# LITIGATION MINUTE: ETHYLENE OXIDE—INSURANCE COVERAGE CONSIDERATIONS

## ETHYLENE OXIDE SERIES: PART FOUR OF FOUR

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## WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

As the number of ethylene oxide (EO) lawsuits has risen in recent years, so have disputes regarding the obligation of insurers to defend and indemnify defendant policyholders from such liabilities. Companies that are targets or potential targets for EO lawsuits should identify and evaluate their insurance assets in order to maximize potential insurance rights if and when a claim is filed.

In a minute or less, here is what you need to know about potential insurance coverage for claims arising from alleged EO emissions or other exposure.

### Identifying Potentially Responsive Policies

Policyholders facing potential liability for claims arising from alleged exposure to EO emissions should identify and review insurance policies that may provide coverage, including:

#### *General Liability Insurance*

Commercial general liability policies typically provide defense and indemnity coverage for suits or claims alleging bodily injury (including disease) or property damage arising from an accident or occurrence during the policy period.

General liability policies written on an occurrence basis may respond even if the policies were issued years or decades earlier. Depending on a claimant's allegations of injury from EO (as well as the scientific and medical theories proffered to support that theory), policies in place from a claimant's date of first exposure through the date the claimant's injury or disease manifested may be triggered and potentially provide coverage.

Policies written on a claims-made basis may only provide coverage for claims or suits first asserted against the policyholder during the policy period.

#### *Pollution Legal Liability Insurance*

Pollution legal liability policies are specialized liability policies that may provide coverage for—among other things—third-party tort claims arising out of alleged exposure to “pollutants” released from a policyholder's facility, including alleged EO emissions.

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These types of policies are typically written on a claims-made basis, and they likely will include a retroactive date that may eliminate coverage for claims arising from activity occurring before a specified date, even if the claim is first made during the policy period.

## Predecessor Policies And Insurance Archaeology

Because a claimant's allegations of EO exposure and injury may go back decades, it is important for policyholders to consider whether any predecessor site owners' insurance or that of predecessor operating entities may be implicated.

Insurance archaeology is the effort (often aided by outside consultants and counsel) to research, locate, and potentially reconstruct historical insurance policies when records are lost or incomplete.

## Potential Exclusions

Insurers faced with significant potential coverage obligations for EO claims may attempt to raise exclusions in attempts to defeat coverage, including:

### *Pollution Exclusions*

A so-called “absolute” pollution exclusion was widely adopted in general liability policies around 1986. Insurers may argue that EO is a “pollutant,” and claims alleging bodily injury therefrom are accordingly barred from coverage by the pollution exclusion. If a claimant's alleged exposure commences prior to 1986—or whenever “absolute” pollution exclusions entered the policyholder's insurance program, the policyholder may have a better chance of accessing such earlier issued policies.

### *Expected or Intended Exclusions*

General liability policies commonly contain an exclusion for injury or damage “expected or intended” from the standpoint of the policyholder. Faced with claims arising from alleged environmental releases of alleged harmful emissions, insurers may attempt to marshal evidence that the policyholder operating the facility understood the hazards of the release and—intentionally or recklessly—allowed the releases to occur anyway.

The standard of proof an insurer must meet to invoke such an exclusion varies depending on applicable law and may present policyholders with strong bases to resist “expected and intended” arguments.

## Medical Monitoring Claims

Claimants may allege that EO exposure necessitates ongoing medical monitoring, even if they do not allege a present diagnosis with a disease arising from EO.

In some states, courts have recognized that claims for medical monitoring fall within the scope of damages from bodily injury under general liability policies. In other states, courts have refused to construe bodily injury coverage to include the cost of future medical monitoring in the absence of a presently diagnosed disease. It is important to consider and analyze potentially applicable law.

## Protecting Coverage Rights

To maximize access to potential coverage, policyholders should act promptly to provide notice under potentially responsive policies in the event of an EO claim or lawsuit. Proactive policyholders should consult with

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experienced insurance coverage counsel to help identify and analyze potentially responsive policies—and to anticipate and potentially avoid coverage disputes.

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