

The Environmental **Advisor**

Environmental Division / Great American Insurance Group

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Welcome to the latest edition of
the Environmental Advisor.

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Construction and related activities represent one of the key sectors of the global economy. The construction industry continues to experience significant economic challenges. Risk management practices become even more important during times of heightened financial stress. Please join us in this issue as we explore environmental risk management within the construction sector.

John Reynolds

Protecting your Bottom Line with Contractor Pollution Liability Insurance



Kirk Davenport,
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In today's economy, many contractors are faced with the challenges of reduced revenues and shrinking profit margins. Adding an additional expense to the income statement may not seem like a good idea. However, there are several reasons why Contractors Pollution Liability (CPL) insurance is a good investment. The most important of these is protecting your bottom line. In many cases, contractors purchase CPL coverage due to a contractual obligation. Many owners and general contractors understand the pollution exposures that are presented through contracting services. Allegations of exposure and injury due to asbestos at a jobsite; alleged injury and clean up costs due to mold from construction defects; and, clean up of contamination resulting from damage to underground pipelines or tanks are just a few examples. The parties that require this insurance also understand that while pollution events are not as frequent as other job site accidents, the expenses incurred to investigate, clean up and defend these incidents can be severe. In certain cases, the cost to respond to pollution events associated with contracting services can be in the hundreds of thousands to

millions of dollars. If that weren't enough, these expenses are not usually covered by standard property and casualty insurance such as General Liability (GL) insurance.

GL policies are used to respond to a variety of situations. However, most GL policies do not respond to pollution claims because of their absolute pollution exclusion. Therefore, a significant coverage gap is present. Unlike the slip and fall incidents and other common job site accident claims that may happen a few times a year and result in manageable losses, pollution claims tend to be infrequent but have a much higher potential of becoming severe. If uninsured, the consequences to the responsible company's bottom line could be devastating.



Consider the scenario involving a contractor that generates \$10 million in annual revenues. Assume cost of construction and materials, operating expenses, etc. resulting in \$200,000 net income. This is not an unrealistic situation in today's economy. The reality is that many companies would be pleased to show a narrow profit margin. Let's now throw in an uninsured pollution claim resulting in a \$250,000 loss. This once profitable company is now operating at a loss. Furthermore, the lost goodwill that results from telling a client there is no insurance to cover this matter is likely to have a negative impact on future projects and revenue. There is also an opportunity cost associated with the time and resources that will be incurred dealing with regulators, consultants, attorneys and environmental contractors instead of focusing on current and future projects.

Consider the same scenario; however, the contractor had purchased a CPL policy prior to the incident. Premium for a CPL policy will vary depending upon the limits, class of contracting services and other factors. We will assume a \$10,000 premium for \$1,000,000 limits. With the additional expense, the net income is now \$190,000. When the same claim scenario occurs, there is now coverage in place. The insurance company pays the claim less the self-insured retention and the contractor remains profitable. Furthermore, most insurance companies that provide CPL insurance also provide in-house pollution experts that will promptly respond with needed resources for clean up. Therefore, the

The National Response Center (NRC) was established as a contact for reporting oil, chemical and other pollution incidents on both land and sea anywhere in the United States. According to the NRC, 34,286 pollution incidents were reported in the United States in 2010.

additional value towards customer goodwill and no lost time on the part of our contractor dealing with regulators and clean up companies is also realized.

All contractors have pollution exposures. General contractors face a broad range of exposures based upon the multiple trades they subcontract as well as those services performed by in-house staff. These exposures include but are not limited to mold associated with roofers and siding contractors; Legionella attributed to HVAC and plumbing contractors; and, silt run off from grading contractors just to name a few. Pollution incidents occur much more frequently in the United States than you might imagine. Numerous other pollution incidents go unreported.

In the past, CPL Insurance was considered by some to be a luxury insurance. Today, CPL insurance is commonly purchased by contracting companies of all sizes. This is partly because many State and government entities require the coverage. General contractors that purchase the coverage to protect their assets frequently transfer liabilities to their subcontractors and require them to purchase separate CPL insurance policies. Contractors may attempt to secure project specific policies when required by contract. However, these project specific policies are often not as cost effective as a policy that covers the entire practice.

The CPL market has matured to the point that creative coverage is available for an affordable price. The result of adding CPL Insurance is a more comprehensive risk management program that allows contractors to be more competitive when bidding projects that require CPL insurance. Also, prompt access to environmental consultants and contractors to quickly and properly respond to a pollution event. Most importantly, an insurance program that can protect your hard earned revenue and profits against the often catastrophic losses that result from job site pollution claims.

Contractors Pollution Liability: Choosing Occurrence or Claims Made Coverage



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Contractor’s pollution liability coverage can be written either with a claims made coverage trigger or with an occurrence coverage trigger. While some people would typically consider occurrence coverage more favorable than claims made they both have their own advantages and disadvantages. Since contractor’s pollution liability policy terms and conditions can vary significantly between insurance carriers, extended reporting coverage options for claims made policies and completed operations coverage should also be considered when choosing coverage.

Claims made coverage means a claim must be first made and reported to the insurance carrier during the policy period and therefore presents a limited window of coverage. However claims made policies are usually less expensive than a comparable occurrence

policy for this reason. Claims made policies provide the opportunity to expand and broaden coverage since limits can be increased and coverage can be broadened on a renewal policy which would cover both new and historical operations and services performed prior to the policy period but subsequent to the retroactive date. An occurrence policy is subject to the same terms and conditions written in any specific policy year. Also when changing insurance carriers the new carrier will typically backdate over existing claims made coverage matching limits or possibly broadening terms and conditions. New carriers do not backdate over other occurrence policies. Claim made coverage can also be converted to occurrence based coverage by using an occurrence prior acts endorsement. This endorsement basically converts the limited claims made and reported trigger to an unlimited reporting trigger. Coverage includes historical exposure within the first subsequent occurrence policy. This endorsement only needs to be included on the first occurrence policy and there is no need to maintain the endorsement on subsequent occurrence policies.



Occurrence coverage typically means a claim can be made and reported anytime during or subsequent to the policy period as long as the bodily injury, property damage or environmental damage resulting from the pollution condition occurs during the policy period. A pollution condition must

occur in order to trigger the policy and must arise out of the performance of contracting operations or services as defined in the policy or listed on the policy declarations page. This unlimited reporting requirement is the primary advantage over claims made policies. The long term solvency of an insurance carrier is critical when occurrence coverage is considered. If a carrier becomes insolvent it is possible for coverage under occurrence policies to be lost.

One important item to note is that both claims made and occurrence practice or blanket policies must be maintained every year in order to provide coverage for completed operations exposure. A pollution condition could begin subsequent to the policy period arising out of a construction defect which takes time to manifest as would be the case with mold related pollution. For example a roofing construction defect causes water intrusion after a storm 2 years after construction. The mold or pollution condition does not manifest until after the policy period.

If the Insured does not maintain the blanket policy there would be potentially no coverage for this claim since the pollution condition and resultant PD occurred after the policy period ended.

In summary occurrence policies are usually more expensive but provide an unlimited reporting requirement. They are locked into the terms and conditions at the time they are purchased and the long term solvency of the carrier is critical. A claims made policy might be better if the price of the coverage is a concern or if the Insured may want to change or enhance coverage in the future.

Contractual Indemnity Coverage for Contractors

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As a result of the ongoing economic downturn, general contractors, trade contractors, construction managers and the like are being forced to sign more and more onerous contracts simply to remain competitive and keep working. An often overlooked, but important section of the construction contract is the indemnity or hold harmless provision. In this Article, we will briefly explain what indemnity provisions do, how critical they are to understanding the environmental exposures on a particular project and what insurance protection is available to help contractors mitigate those exposures.

Understanding an Indemnity Provision

An indemnity or hold harmless provision requires one party (the "indemnitor") to reimburse and, in some cases, defend the other party (the "indemnitee") against certain claims brought against the indemnitee by a third party. The purpose of the provision is to transfer the costs associated with such claims from the indemnitee to the indemnitor. It is important to understand that an enforceable indemnity clause does not relieve the indemnitee of its liability.



Rather, such a provision transfers the obligation to pay the costs associated with that liability to the indemnitor.

There are generally two types of indemnity provisions which present problems for contractors: the broad form and the intermediate form.

A broad form provision is the most onerous on the indemnitor and provides the most protection for the indemnitee. When this version is used, the indemnitor is agreeing to assume the liability of the indemnitee, even if the indemnitee is solely at fault for the loss. For example, an HVAC contractor may agree to indemnify, defend and hold harmless the GC from and against any and all liability... even if such liability arises in whole or in part from the negligence of the GC. If the owner of the project brings a claim against the GC for damage to the owner's property because of mold, the HVAC contractor could find himself paying for those damages, even if the mold arose solely from the GC's work.

An intermediate form indemnity provision is less onerous on the indemnitee, but can still have significant consequences. Here, the indemnitor is agreeing to assume the liability of the indemnitee, but not if the indemnitee is solely at fault for the loss. The contract might state that the HVAC contractor agrees to indemnify, defend and hold harmless the GC from and against any and all liability... even if such liability arises in part from the negligence of the GC. If the owner of the project brings the same type of mold claim, the HVAC contractor could again find himself paying for all damages, even for those which are

attributable to the GC's negligence. However, if the GC is solely at fault, the HVAC contractor would not be obligated to indemnify the GC.

While each state has its own statutes and case law that may restrict the enforceability of indemnity provisions, they remain viable in most jurisdictions. Smart contractors can look to insurance to help mitigate their risk, even when they are forced to sign contracts with onerous indemnity language.

Insurance Coverage

Insurance coverage is available for a contractor's pollution-related contractual indemnity exposure through Contractor's Pollution Liability (CPL) forms. However, the coverage is found in an unusual place. Like most Commercial General Liability (CGL) policies, CPL forms exclude coverage for the liability of another assumed in a contract or agreement. That is, there is a general exclusion for the types of indemnity exposures discussed above. However, an exception to this exclusion may be included (or can be negotiated) that provides coverage for certain pollution-related liabilities assumed in a contract signed by the contractor and its client prior to the date the pollution commenced. Additionally, certain contracts can be scheduled onto the policy to provide protection for the contractor's contractual indemnity exposures.

It is important to understand that liability assumed by the insured in a contract generally refers to liability incurred when one promises to indemnify another, and does not refer liability arising from the assumption of a duty to perform or from liability that results from breach of contract. When choosing a CPL insurance carrier make sure they have an experienced underwriting staff and legal support team qualified to evaluate the environmental exposures of contractors, including those liabilities assumed in a contract, and to provide the insured with creative insurance solutions as part of its overall risk management approach.

Great American Environmental heads to IRMI

Great American Insurance Group's Environmental Division is pleased to announce that it has been selected by the International Risk Management Institute (IRMI) to present at its annual Construction Risk Management Conference in San Diego November 13 - 17, 2011. Robert M. Burkholder, Divisional Vice President, Claims for Great American's Environmental Division, will co-present with Jeffrey S. Barron, Partner, Morris Polich & Purdy, LLP on establishing protocols for Contractors' Pollution Liability claims.

IRMI's website provides the following workshop description: "A potential pollution incident often results in a frantic search for answers: Are we responsible? How do we keep the project on track? Do we have coverage for something like this? Even the best run companies face the risk of an environmental incident. This workshop will discuss several contractor-related environmental claim scenarios and offer suggestions for how best to manage the claim and navigate through the insurance company's claims department. Two industry claims veterans will discuss how to avoid pitfalls in the environmental claims-handling process and provide insights into claims-related legalese and documents."

The workshop will be presented twice on Tuesday November 15th beginning at 1:30 pm and 3:30 pm Pacific Time. Please visit

<http://www.irmi.com/conferences/default.aspx> for more information about the speakers as well as registration details.

About Great American's Environmental Division

Great American Insurance Group's Environmental Division provides a comprehensive portfolio of environmental insurance products to a broad array of industries. All products can be customized to address the specific risks and exposures of the client. Products include: Premises Environmental Liability Insurance, Indoor Air Quality and Mold Liability Insurance, Contracting Services Environmental Liability Insurance, Professional and Contracting Services Environmental Liability Insurance, Excess Environmental Liability Insurance, and Closure and Post Closure Financial Assurance.

About Great American Insurance Group

Great American Insurance Group's roots go back to 1872 with the founding of its flagship company, Great American Insurance Company. Based in Cincinnati, Ohio, the operations of Great American Insurance Group are engaged primarily in property and casualty insurance, focusing on specialty commercial products for businesses, and in the sale of traditional fixed and indexed annuities and a variety of supplemental insurance products such as Medicare supplement. Great American Insurance Company has received an "A" (Excellent) or higher rating from the A.M. Best Company for over 100 years (most recent rating evaluation effective February 14, 2011). The members of the Great American Insurance Group are subsidiaries of American Financial Group, Inc. (AFG), also based in Cincinnati, Ohio. AFG's common stock is listed and traded on the New York Stock Exchange and the Nasdaq Global Select Market under the symbol AFG.

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