

Wastewater Treatment /PCB Contamination: South Carolina Court of Appeals Addresses Insurance Coverage Issue



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The Court of Appeals of South Carolina (“Court”) addressed in a January 3rd opinion an insurance coverage issue associated with a claim related to polychlorinated biphenyls (“PCBs”) deposited by a third party into a wastewater treatment system. See *Renewable Water Resources v. Insurance Reserve Fund*, 2024 WL 24949.

The question addressed was whether the master (i.e., lower court) erred in finding coverage for claims related to damages caused by prohibited levels of PCBs in the wastewater at the wastewater facility (“WW Facility”).

Renewable Water Resources (“ReWa”) is a special-purpose district created to treat wastewater through its WW Facility. The wastewater services are provided to local governments in upstate South Carolina.

The WW Facility discovered through routine sampling that a third party had illegally introduced PCBs into the ReWa wastewater treatment system. Insurance Reserve Fund (“the Fund”) insured the buildings and personal property of ReWa. This included coverage for third party tort claims.

Both ReWa and the Fund agreed that the third party’s actions constituted vandalism. Further, vandalism was an included cause of loss under the Building and Personal Property Policy (“the Policy”) issued by the Fund.

Introduction of the PCBs damaged WW Facility equipment, components, and facilities used by ReWa for wastewater treatment at three locations specifically named in and covered by the Policy.

The federal Toxic Substances Control Act regulates biosolids at or above 50 parts per million. The presence of PCBs required that ReWa cease land application of its biosolids. It therefore shut down all biosolids/sludge holding tanks which were contaminated and rendered unusable by the presence of PCBs.

Under the direction of the United States Environmental Protection Agency and the South Carolina Department of Health and Environmental Control, ReWa expended more than \$8,000,000 to repair and restore the treatment machinery, components, and equipment at the three sites to usable condition. The expenditures also included the costs to cleanup, remove, and dispose (as required by regulatory requirements) of the resulting contaminated material.

ReWa submitted an insurance claim to the Fund. The Fund denied coverage. However, it offered a token payment of \$30,000 under a Pollutant Cleanup and Removal Provision policy that ReWa had purchased.

ReWa then filed a judicial action against the Fund seeking coverage. It argued that the pollution, caused by vandalism and repairs made necessary by it, was covered by the full limits of the Policy.

The lower court found the Policy covered most of ReWa's remediation expenses. It awarded ReWa \$5,824,924.49 in damages.

The Fund appealed the decision. It argued the lower court erred in finding the Policy covered ReWa's remediation efforts at the three facilities. It contended the Policy only covered the expenses to the extent ReWa provided a breakdown of those specific costs.

The Court concluded that the lower court erred in finding the Policy covered several categories of consequential damages. Nevertheless, it held that the lower court properly awarded costs for cleaning the affected areas.

The Policy covered expenses associated with cleaning the holding tanks at the facilities "to the extent ReWa provided a breakdown of those specific costs." The Fund argued that ReWa had not provided a detailed report of the costs. However, multiple witnesses testified ReWa provided monthly expense reports separated by facility to the Fund. ReWa also demonstrated that invoices and documents related to these costs had been available for four years via discovery.

Undisputed evidence was provided showing that contaminated biosolids adhered to the walls of the structures at two facilities despite washing. The Court determined this constitutes direct physical loss or damage which is covered under the Policy.

The Court did reverse certain portions of the damages award. It found that the lower court erred in awarding damages in several categories of consequential damages. These included:

- Testing and sampling
- Expert consultation regarding government agency requirements
- Investigating the contamination
- Continuing the operation of the wastewater facilities including future protocols for receiving waste

The Court agreed with the argument that these consequential damages did not relate to a direct loss.

A copy of the Opinion can be downloaded [here](#).