

TECHNICAL ADVISORY

TA 356

Subject

Contents

October 2, 2022

**Insurance Issues Related to
Saltwater Intrusion Into Water
Systems**

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EXECUTIVE SUMMARY

Severe drought conditions in much of the United States has resulted in extreme low flow conditions in the Mississippi River, allowing a “saltwater wedge” to flow upriver. Communities from Jefferson Parish to the mouth of the River source their drinking water from the Mississippi River and will likely have saltwater intrusion into their water supply by the end of October. Depending upon the weather, the saltwater intrusion may last for several months. IIABL has received numerous requests from members seeking guidance on insurance issues related to saltwater contamination of the water supply.

This Technical Advisory is intended to provide educational information to help members discuss saltwater contamination with their customers. This document is NOT a legal opinion and should NOT be relied upon as determination of insurance coverage on insurance claims.

Necessary Action

Share this Technical Advisory with appropriate agency staff. Review the types of policies your agency writes and what the likely coverage for saltwater intrusion/contamination might be for your policyholders. Establish procedures for how agency staff will respond to questions from policyholders about saltwater intrusion/contamination. Establish procedures for how agency staff will process any potential claims.

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BACKGROUND

Policyholders have started to worry about the impact of saltwater contamination of the water supply. Will the saltwater cause “direct physical damage” to the pipes or plumbing fixtures of home or business? Will saltwater contamination force the “loss of use” of the home or business? Will there be an interruption or “loss of utilities” of the water supply?

If these things happen, is there insurance coverage?

Following are some discussions of possible insurance ramifications related to these questions on saltwater contamination based upon ISO standard policy forms. Please keep in mind that policy forms vary and can be modified by many different endorsements which changes coverages under the policy.

From an agent E&O loss control standpoint, agents should not give definitive opinions to policyholders as to whether or not any claim, including saltwater intrusion/contamination claims discussed here, are covered. If the policyholder wants to make a claim, the agent should report the claim to the insurance company and let the insurer determine whether or not there is coverage. It is appropriate for the agent to advocate on behalf of their customer, but not to make formal determinations of coverage.

Our analysis would suggest that most property insurance policies are not likely to provide insurance coverage for either direct damage to property by a covered peril or for loss of use caused by direct damage to property by a covered peril. Detailed analysis follows.

Homeowners – Physical Damage

So the first insurance question is, does saltwater contamination cause “direct physical loss to property?” We have not seen any definitive information on this subject yet. A lot will depend upon the salinity levels and length of time that saltwater is in the system. We suggest that insurers would be very hesitant to agree that saltwater intrusion into the water system caused direct physical loss to the property. Plaintiff attorneys will, no doubt, test this in court.

But let’s assume that saltwater does cause direct physical loss to property. The second question is whether the plumbing and plumbing fixtures are covered property under the Homeowners Policy? Under the ISO Homeowners Policy HO 00 03 03 22, Coverage A – Dwelling and Coverage B – Other Structures would include any permanently installed pipes and plumbing fixtures. We can find no limitations on covered property that would exclude this as “covered property.”

The third, and most interesting question, is whether saltwater contamination is a covered peril under the Homeowners Policy. Named peril policies such as Fire, Dwelling, and Homeowners 1 & 2 do not have saltwater intrusion, contamination or other variations listed as a named peril and therefore would not provide coverage as a covered cause of loss. So called “all peril” policies, like the ISO Homeowners Policy HO 00 03 03 22, Section 1 – Perils Insured Against covers “direct physical loss to the property described” so initially, there would be coverage for damage caused by saltwater.

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But not so fast! What about limitations and exclusions to Section 1 – Perils Insured Against? The ISO Homeowners Policy HO 00 03 03 22 includes two relevant exclusions.

2. We do not insure, however, for loss:

(6) Any of the following:

- (a) Wear and tear, marring, deterioration;
- (b) Mechanical breakdown, latent defect, inherent vice or any quality in property that causes it to damage or destroy itself;
- (c) Smog, rust or **other corrosion**, or dry rot;
- (d) Smoke from agricultural smudging or industrial operations;
- (e) **Discharge, dispersal, seepage, migration, release or escape of pollutants** unless the discharge, dispersal, seepage, migration, release or escape is itself caused by a Peril Insured Against named under Coverage C.
 - Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed;
- (f) Settling, shrinking, bulging or expansion, including resultant cracking, of bulkheads, pavements, patios, footings, foundations, walls, floors, roofs or ceilings;
- (g) Birds, rodents or insects;
- (h) Nesting or infestation, or discharge or release of waste products or secretions, by any animals; or
- (i) Animals owned or kept by an "insured".

We suggest that insurers would most likely exclude claims for physical damage from saltwater intrusion or contamination under the “corrosion” and/or “pollutants” exclusions under the policy.

Homeowners – Loss of Use

Under the ISO Homeowners Policy HO 00 03 03 22, Coverage D states:

D. Coverage D - Loss Of Use

The limit of liability for Coverage **D** is the total limit for the coverages in **1. Additional Living Expense**, **2. Fair Rental Value** and **3. Civil Authority Prohibits Use** below.

1. Additional Living Expense

If a loss covered under Section 1 makes that part of the "residence premises" where you reside not fit to live in, we cover any necessary increase in living expenses incurred by you and residents of your household who are:

Loss of Use coverage is contingent upon the loss being covered under Section 1 – Property Coverages. As outlined above, we suggest that insurers are not likely to find coverage under the Section 1 – Perils Insured Against

What about Civil Authority Coverage? The ISO Homeowners Policy HO 00 03 03 22, Coverage D states:

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3. Civil Authority Prohibits Use

If a civil authority prohibits you from use of the "residence premises" as a result of direct damage to neighboring premises by a Peril Insured Against, we cover the loss as provided in 1. Additional Living Expense and 2. Fair Rental Value above for no more than two weeks.

As outlined above, saltwater does not appear to be "a Peril Insured Against" and therefore would not trigger Civil Authority Prohibits Use coverage under the Homeowners Policy.

Business - Physical Damage

Are pipes and plumbing fixtures "covered property" on commercial property insurance policies? Under the ISO Building and Personal Property Coverage Form CP 00 10 10 12, covered property is defined:

1. Covered Property

Covered Property, as used in this Coverage Part, means the type of property described in this section, A.1., and limited in A.2. Property Not Covered, if a Limit Of Insurance is shown in the Declarations for that type of property.

a. Building, meaning the building or structure described in the Declarations, including:

- (1) Completed additions;
- (2) Fixtures, including outdoor fixtures;

(3) Permanently installed:

(a) Machinery; and

(b) Equipment;

(4) Personal property owned by you that is used to maintain or service the building or structure or its premises, including:

- (a) Fire-extinguishing equipment;
- (b) Outdoor furniture;
- (c) Floor coverings; and
- (d) Appliances used for refrigerating, ventilating, cooking, dishwashing or laundering;

(5) If not covered by other insurance:

- (a) Additions under construction, alterations and repairs to the building or structure;
- (b) Materials, equipment, supplies and temporary structures, on or within 100 feet of the described premises, used for making additions, alterations or repairs to the building or structure.

Initially, the building and permanently installed machinery and equipment are covered property, which would seem to include pipes and plumbing fixtures. However, there are limitations on covered property which include:

2. Property Not Covered

Covered Property does not include:

- m. Underground pipes, flues or drains;

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Underground pipes would not be covered property for saltwater physical damage claims. Other pipes and plumbing fixtures not underground, and therefore not excluded, would be covered property for such claims.

Named peril Commercial Causes of Loss Forms, such as the Basic Form and Broad Form do not have saltwater intrusion, contamination or other variations listed as a named peril and therefore would not provide coverage as a covered cause of loss.

The so called "all risk" ISO Causes of Loss Special Form CP 10 30 09 17 provides coverage for causes of loss:

A. Covered Causes Of Loss

When Special is shown in the Declarations, Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy.

So the question then becomes are there limitations or exclusions that would apply to saltwater claims. There are several applicable provisions:

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

e. Utility Services

The failure of power, communication, water or other utility service supplied to the described premises, however caused, if the failure:

- (1) Originates away from the described premises; or
- (2) Originates at the described premises, but only if such failure involves equipment used to supply the utility service to the described premises from a source away from the described premises.

Failure of any utility service includes lack of sufficient capacity and reduction in supply.

Loss or damage caused by a surge of power is also excluded, if the surge would not have occurred but for an event causing a failure of power.

But if the failure or surge of power, or the failure of communication, water or other utility service, results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

Communication services include but are not limited to service relating to Internet access or access to any electronic, cellular or satellite network.

Would saltwater intrusion/contamination trigger this exclusion? Not clear, but certainly creates interesting questions.

2. We will not pay for loss or damage caused by or resulting from any of the following:

- d.(1) Wear and tear;

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(2) Rust or **other corrosion**, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;

(3) Smog;

(4) Settling, cracking, shrinking or expansion;

(5) Nesting or infestation, or discharge or release of waste products or secretions, by insects, birds, rodents or other animals.

(6) Mechanical breakdown, including rupture or bursting caused by centrifugal force. But if mechanical breakdown results in elevator collision, we will pay for the loss or damage caused by that elevator collision.

(7) The following causes of loss to personal property:

(a) Dampness or dryness of atmosphere;

(b) Changes in or extremes of temperature; or

(c) Marring or scratching.

But if an excluded cause of loss that is listed in **2.d.(1)** through **(7)** results in a "specified cause of loss" or building glass breakage, we will pay for the loss or damage caused by that "specified cause of loss" or building glass breakage.

The ISO Causes of Loss Special Form CP 10 30 09 17 includes a "corrosion" exclusion which insurers could use to exclude saltwater corrosion.

I. **Discharge, dispersal, seepage, migration, release or escape of "pollutants"** unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the "specified causes of loss". But if the discharge, dispersal, seepage, migration, release or escape of "pollutants" results in a "specified cause of loss", we will pay for the loss or damage caused by that "specified cause of loss".

This exclusion, I., does not apply to damage to glass caused by chemicals applied to the glass.

There is also a pollution exclusion applicable.

We suggest that insurers would most likely exclude claims for physical damage from saltwater intrusion or contamination under the "corrosion" and/or "pollutants" exclusions under the policy.

Business – Business Income

The first question that comes to mind under Business Income, is whether or not saltwater intrusion/contamination would prevent a business from operating. Since water is still available for sanitation and other needs, the primary impact is on drinking water, which is not an operational necessity for most businesses. Business interruption may be an issue for certain business operations which use the municipal water system in their critical processes.

The Business Income (and Extra Expense) Coverage Form CP 00 30 12 12 coverage agreement reads in part:

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A. Coverage

1. Business Income

Business Income means the:

- a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and
- b. Continuing normal operating expenses incurred, including payroll.

For manufacturing risks, Net Income includes the net sales value of production.

Coverage is provided as described and limited below for one or more of the following options for which a Limit Of Insurance is shown in the Declarations:

- (1) Business Income Including "Rental Value".
- (2) Business Income Other Than "Rental Value".
- (3) "Rental Value".

If option **(1)** above is selected, the term Business Income will include "Rental Value". If option **(3)** above is selected, the term Business Income will mean "Rental Value" only.

If Limits of Insurance are shown under more than one of the above options, the provisions of this Coverage Part apply separately to each.

We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". **The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations** and for which a Business Income Limit Of Insurance is shown in the Declarations. **The loss or damage must be caused by or result from a Covered Cause of Loss.**

With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises.

With respect to the requirements set forth in the preceding paragraph, if you occupy only part of a building, your premises means:

- (a) The portion of the building which you rent, lease or occupy;
- (b) The area within 100 feet of the building or within 100 feet of the premises described in the Declarations, whichever distance is greater (with respect to loss of or damage to personal property in the open or personal property in a vehicle); and
- (c) Any area within the building or at the described premises, if that area services, or is used to gain access to, the portion of the building which you rent, lease or occupy.

2. Extra Expense

a. Extra Expense Coverage is provided at the premises described in the Declarations only if the Declarations show that Business Income Coverage applies at that premises.

b. Extra Expense means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss.

We will pay Extra Expense (other than the expense to repair or replace property) to:

- (1) Avoid or minimize the "suspension" of business and to continue operations at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location.
- (2) Minimize the "suspension" of business if you cannot continue "operations".

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We will also pay Extra Expense to repair or replace property, but only to the extent it reduces the amount of loss that otherwise would have been payable under this Coverage Form.

3. Covered Causes Of Loss, Exclusions And Limitations

See applicable Causes Of Loss form as shown in the Declarations.

To trigger Business Income Coverage, the business must be forced to suspend operations because of direct physical damage caused by a Covered Cause of Loss. As discussed above, named peril Commercial Causes of Loss Forms, such as the Basic Form and Broad Form do not have saltwater intrusion, contamination or other variations listed as a named peril and therefore would not provide coverage as a covered cause of loss. The so called "all risk" ISO Causes of Loss Special Form CP 10 30 09 17 has a corrosion exclusion and a pollution exclusion. We suggest that insurers would most likely exclude claims for physical damage from saltwater intrusion or contamination under the "corrosion" and/or "pollutants" exclusions under the policy.

Business – Off-Premises Services Direct Damage

ISO | Commercial Property Forms | 10/01/91

POLICY NUMBER: COMMERCIAL PROPERTY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

OFF-PREMISES SERVICES DIRECT DAMAGE

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
BUILDERS' RISK COVERAGE FORM
CONDOMINIUM ASSOCIATION COVERAGE FORM
CONDOMINIUM COMMERCIAL UNIT-OWNERS COVERAGE FORM
STANDARD PROPERTY POLICY
TOBACCO SALES WAREHOUSES COVERAGE FORM

	SCHEDULE*			
Water Supply	Communication Supply (not including overhead transmission lines)	Communication Supply (including overhead transmission lines)	Power Supply (not including overhead transmission lines)	Power Supply (including overhead transmission lines)
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Prem. No.	Bldg. No.	Covered Property	Causes of Loss Form Applicable	

We will pay for loss of or damage to Covered Property described in the Schedule, caused by the interruption of service to the described premises. The interruption must result from direct physical loss or damage by a Covered Cause of Loss to the following property, not on the described premises, if indicated by an "X" in the Schedule:

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A. Water Supply Services, meaning the following types of property supplying water to the described premises:

1. Pumping stations; and
2. Water mains.

* Information required to complete this Schedule, if not shown on this endorsement, will be shown in the Declarations.

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To trigger Off-Premises Services Direct Damage, the business must have an interruption of service to the described premises because of direct physical damage caused by a Covered Cause of Loss. As discussed above, named peril Commercial Causes of Loss Forms, such as the Basic Form and Broad Form do not have saltwater intrusion, contamination or other variations listed as a named peril and therefore would not provide coverage as a covered cause of loss. The so called "all risk" ISO Causes of Loss Special Form CP 10 30 09 17 has a corrosion exclusion and a pollution exclusion. We suggest that insurers would most likely exclude claims for physical damage from saltwater intrusion or contamination under the "corrosion" and/or "pollutants" exclusions under the policy.

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