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WHEN TO INCLUDE CONTRACTOR'S POLLUTION LIABILITY

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One of the tasks with which I often assist my construction clients is to develop their insurance requirements for their various contractual agreements. One of the core coverages that I always recommend including in these requirements for subcontractors is pollution liability. The question that inevitably comes back to me is, "When should we require it? Or should we tie it to a scope of work such as hazardous waste removal, asbestos, or lead abatement?" My initial response to this question is to always require this coverage, due to a number of reasons and associated exposures:

WHAT IS A POLLUTANT?

Pollutants can include any solid, liquid, gaseous, or thermal pollutant, irritant, or contaminant including, but not limited to smoke, vapors, odors, soot, fumes, acids, alkalis, toxic chemicals, hazardous substances, electromagnetic fields, low-level radioactive waste and material, mold matter, Legionella, and waste materials (including medical, infectious, and pathological wastes).

POLLUTION EXPOSURES

Here are a few examples of pollution liability exposures faced by certain types of contractors:

- **Excavation Contractors** – Impacting groundwater from drilling and excavation work (dewatering operations, etc.).
- **Concrete firms** – Residual contamination from improper control of oil and lubricants used for the concrete forms.
- **Demolition Contractors** – Inadvertent disturbance and airborne release of pre-existing contamination or products (i.e. naturally occurring asbestos in subsurface soils/geology, contaminated soils, surface or groundwater, etc.).



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- **Drilling Contractor** – Cross-contaminating aquifers by drilling through contaminated soil and into the groundwater.
- **Electrical Contractor** – Responsibility for damages and/or pollution releases arising from power cut off on client's facility pollution control equipment, fire sprinkler systems, electronic monitoring devices, etc.
- **Interior Renovation Contractors** – Fumes, emissions, and spills from chemicals (volatile organic compounds) applied during construction (finishers, sealants, curing compounds, floor coatings, adhesives, etc.), and from equipment exhaust, causing respiratory hazards.
- **Roofing Contractors** – Toxic mold exposure caused by water entering a building's roofing system or substructure due to improper installation of the roofing system.
- **Steel Erectors** – Fumes from welding operations causing adverse health effects on workers. This is primarily a third party over action expense; nonetheless, it can expose the organization to environmental liability.
- **All Construction Trades** – Various exposures from subcontractors who perform work onsite or transport and dispose of waste materials or soils.

COMMERCIAL GENERAL LIABILITY INSURANCE AND POLLUTION COVERAGE

The Insurance Services Office's commercial general liability standard coverage form #CG 00 01 includes a pollution liability exclusion with some standard exceptions for coverage. However, the insurance industry has moved towards adopting broader absolute pollution exclusions as a result of their dissatisfaction with the judicial interpretation of the pollution exclusion exceptions and the enormous expense and exposure resulting from the significant increase in environmental

litigation. A number of court decisions around the United States applied the pollution exclusion in contractor's commercial general liability policies to deny coverage for damages that were deemed to arise from pollution².

In addition to total or absolute pollution exclusions, it is common to see additional exclusions related to pollution liability attached to commercial general liability policies. These can include silica or silica-related dust, fungi or bacteria, asbestos, radioactive matter, lead, hazardous material, and chromated copper arsenate.

The bottom line is that you cannot rely on your commercial general liability coverage to provide any protection against third party claims related to pollution.

As the commercial general liability policy has evolved and become more restrictive relating to pollution claims, the opposite is true for the marketplace and what can be obtained through a contractor's pollution liability policy.

POLLUTION LIABILITY COVERAGE

There are around 45 carriers providing contractor's pollution liability coverage. That number of insurance carriers puts pressure to offer continued competitive pricing, terms, and conditions. The coverage forms continue to expand and can include:

- Jobsite pollution liability
- Natural resource damage
- Mold, fungi, Legionella
- Transportation
- Non-owned disposal site
- First party emergency remediation or cleanup costs
- First party protective pollution liability
- Sudden and accidental coverage for client's owned, leased, or rented locations.

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The bottom line is that **you cannot rely on your commercial general liability coverage to provide any protection against third party claims related to pollution.**

SUMMARY

Most construction contracts include an indemnity provision that requires the contractor/subcontractor to indemnify and hold harmless their client for claims, damages, losses and expenses, and potentially attorney fees arising out of your operations to the extent caused by you or anyone for whom you are liable for negligent acts or omissions. This language appears regardless of whether the contract specifically requires you to carry pollution liability.

Also remember that any negligent acts or omissions follow you both for the duration of your ongoing operations as well as for the amount of time you are legally liable in the jurisdiction in which the work is performed (statute of repose period: WA - 6 years, AK, CA & OR – 10 years).

There are some who continue to push back on these insurance requirements when it appears in their contracts. However, effectively transferring the indemnity risk from your construction contracts to a

third party insurance carrier and including the cost for the pollution liability policy as part of your insurance burden in your bids/contracts for the work your firm performs is the most cost effective financial protection for your business. This is a much preferable outcome than paying out of pocket for such expenses.

If you are wondering whether you should require pollution liability coverage of those you are hiring, ask if you can request the coverage and gain protection of a broad additional insured endorsement for pollution where the insurer, not the hired subcontractor or vendor, has to provide you and your upstream client contracts defense and protection from awarded damages. This arrangement will prevent the damages from hitting your own insurance policy or subcontractor/vendors' bank accounts, and is, as our experience tells us, the most prudent risk management strategy. **Although pollution policies adoption for contractors has been on the rise, many still choose to ignore the exposure or rely on their balance sheet (knowing or unknowingly) to address the risk. It is prudent to consult with an experienced risk management broker to discuss implementing pollution liability coverage into your next project.**

References and Resources

1. <https://blog.newdayunderwriting.com>
2. <https://www.constructionrisk.com/2015/11/pollution-exclusion/>