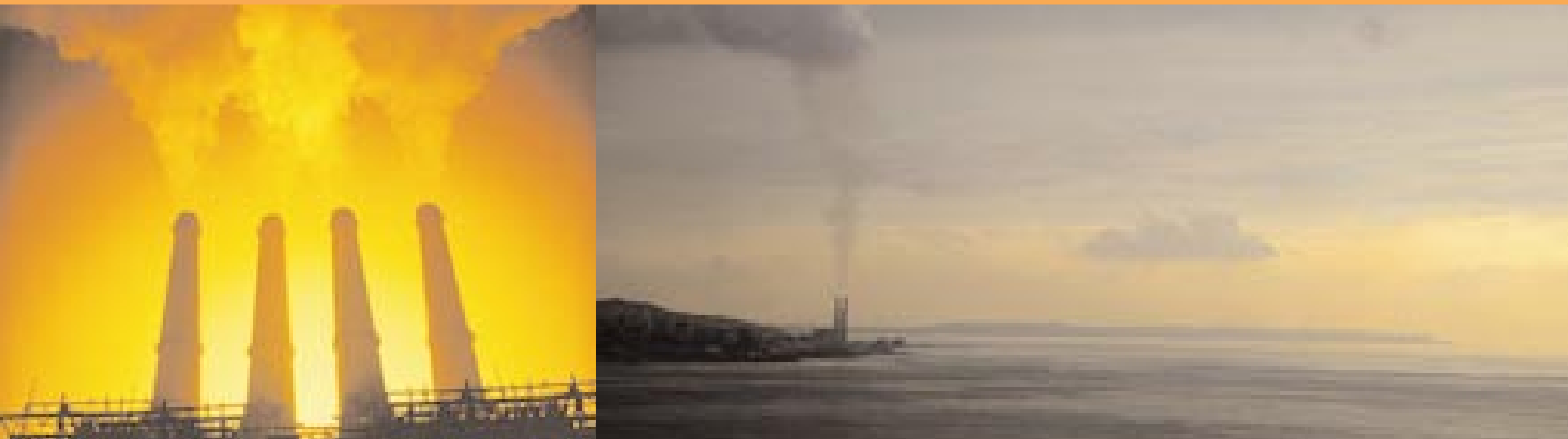


# Hazardous *Times*



## *Louisiana Proposal Would Restrict The Use Of Pollution Exclusions On Commercial Policies*

The Louisiana Department of Insurance (LDOI) has distributed a preliminary draft of its newly proposed regulation which would restrict the use of “total” pollution exclusions (which includes what is commonly referred to as the absolute pollution exclusion as well as a total exclusion) in commercial policies issued within, or for insureds with operations in, the state.

According to the accompanying preamble, Regulation 73 is intended to clear any confusion which may have resulted from a perceived conflict between the LDOI’s advisory letter 97-01 warning insurers to only apply the absolute [total] pollution exclusion to “intentional active industrial polluters” and claims involving “significant damage to the environment” and the Louisiana Supreme Court’s decision upholding a total pollution exclusion in *Ducote v. Koch Pipeline* (730 So. 2d 430, 1999). It is also intended to address a number of filings “which purport to provide coverage” but for classes of risks, according to LDOI, that “do not pose a pollution risk.”

If passed, the language of the regulation indicates that the LDOI will apply it

retroactively to pollution exclusions contained in liability and property policies issued before, on, or after the effective date of the regulation.

Section 9311 of the proposed regulation states that “authorized insurers” can only apply a total pollution exclusion to new and renewal policies issued on or after the effective date of the regulation to risks that: 1) “are required to show proof of financial responsibility to a regulatory agency responsible for enforcing: the Comprehensive Environmental Response, Compensation and Liability Act (or the Superfund law); the Resource Conservation and Recovery Act; the Clean Air Act; the Clean Water Act or any substantially similar federal, state or local law or regulation”; and 2) the insured “engages in activities which requires the issuance of a discharge permit, disposal permit or hazardous waste transportation permit from a federal or state environmental regulatory agency.”

The owners/operators of waste treatment, storage and disposal facilities, operators of offshore oil drilling operations, certain owners/operators of regulated underground storage tanks

(generally petroleum marketers, non-marketers with less than \$20 million of net worth and local governments) and hazardous waste haulers are among the few classes of business that are required under various environmental laws to show proof of financial responsibility for potential pollution. This provision could severely limit the use of absolute and total pollution exclusions.

Insurers would also be able to attach an absolute or total pollution exclusion to insureds which qualify as an “exempt commercial policyholder” under Louisiana insurance regulations. An “exempt commercial policyholder” is defined in LDOI Regulation 72 as one that:

- “1. Has and maintains aggregate annual commercial insurance premiums, excluding workers’ compensation and employer’s liability, and professional liability insurance premiums, of more than two hundred thousand (\$200,000) dollars in the preceding fiscal year. In determining whether this threshold has been met, premiums paid to one or more insurers are to be added together to reach the total aggregate.

2. At the time the policy is issued the policyholder must have:
- if a single company, not less than fifty (50) employees;
  - if a member of an affiliated group, not less than one hundred (100) employees collectively;
  - if a municipality, a population of not less than fifty thousand (50,000); and
  - if a public entity, an operating budget of not less than twenty million dollars (\$20,000,000) for the most recently completed calendar or fiscal year, whichever applies."

While insurers will be able to attach absolute or total pollution exclusions to these larger risks or "exempt commercial policyholders," the language of the proposed regulation attempts to limit the applicability of either of these exclusions for risks that fit into the acceptable classes. The claims handling procedures spelled out in the regulation also attempt to limit the use of these exclusions.

Non-admitted carriers can still include absolute or total pollution exclusions in their commercial policies; however, the regulation states that no surplus lines broker may place coverage with a policyholder using a policy which contains an absolute or a total pollution exclusion, within its text or by endorsement, unless the surplus lines broker has received authorization in writing from the Commissioner of Insurance.

Where a risk has an exposure arising out of products that are toxic, insurers may attach a chemical products liability exclusion to policies; however, the exclusion must "provide for the scheduling of risks and perils" and must be signed by the insured.

The proposed regulation attempts to change the language of policies with a new definition for the term "pollutant" and also defines "pollution incident."

"Pollutant" is defined as follows: "the residual wastes or by-products which accrue as a result of the insured's industrial or manufacturing operations which are:

- Composed primarily of substances which have no commercial value and at certain levels of concentration are

harmful to human health and the environment;

- The generation, storage, transportation and disposal of such wastes or by-products are subject to the Comprehensive Environmental Response, Compensation and Liability Act, (CERCLA), the Resource Conservation and Recovery Act (RCRA), the Superfund Amendments and Reauthorization Act (SARA), the Clean Air Act (CAA), the Clean Water Act (CWA), or any substantially similar federal, state or local law or regulation; and
- The waste or by-product may consist of solid, liquid, gaseous or thermal matter."

"Pollution incident" means: "the release, discharge, dispersal or escape of pollutants on a continual or sporadic but routine basis in an amount which will cause severe bodily injury or death to humans and causes environmental damage. *Environment damage means long-term, systemic injury to the soil, atmosphere, surface water or groundwater.*"

For the limited type of risks where the LDOI will allow the use of absolute or total pollution exclusions, the regulation states that both authorized and unauthorized (i.e., non-admitted) insurers must comply with the claims handling practices laid out in the regulation.

These stipulate that:

- No claim will be denied based upon a pollution exclusion unless the loss arises from a pollution incident as defined above. This presumably means that insurers will not be able to apply the pollution exclusion to claims involving a "sudden & accidental" type of incident or bodily injury caused by exposure to a toxin that did not also cause "long-term, systemic" environmental damage.
- A claim cannot be denied based upon a pollution exclusion if it was caused by a product that is being used in accordance with its intended purpose or one that is being stored for future use (e.g., underground storage and above ground tank leaks). So, while insurers will be able to attach an absolute or total pollution exclusion to risks like gasoline stations or tank farms, insurers would not be able to

apply the exclusion to the most prevalent pollution exposures.

- The claim does not involve injury or loss arising from odors, smoke, fumes or gases from:
  - a ventilation system;
  - natural decomposition of organic wastes;
  - a hostile fire;
  - an explosion; or
  - any similar occurrence.
- A claim for loss arising from an indoor release cannot be denied based upon a pollution exclusion.

The pollution exclusion may also not be used to exclude asbestos or lead claims, however, insurers can attach separate exclusions for these.

The regulation also states that noncompliant insurers and surplus lines brokers will face "disciplinary actions and/or penalties" authorized by law.

Section 9313 of the regulation dealing with claims handling procedures for pollution claims seems to run to any pollution exclusion; therefore, it also seems likely that the new definitions of "pollutant" and "pollution incident" as well as the pollution claims handling practices described above may also be applied to the variety of Named Peril and/or Time Element pollution coverage endorsements being used in the marketplace. These definitions could serve to further broaden the pollution coverage grants given by these endorsements.