 2001** - Federal EPA/Wisconsin DILHR deadline for above ground outside storage tanks which exceed 5,000 gallons capacity and which were installed prior to May 1, 1991, to comply with upgrading or closure requirements.

### **Compliance Alert – Stormwater**

In November, 1994, the Wisconsin Department of Natural Resources (DNR) adopted regulations which require industrial facilities to apply for a permit to discharge "stormwater associated with industrial activity" to "waters of the State of Wisconsin." Facilities that are required to file an application for a stormwater permit are listed by SIC Code in Wisconsin Administrative Code NR 216. Once a permit has been issued, "tier one" and "tier two" facilities are required to prepare a Stormwater Pollution Prevention Plan (SWPPP). The purpose of the SWPPP is to identify potential source areas of stormwater runoff, and implement "best management practices" to mitigate or eliminate contaminated stormwater runoff from reaching waters of the State. The DNR is currently conducting inspections of facilities that are subject to NR 216 to review SWPPP's and determine the effectiveness of best management practices.

Many affected facilities have failed to submit required applications and Notice of Intent statements to the DNR, and thus may be at risk of enforcement action. Facilities are encouraged to review program applicability and their compliance status before DNR begins enforcement efforts.

### **Legislative and Regulatory Developments**

PECFA Partial Sunset Approaches-For petroleum tank clean-up costs incurred after July 1, 1998, the Wisconsin PECFA program maximum award will decrease from \$500,000 or \$1 million down to \$190,000, and the deductible amount will increase. Sites at which a petroleum release has been discovered and reported and clean-up activities begun before July 1, 1998, will be grandfathered and subject to the current limits. Legislation has been proposed to defer the sunset, but if the legislation does not pass, underground storage tank owners should ascertain whether or not their tanks have leaked and begin clean-up activities before July 1, 1998, to avoid the new limits.

**Spill Reporting** - As of March 1, 1997, minor spills of certain substances no longer need to be reported to the DNR if they are immediately contained and cleaned up. Reporting exemptions now apply to petroleum products spilled on an impervious surface, spills of less than 1 gallon of gasoline, and spills of less than 5 gallons of other petroleum products, certain agricultural/pesticide spills, and to discharges of less than the federal reportable quantities under the Clean Water Act and Superfund. All clean-up requirements continue to apply, even if no DNR notification is required.

**Wetland Permit Rule Changes** - The US Army Corps of Engineers has recently revised some of its nationwide permits to further restrict filling in wetland areas. For example, Nationwide Permit 26 which regulates the discharge of dredged or fill material into headwaters and isolated waters has been modified to authorize filling up to only 3 acres. Discharges over 1/3 acre will require a Preconstruction Notice (PCN). The former thresholds allowed filling up to 10 acres and a PCN for discharges over 1 acre.

**Brownfields** - The current Wisconsin Budget Bill contains many provisions to expand and refine the brownfields provisions of the Land Recycling Act. Among other things, the changes – which are site certification, would allow lenders to use Phase I investigations done in the recent past, and would permit DNR to issue certifications for partial site clean ups. The bill would also create several loan or grant programs, allow DNR to charge fees for certain review actions, and create several DNR positions to help with the backlog of brownfields closure requests.

**Environmental Audit Privilege** - Legislation has been introduced in Wisconsin to create an environmental audit privilege and related immunity for violations disclosed to the DNR as the result of an audit and addressed in a timely matter in cooperation with the DNR. Although some 20 states have such audit laws, the US EPA and the Wisconsin Department of Justice are actively opposed to the bill as drafted, and the comments of the Wisconsin DNR are antagonistic. A significant issue with the legislation concerns whether or not the immunity for violations disclosed as the result of an audit should extend to criminal prosecution. Work continues on compromise legislation. Our analysis of the related US EPA audit policy (Legal Update, Spring 1996) is available on request.

**PECFA Program Changes** - The State funding program that provides reimbursement for the investigation and remediation of petroleum-contaminated sites is now administered by the Wisconsin Department of Commerce (DOC) instead of the Department of Industry, Labor and Human Relations (DILHR). In addition, if the contamination at a site is confined to the soil (i.e., there is no groundwater contamination), the DOC also has authority to make determinations regarding the scope and thoroughness of an investigation or remediation, which formerly were within the exclusive jurisdiction of the Wisconsin DNR.

---

von Briesen & Roper Legal Update is a periodic publication of von Briesen & Roper, s.c. It is intended for general information purposes for the community and highlights recent changes and developments in the legal area. This publication does not constitute legal advice, and the reader should consult legal counsel to determine how this information applies to any specific situation.

