

Special News Bulletin

Environmental Liability Insurance

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Why Should Contractors Purchase Pollution Liability Insurance?

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This article outlines some of the advantages of purchasing a dedicated pollution liability policy to cover a contractor's environmental risks and also highlights the issues that can result from relying on a Commercial General Liability policy for these exposures.

Most contractors carry Commercial General Liability (CGL) insurance, as it is the mainstay coverage to protect them in the event of a third party claim for bodily injury or property damage arising out of their construction operations.

While some CGL policies include limited coverage for environmental losses, relying on a CGL policy to fully cover environmental exposures is not prudent risk management. This is particularly important given the complex legal issues, and regulatory and contractual requirements facing contractors today. Outlined below are the top five reasons why contractors should buy a separate pollution liability policy.

1. Most CGL policies contain a pollution exclusion

The majority of CGL policies contain a pollution exclusion. Notably, claims resulting from the escape of pollutants brought to the jobsite by the contractor are typically excluded. *(A recent exception to this exclusion was introduced in the Insurance Bureau of*

Canada's CGL policy, whereby there would be coverage for pollutants such as oil and gas that are contained in the contractor's equipment.)

Also excluded by most CGL policies are losses arising from the release of pollutants on a site that has at any time been used to handle, store or process waste. Therefore, contractors performing operations at municipal sites such as landfills or water and waste water treatment plants should be mindful of this. Even those working on ordinary sewer lines are subject to an interpretation that the sewer line is involved in processing waste, and therefore there would be no pollution coverage if there was an ensuing escape of raw sewage.

This type of pollution exclusion is the most common and it is often referred to as the **absolute pollution exclusion**. There are two notable exceptions to the absolute pollution exclusion whereby contractors may find some coverage under their CGL policies for environmental incidents:

- a) If the environmental contamination is consequent to bodily injury or property damage which is covered by the CGL policy. For instance, a contractor is excavating the street to install a new water main. During excavation, he strikes an existing oil pipeline causing property damage and resulting environmental contamination. As the property damage to the pipeline is not excluded, the policy will also indemnify the contractor for the resulting cleanup of the oil spill.
- b) If the environmental damage occurs during the completed operations period. For instance, while constructing a new hospital, a contractor installs a diesel generator as part of the hospital's emergency power system. Six months after project completion,

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a leak develops in the generator due to improper installation by the contractor, and diesel fuel seeps into the ground. As the environmental contamination occurred during the completed operations period, the CGL policy will indemnify the contractor for the resulting cleanup of the diesel spill.

Some CGL policies contain an even more restrictive pollution exclusion which is often referred to as the **total pollution exclusion**. This more onerous exclusion eliminates the coverage provided in the two exceptions above. Therefore, in this case, if the contractor hits an existing oil pipe and causes environmental contamination, only damage to the pipe itself would be covered—the policy would not indemnify the contractor for any costs to clean up the oil spill. Moreover, there is no longer any completed operations coverage for environmental spills.

The primary reason why most contractors should buy a pollution liability policy to cover their environmental exposures is due to the various pollution exclusions contained on most CGL policies.

2. There is limited value in the sudden and accidental pollution coverage endorsement

Some insurers provide limited pollution coverage on the CGL policy by virtue of the Insurance Bureau of Canada's endorsement 2313, or the more recent endorsement 2336, commonly referred to as sudden and accidental pollution coverage.

The primary intent of this endorsement is to restore coverage for pollutants that the contractor brings to the jobsite (*as previously noted in reason number one above, the pollution exclusion removes coverage for pollutants that the contractor brings to the jobsite*).

In order for coverage to apply through the sudden and accidental pollution coverage endorsement, the pollutants must be detected within 120 hours of the commencement of discharge *and* must be reported to the insurer within 120 hours of being detected. Some insurers also offer options of detection and reporting within 240 hours. We have seen cases where disputes arise as a result of these time limitations. When there's

uncertainty, or disagreement between the insurer and insured as to whether the discharge was detected within the 120-hour time limitation, there can be delays or even a denial of coverage.

While this endorsement does provide coverage that will apply in certain situations, contractors should consider that many pollution losses occur over a period of time that is much longer than 120 or even 240 hours. The sudden and accidental pollution endorsement solely covers events that are sudden in nature.

Consider the loss scenario of a contractor that installed a tack coat between two layers of asphalt, as illustrated below. A tack coat is a thin layer of asphalt product that helps different layers of asphalt bond together more efficiently. Shortly after the installation of the tack coat, there was a violent rainstorm and some of the contaminants contained in the tack coat were washed into a ditch along the side of the road. Two months later, the contaminants reached a nearby stream. Cleanup costs exceeded \$150,000.



Source: Pavement Interactive

In such a case, not only did the contractor bring the pollutants to the job site, but even if the CGL policy contains sudden and accidental pollution coverage, the contamination was only detected two months after the accident; therefore, no coverage would apply under a CGL policy with this endorsement.

ENCON's Pollution Liability Insurance for Contractors provides coverage for pollution incidents both of a gradual *and* sudden and accidental nature, without the need to prove to the insurer that the discharge was detected within 120 hours.

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3. Most CGL policies exclude claims involving asbestos and fungi

Asbestos is a risk that is excluded by most CGL policies. Contractors performing renovation projects in older buildings should be mindful of the potential for asbestos. While the use of asbestos is banned in new building projects in many developed countries, asbestos was previously used in thousands of materials. Friable materials, meaning those that are easily crumbled, are judged to be more dangerous. Demolition operations in particular can result in the accidental spreading of asbestos particles throughout an existing building. Some of the older products that have contained asbestos in the past include stipple for textured ceilings, floor tiles or vinyl sheet flooring, window putty, drywall joint filler compound, furnace tape and stucco. Some fireproofing and acoustic materials have also been known to contain asbestos.

Similarly, mould and fungi are also risks that are excluded by most CGL policies. In the cases where coverage is provided, it is typically subject to a very low sublimit. The growth of mould in buildings can lead to several health problems. Some moulds even produce mycotoxins, and these types of mould are referred to as “toxic mould.” Contractors performing building construction and renovation should be mindful of these risks. Virtually all building projects have a mould exposure as water can infiltrate the structure in many ways.

Both the asbestos and fungi/mould risks are exposures that can be covered by virtue of ENCON’s Pollution Liability Insurance for Contractors. Asbestos coverage is included in the standard policy, whereas coverage for fungi/mould must be added by endorsement. Often, only specialized contractors that perform asbestos or mould remediation operations believe that they have asbestos or mould exposures. While these contractors’ operations are **more** susceptible to these exposures, any contractor can be exposed to an asbestos or mould claim, particularly if they are involved in renovation projects.

4. Excavation work poses specific risk exposures

The fourth reason why contractors should purchase a pollution liability policy is excavation work. Contractors never really know what lies below the surface, and locates are often inaccurate or miss an old, or forgotten, utility.

For instance, consider a recent project in a major Canadian city for construction of a new office tower. During excavation, the contractor struck an old oil heating reservoir that was no longer in use. Investigation revealed that the tank was over 100 years old and had not been in use for over 60 years. Had the tank contained a substantial amount of product, a significant environmental loss could have ensued. For contractors with a total pollution exclusion in their CGL policy, as described in reason number one, there would be a significant coverage gap.



Another similar Canadian case involving excavation work was the Burnaby crude oil spill where an excavator digging a sewer trench ruptured an oil pipeline. The resulting cleanup operations cost more than \$15 million. *(For more information on the Burnaby crude oil spill, please see http://www.env.gov.bc.ca/eemp/incidents/2007/burnaby_oil_spill_07.htm.)*

Having ENCON’s Pollution Liability Insurance for Contractors provides additional protection for pollution incidents resulting from excavation work.

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5. Fines and punitive damages against insureds can be substantial

CGL policies typically only cover the insured for compensatory damages. These are damages that are due or awarded in payment for actual injury or economic loss. Compensatory damages do not include punitive or exemplary damages, or the multiple portion of any multiplied damage award.

ENCON's Pollution Liability Insurance for Contractors is one of very few policy wordings that includes exemplary or multiplied damages, and civil fines, penalties or assessments in the definition of loss. In the Burnaby crude oil spill mentioned above, the courts sought a total fine of \$150,000 which included an allocation of funds to the Habitat Conservation Trust Foundation. This means that the assessed fines and penalties would be covered under ENCON's Pollution Liability Insurance for Contractors if they resulted from an insurable claim for third party bodily injury or property damage.

Pollution cleanup costs are growing as our society, and legislators, demand that contaminants are cleaned up quickly and thoroughly. Federal legislation can impose cleanup costs upon a property owner even if the owner was not responsible for causing the damage. Contractors are held to a very high standard of care when working in and around potential pollutants, and/or when handling substances that could contaminate the environment. Defence costs and the cost of cleanup from just one loss can be financially devastating to a company. These costs, as well as the standard of care and cleanup expected of contractors, are all only trending upwards, as illustrated by our own claims experience. Accidents do happen and having the appropriate pollution coverage through ENCON can help protect your clients against that risk.

