

This article was downloaded by: [Austin, William]

On: 23 February 2011

Access details: Access Details: [subscription number 933923168]

Publisher Routledge

Informa Ltd Registered in England and Wales Registered Number: 1072954 Registered office: Mortimer House, 37-41 Mortimer Street, London W1T 3JH, UK



Environmental Claims Journal

Publication details, including instructions for authors and subscription information:

<http://www.informaworld.com/smpp/title~content=t713609436>

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Online publication date: 23 February 2011

To cite this Article Austin, William K.(2011) 'Environmental Insurance for Contractors: More Possibilities Than May Be Expected', Environmental Claims Journal, 23: 1, 3 – 18

To link to this Article: DOI: 10.1080/10406026.2011.545698

URL: <http://dx.doi.org/10.1080/10406026.2011.545698>

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Environmental Insurance for Contractors: More Possibilities Than May Be Expected

WILLIAM K. AUSTIN*

Pollution events are often thought of as uninsurable. A more realistic view is that loss or claim from a pollution incident is an insured event in many insurance standard property and liability policies. While coverage may be narrow and limits less than may be desired, it does exist. In this article we look at insurance policies typical of the construction industry to determine the extent of coverage for damages from an incident of pollution.

INTRODUCTION

Ask an insurance professional the extent of pollution insurance in an average commercial property and liability insurance program and many will respond “none.” Pose the same question again but framed for the construction industry and the answer will likely be the same or “check for a contractor’s pollution policy.” What is the appropriate answer? It depends on the claim for damages and cause of the incident. What many insurance professionals will find interesting is the amount of “pollution” coverage available in standard property and liability insurance policies for an insured whether a member of construction industry or not.

A pollution incident may result in claims by several parties. First, the insured may have an incident that damages its own property. Second, the insured’s incident may cause an unrelated party to suffer damages. Third, a governmental entity may invoke local, state, or federal statutes to enforce remediation of impaired land or water.

In this article we look at insurance policies typical to the construction industry to determine the extent of coverage for damages from an incident of pollution. All policy forms will be based on standard Insurance Services Office (ISO) forms unless otherwise noted. All reference to “contractor” in this

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article means a general or subcontractor involved in construction or renovation of buildings but not involved in removal of lead, asbestos, or other types of hazardous material. For simplicity, all discussion is based on a contractor's own insurance and not any that may be provided under a wrap-up program whether owner controlled insurance program (OCIP) or contractor controlled insurance program (CCIP). All property insurance is predicated on an "all risks of loss" basis using most recent issued ISO special coverage forms. Property coverage may differ by insurer as many insurers use independent filings within ISO filings to create policy forms unique to their own risk appetite.

The reader is cautioned that no commentary is made on any state mandated endorsements that may broaden or lessen pollution coverage in any ISO or non-ISO form. The only way to properly determine what pollution coverage may be available in the body of any policy or as amended by endorsement is to read the complete policy whether in issued form or as a specimen policy prior to binding coverage. "A&S" as used in this article means "Austin & Stanovich Risk Managers LLC."

POLLUTION DEFINED

What is pollution? *Merriman-Webster* defines it as "the action of polluting especially by environmental contamination with man-made waste: the condition of being polluted." *Black's Law Dictionary* (7th ed.) states "Pollute" means "To corrupt or defile; especially to contaminate the soil, air, or water with noxious substances." Common and legal usage of any word or words may not be the same as that which may be used in an insurance policy. It is important to understand the common and legal definitions of these words but for purposes of coverage it is critical to understand how an insurer's definitions will create or disallow coverage for a "pollution" incident. "Pollutant" in ISO property¹ and liability² policies reviewed in this article is defined as "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."

CONTRACTOR ON AND OFF JOB SITE EXPOSURES

A contractor typically maintains a fixed location such as office, workshop and storage area for permanently installed equipment and construction supplies (fixed site) and may use many temporary locations at any given time in which

¹ ISO property policies include business owners policies (BOP), commercial property forms (CP), builders risk, installation forms, and contractors equipment.

² ISO liability policies include commercial general liability (CGL), business automobile policy (BAP), owners and contractors protective (OCP), railroad protective liability (RPL), and umbrella.

the contractor's work is created or installed (job site). The extent of first-party and third-party pollution coverage for a contractor will depend on the incident and if it occurs at the fixed site or on a job site.

FIXED SITE

The insurance needed for fixed site exposures is similar to that of most organizations: property insurance is for damage to owned and leased property, building and contents including any nonowned contents that is the organization's responsibility while in its custody or control. The use of any location, including a job site, creates the possibility of bodily injury, property damage, and personal injury³ to a visitor to the location. Hazardous materials in any form used and/or stored at any fixed location may create an incident at that location or other location if moved to a job site.

Property

A contractor's property insurance needs may include building insurance (owned or net leased location) and coverage for contents (furniture, fixtures, machinery, equipment, and supplies). Coverage for building and contents can be obtained either using a business owner's policy (BOP) or a commercial property policy (CP). There are two pollution exposures to consider for coverage in any type of property policy: first, extent of direct damage coverage provided to the contractor's building and contents from the peril of "pollution" and second, the amount of coverage that may be available to remediate impaired land or water as a result of insured damage to building and/or contents. BOPs are usually used for smaller businesses and organizations and property insurance is packaged with commercial general liability and crime. CP forms are typically used for larger businesses and organizations and property insurance is monoline with coverage such as general liability and crime written in separate policies.

BOP: ISO BP 00 02 (12 99)

Perils insured in the BOP are found in "Special Causes of Loss," which states that risk(s) insured are direct physical loss unless the loss is excluded in Section B., Exclusions, or Limited in "Limitations" found in Paragraph A.4.

³ It is important to distinguish between use of "bodily injury" and "personal injury" in insurance policies. "Personal injury" is not considered "bodily injury." The ISO commercial general liability policy CG 00 01 (12 07) defines "personal injury" as "injury, including consequential "bodily injury", arising out of one or more of the following offenses: false arrest, detention or imprisonment; malicious prosecution; wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor; oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; oral or written publication, in any manner, of material that violates a person's right of privacy."

- **Exclusion:** We will not pay for loss or damage caused by or resulting from the 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”⁴. 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.”
- **Additional Coverages:** Pollutant Clean-up and Removal: We will pay your expense to extract “pollutants” from land or water at the described premises if the discharge, dispersal, seepage, migration, release or escape of the “pollutants” is caused by or results from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the earlier of: (1) The date of direct physical loss or damage; or (2) The end of the policy period. The most we will pay for each location under this Additional Coverage is \$10,000 for the sum of all such expenses arising out of Covered Causes of Loss occurring during each separate 12-month period of this policy.

A&S BOP coverage comment: Pollution damage to insured building or contents is covered subject to policy limit(s) when caused by a specified peril as defined and then to the extent the substances are within the definition of “pollutants.” Remediation of contaminated land and/ or water is insured subject to a \$10,000 extraction limit. This limit may be increased upon request by the insured and favorable underwriting by the insurer.

Commercial Property: CP Forms

When ISO commercial property forms (CP) are used, both the Special Causes of Loss Form, CP 10 30 (06 07), and Building and Contents Coverage Form, CP 00 10 (06 07), must be reviewed.

- **Exclusion:** We will not pay for loss or damaged caused by or resulting from the 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.
- **Additional Coverage:** Pollutant Cleanup And Removal: We will pay your expense to extract “pollutants” from land or water at the described premises if the discharge, dispersal, seepage, migration, release or escape of the “pollutants” is caused by or results from a Covered Cause of Loss that occurs during

⁴ Specified causes of loss in all ISO property policies reviewed in this article means: fire; lightning; explosion, windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.

the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date on which the Covered Cause of Loss occurs. This Additional Coverage does not apply to costs to test for, monitor or assess the existence, concentration or effects of “pollutants”. But we will pay for testing which is performed in the course of extracting the “pollutants” from the land or water. The most we will pay under this Additional Coverage for each described premises is \$10,000 for the sum of all covered expenses arising out of Covered Causes of Loss occurring during each separate 12-month period of this policy.

A&S CP comment: Pollution damage to an insured’s building or contents in a commercial property policy has to be viewed from the “Causes of Loss—Special Form” and the “Building and Contents Coverage Form.” Pollution damage to insured building or contents is covered subject to policy limit(s) when caused by a specified peril as defined and then to the extent the substances are within the definition of “pollutants.” Remediation of contaminated and/or water is insured by a \$10,000 extraction limit. This limit may be increased upon request by the insured and favorable underwriting by the insurer. A separate ISO form, CP 04 07 (10 91), may be used by an insurer to increase the aggregate limit beyond \$10,000.

JOB SITE

Most contractors will build, repair, renovate, and/or install their work at locations other than their fixed site. Work at a contractor’s job site will require special property insurance coverage forms and/or policies to insure the contractor’s labor, materials, and profit at any one site. While it is possible that a fixed site property policy, such as CP form, can be amended to include job site exposures it is a usual practice for the contractor to purchase separate policies for these exposures. Policies such as builder’s risk or installation floater can be specific to one site or include any job sites depending on the contractor’s needs, terms of the construction contract, and the insurer’s underwriting ability. A separate policy for equipment used primarily away from the contractor’s fixed site is usually insured by a contractor’s equipment floater. This floater may be part of the overall property insurance policy for fixed site exposures or as a separate policy.

Builder’s Risk—New Construction or Renovation of Existing Structure

Builder’s Risk Coverage Form: CP 00 20 (06 07)

When an insured looks to ISO builders risk forms for pollution coverage the builders risk commercial property form, CP 00 20 (06 07), must be reviewed as well as the commercial property form Causes of Loss—Special Form, CP 10 30 (06 07).

Causes of Loss—Special Form CP 10 30 (06 07)

- **Exclusion:** 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 does not apply to damage to glass caused by chemicals applied to the glass.

Builders Risk CP 00 20 (06 07)

- **Additional Coverages: Pollutant Cleanup and Removal.** We will pay your expense to extract “pollutants” from land or water at the described premises if the discharge, dispersal, seepage, migration, release or escape of the “pollutants” is caused by or results from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date on which the Covered Cause of Loss occurs. This Additional Coverage does not apply to costs to test for, monitor or assess the existence, concentration or effects of “pollutants”. But we will pay for testing which is performed in the course of extracting the “pollutants” from the land or water. The most we will pay under this Additional Coverage for each described premises is \$10,000 for the sum of all covered expenses arising out of Covered Causes of Loss occurring during each separate 12-month period of this policy.

A&S Builders Risk comment: Pollution damage to the insured building is covered subject to policy limit(s) when caused by a specified peril as defined and then to the extent the substances are within the definition of “pollutants.” Remediation of contaminated insured premises is insured by a \$10,000 extraction limit. This limit may be increased upon request by the insured and favorable underwriting by the insurer. ISO form CP 04 07 (10 91) may be used by an insurer to increase the aggregate limit beyond \$10,000.

Installation

Installation Coverage Form IH 00 73 (09 09)

The ISO Installation Form is used when contractors such as electricians, plumbers, and finish carpenters work on a portion of a building but may not be subject to a builders risk policy. An example is when an electrician is hired to upgrade electrical service in a specific portion of an existing building. No other work is being done in or on the building thus no builders risk policy is available to cover the interests of the contractor. The electrician needs to insure its labor, materials, and profit until the work is accepted by the owner and the electrician is paid for the work. Two policy forms must be reviewed to determine the extent of direct damage coverage for the contractor’s installation

work. Installation Coverage Form, IH 00 73 (09 09), must be reviewed with the Causes of Loss–Special Form, CP 10 30 (06 07). Property covered in the installation coverage form defines “Covered Property” as “property situated as specified in the Declarations for installation at any described premises.”

IH 00 73 (09 09)

- **Additional Coverage: Pollutant Cleanup And Removal:** We will pay your expense to extract “pollutants” from land or water at the described premises if the discharge, dispersal, seepage, migration, release or escape of the “pollutants” is caused by or results from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date on which the Covered Cause of Loss occurs. This Additional Coverage does not apply to costs to test for, monitor or assess the existence, concentration or effects of “pollutants”. But we will pay for testing which is performed in the course of extracting “pollutants” from the land or water. The most we will pay under this Additional Coverage for each described premises is \$10,000 for the sum of all covered expenses arising out of Covered Causes of Loss occurring during each separate 12-month period of this policy. The limit for this Additional Coverage is in addition to the Limit of Insurance.

CP 10 30 (06 07)

- **Exclusions:** 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.

A&S Installation Coverage Form comment: Pollution damage to the insured’s work is covered subject to policy limit(s) when caused by a specified peril as defined and then to the extent the substances are within the definition of “pollutants.” Remediation of contaminated land and/or water is insured by the \$10,000 extraction limit. This limit may be increased upon request by the insured and favorable underwriting by the insurer.

Contractor’s Equipment

Contents coverage under ISO Building and Personal Property Coverage Form, CP 00 10 06 07, is location-specific unless contents coverage is subject to an unscheduled location limit. Often coverage for contractors equipment is broader when provided by the Contractor’s Equipment Coverage Form, IH 00 68 (09 09), due to insured perils (i.e., no exclusion for flood and earthquake), lack of coinsurance, and lower deductible per covered loss.

Contractor's Equipment Coverage Form, IH 00 68 (09 09)

- **Exclusion:** Pollution as a cause of loss *is* not excluded.
- **Additional Coverage: Pollutant Cleanup And Removal:** We will pay your expense to extract "pollutants" from land or water if the discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused by or results from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date on which the Covered Cause of Loss occurs. This Additional Coverage does not apply to costs to test for, monitor or assess the existence, concentration or effects of "pollutants". But we will pay for testing which is performed in the course of extracting the "pollutants" from the land or water. The most we will pay under this Additional Coverage is \$10,000 for the sum of all covered expenses arising out of Covered Causes of Loss occurring during each separate 12-month period of this policy.

A&S Contractor's Equipment Coverage Form comment: Pollution damage to an insured's equipment is covered for any risk of pollution except as that which may result from governmental action, nuclear hazard, and war/military action. This is broader than other direct damage property coverage that provides coverage for pollution only from specified causes of loss. Remediation of contaminated insured premises is insured by the \$10,000 extraction limit. This limit may be increased upon request by the insured and favorable underwriting by the insurer.

LIABILITY INSURANCE

A pollution incident may create bodily injury, property damage, and remediation expenses that become a contractor's financial responsibility under tort, strict liability, or application of municipal, state, or federal statute. Depending on the allegations and facts of the pollution incident a contractor may look for coverage in one or more liability type of policies. Usually the first policy to consult is the commercial general liability (CGL). Depending on fixed site exposures it is possible that fuel storage tanks either above ground (AST) or underground (UST) may leak and be subject to an UST pollution liability policy.⁵ Use of vehicles and certain types of pollution incidents may be insured in a business automobile policy (BAP). Construction contracts may require the contractor to purchase owners contractors protective (OCP), railroad protective liability (RRL), or a contractors pollution liability policy (CPL). All liability insurance coverage reviewed in this section is based on an "occurrence" trigger unless noted otherwise.

First line of pollution coverage for any contractor is to check its CGL policy and second, BAP if the incident is based on a registered vehicle. While

⁵ Insurers will often include coverage for AST exposures as well as UST.

many insurers use only ISO forms the contractor must carefully review the forms used by its insurer as some will use portions of the ISO CGL policy forms but through independent filings depart from all ISO terms and conditions and thus may have broader or narrower coverage terms than discussed in this article.

Commercial General Liability

Insuring Agreement: Coverage A: bodily injury and property damage. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies.

• **Pollution Exclusion:**

- (1) “Bodily injury” or “property damage” arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of “pollutants”:
 - (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:
 - (i) “Bodily injury” if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building’s occupants or their guests;
 - (ii) “Bodily injury” or “property damage” for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or
 - (iii) “Bodily injury” or “property damage” arising out of heat, smoke or fumes from a “hostile fire”;
 - (b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
 - (c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:
 - (i) Any insured; or
 - (ii) Any person or organization for whom you may be legally responsible; or
 - (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured’s behalf are performing operations if the “pollutants” are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:
 - (i) “Bodily injury” or “property damage” arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform

the normal electrical, hydraulic or mechanical functions necessary for the operation of “mobile equipment” or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the “bodily injury” or “property damage” arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;

- (ii) “Bodily injury” or “property damage” sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or
 - (iii) “Bodily injury” or “property damage” arising out of heat, smoke or fumes from a “hostile fire”.
- (e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured’s behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, “pollutants”.
- (2) Any loss, cost or expense arising out of any:
- (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, “pollutants”; or
 - (b) Claim or “suit” by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, “pollutants”.
- However, this paragraph does not apply to liability for damages because of “property damage” that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or “suit” by or on behalf of a governmental authority.

Coverage B: Personal injury and advertising injury

- **Pollution Exclusion:** “Personal and advertising injury” arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of “pollutants” at any time.
- **Pollution-Related Exclusion:** Any loss, cost or expense arising out of any:
 - (1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, “pollutants”; or
 - (2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, “pollutants”.

A&S comments on commercial general liability coverage: While many in the industry will state that an absolute pollution exclusion exists in the ISO CGL, the only absolute pollution exclusion in this policy form applies to Coverage B for personal injury and advertising injury. While the exclusion used in Coverage A for bodily injury and property damage is broad it does allow coverage through exceptions for incidents that arise out of a contractor's building (i.e., HVAC equipment problems), ongoing contractor operations at a nonowned building where owner is an additional insured in this policy or out of hostile fire. Coverage is available to any insured for unintentional escape of fluids from mobile equipment and for release of gases, fumes, or vapors that arise out of operations by contractor or subcontractor. Costs from testing and/or treatment of soil or water is excluded except to the extent that the "property damages" would be the responsibility of the insured in absence of demand by any governmental authority.

Some contractors such as painters will bring substances onto job sites that may be considered hazardous and fall within the definition of pollutants. ISO form CG 04 30 (09 99), titled Pollution Exclusion-Limited Exception For Designated Pollutant(s), can be added to CGL form CG 01 00 to create an exception to the pollution exclusion for substances used by the insured contractor (i.e., paint). Coverage is provided for incidents other than when the pollutant is transported, handled, stored, treated, disposed of, or processed as waste, or when transported or stored for others.

Business Automobile Policy: SIO CA 99 48 (12 93)

- **Insuring Agreement:** We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".
- **Accident:** "Continuous or repeated exposure to the same conditions resulting in "bodily injury" or property damage".
- **Exclusion:**

Care, Custody Or Control: "Property damage" to or "covered pollution cost or expense" involving property owned or transported by the "insured" or in the "insured's" care, custody or control. But this exclusion does not apply to liability assumed under a sidetrack agreement.

Pollution: "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

- a. That are, or that are contained in any property that is:
 - (1) Being transported or towed by, handled, or handled for movement into, onto or from, the covered "auto";
 - (2) Otherwise in the course of transit by or on behalf of the "insured"; or
 - (3) Being stored, disposed of, treated or processed in or upon the covered "auto";

- b. Before the “pollutants” or any property in which the “pollutants” are contained are moved from the place where they are accepted by the “insured” for movement into or onto the covered “auto”; or
- c. After the “pollutants” or any property in which the “pollutants” are contained are moved from the covered “auto” to the place where they are finally delivered, disposed of or abandoned by the “insured”.

Paragraph **a.** above does not apply to fuels, lubricants, fluids, exhaust gases or other similar “pollutants” that are needed for or result from the normal electrical, hydraulic or mechanical functioning of the covered “auto” or its parts, if:

- (1) The “pollutants” escape, seep, migrate, or are discharged, dispersed or released directly from an “auto” part designed by its manufacturer to hold, store, receive or dispose of such “pollutants”; and
- (2) The “bodily injury”, “property damage” or “covered pollution cost or expense” does not arise out of the operation of any equipment listed in Paragraphs 6.b. and 6.c. of the definition of “mobile equipment”.

Paragraphs **b.** and **c.** above of this exclusion do not apply to “accidents” that occur away from premises owned by or rented to an “insured” with respect to “pollutants” not in or upon a covered “auto” if:

- (1) The “pollutants” or any property in which the “pollutants” are contained are upset, overturned or damaged as a result of the maintenance or use of a covered “auto”; and
- (2) The discharge, dispersal, seepage, migration, release or escape of the “pollutants” is caused directly by such upset, overturn or damage.

A&S comments on business automobile policy: Coverage is provided for unintentional release of pollutants used by or for electrical, hydraulic, or mechanical functioning of a covered automobile. Coverage is also included for pollutants released by upset, overturn, or damage as a result of covered auto maintenance or use.

Umbrella Liability

A form of liability insurance to provide additional limits over an underlying CGL, BAP, and the employer’s liability coverage found in a worker’s compensation policy. The umbrella is most often a separate policy and may be issued by an insurer unrelated to an underlying insurer. Many BOPs include the umbrella as part of the overall policy. Whether separate or part of a BOP, an insured has to review the umbrella terms and conditions closely because many times it may not provide coverage as broad as that provided in the underlying liability policies even when it is stated to “follow form.”

• Insuring Agreement

We will pay on behalf of the insured the “ultimate net loss” in excess of the “retained limit” because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against

any “suit” seeking damages for such “bodily injury” or “property damage” when the “underlying insurance” does not provide coverage or the limits of “underlying insurance” have been exhausted. When we have no duty to defend, we will have the right to defend, or to participate in the defense of, the insured against any other “suit” seeking damages to which this insurance may apply. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. At our discretion, we may investigate any “occurrence” that may involve this insurance and settle any resultant claim or “suit”, for which we have the duty to defend.

- **Exclusion**

- (1) “Bodily injury” or “property damage” which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of “pollutants” at any time; or
- (2) “Pollution cost or expense”.

This exclusion does not apply if valid “underlying insurance” for the pollution liability risks described above exists or would have existed but for the exhaustion of underlying limits for “bodily injury” and “property damage”. Coverage provided will follow the provisions, exclusions and limitations of the “underlying insurance”.

A&S commentary on umbrella liability: The exception to the pollution exclusion shown above will make the umbrella “follow” the pollution exclusion and any exceptions to it found in an underlying policy. This is the preferred manner in which to structure umbrella liability over underlying liability coverage. The insured will need to read the policy carefully as often the umbrella insurer will add one or more endorsements to the policy in which the umbrella no longer “follows” the pollution coverage of the underlying policy.

Underground Storage Tanks (UST)

Unintentional release of fuel, such as heating oil, stored in a UST at the contractor’s fixed site may result in claims for bodily injury, property damage, and demands for remediation of impaired land and water. Coverage is available through ISO CG 00 42 (10 01), titled Underground Storage Tank Policy Designated Tanks. It is probably more common to find UST coverage offerings from surplus lines insurers using proprietary policy forms that may be similar to but not the same as ISO.

CG 00 42 (10 01)

Insuring Agreement (Claims-made trigger)

a. Coverage A—Bodily Injury And Property Damage Liability

- (1) We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of “bodily injury” or “property damage” to which this insurance applies.

- (2) This insurance applies to “bodily injury” and “property damage” only if:
 - (a) The “bodily injury” or “property damage” is caused by an “underground storage tank incident” that commences on or after the Retroactive Date shown in the Declarations of this policy and before the end of the policy period;
 - (b) The insured’s responsibility to pay damages because of “bodily injury” or “property damage” is determined in a “suit” on the merits in the “coverage territory” or in a settlement we agree to; and
 - (c) A claim for damages because of the “bodily injury” or “property damage” is first made against any insured, in writing, in accordance with Paragraph (3) below, during the policy period or any Extended Reporting Period we provide under Section V—Extended Reporting Periods.

b. Coverage B—Corrective Action Costs

- (1) We will pay those sums the insured becomes legally obligated to pay for “corrective action costs” to which this insurance applies as a result of an “underground storage tank incident”.
- (2) This insurance applies only if:
 - (a) An “underground storage tank incident” commences on or after the Retroactive Date shown in the Declarations of this policy and before the end of the policy period; and
 - (b) Such “underground storage tank incident” is reported in writing, in accordance with Paragraph (3) below, during the policy period or any Extended Reporting Period we provide under Section V—Extended Reporting Periods.
- (3) An “underground storage tank incident” will be considered reported at the earliest time:
 - (a) You report to us, in writing, an “underground storage tank incident”;
 - (b) You report to an “implementing agency”, in writing, an “underground storage tank incident”; or
 - (c) You receive a written notice from an “implementing agency” which requests or demands that you take action due to an “underground storage tank incident”.
- (4) The amount we will pay for damages because of “bodily injury” or “property damage” (Coverage A) or for “corrective action costs” is limited as described in Paragraph 1. of Section III—Limits Of Insurance.

● **Definition**

“Corrective action costs” means reasonable and necessary expenses incurred by you in response to a confirmed “underground storage tank incident” for corrective action as specified in 40 CFR Sections 280.60–280.67 and 40 CFR Section 280.72 promulgated by the Federal Environmental Protection Agency (EPA).

“Underground storage tank incident” means a “release” from an “insured tank”. The entirety of continuous or repeated “releases” from the same “insured tank” shall be deemed to be one “underground storage tank incident”.

● **Exclusions**

Damage To Property

“Property damage” to:

- (1) Property you own, rent or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement,

enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;

- (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;
- (3) Property loaned to you; or
- (4) Personal property in the care, custody or control of the insured.

Failure To Comply With Environmental Laws

"Bodily injury", "property damage" or "corrective action costs" arising out of an "underground storage tank incident" which results from or is directly or indirectly attributable to failure to comply with any applicable statute, regulation, ordinance, directive or order relating to the protection of the environment and promulgated by any governmental body, provided that failure to comply is a willful or deliberate act or omission of:

- (1) The insured; or
- (2) You or any of your members, managers, partners or "executive officers".

Corrective Actions

"Corrective action costs" or any other expenses:

- (1) Resulting from any "underground storage tank incident" which is intended from the standpoint of the insured;
- (2) Resulting from actions taken to report, investigate or confirm a "release";
- (3) To repair, replace or upgrade any "insured tank";
- (4) Which are fines or penalties imposed by a federal, state or local governmental authority;
- (5) To replace the contents of an "insured tank"; or
- (6) Which are part of your restoration, enhancement or routine maintenance of any "insured tank" or of the site where any "insured tank" is located.

A&S comments on UST: A stable insurance market exists for UST exposures for most entities and organizations including contractors. Coverage provided by most policy forms, ISO and others, can be reasonable but one has to pay close attention to endorsements added that may restrict overall coverage.

Other Fixed Site Pollution Coverage Options

ISO provides additional coverage options for on-site pollution either by endorsement to the CGL or by separate policy. ISO has filed four endorsements to modify the pollution exclusion in the CGL: CG 04 22, CG 24 15, CG 00 39, and CG 00 40. The endorsements are rarely used by CGL insurers and are not reviewed in this article.

Liability Policies Required by Construction Contracts

There will times that a contractor will be required to obtain liability insurance to satisfy construction agreements. Two commonly requested insurance policies are owners and contractors protective (OCP) and railroad protective liability (RPL). The named insured in each policy is not the contractor but the

project owner in OCP and railroad permitting the contractor to enter its right of way. The contractor is not an insured in either policy and thus not subject to coverage within any exception to the pollution exclusion.

Contractors Pollution Liability (CPL)

CPL may be required of a contractor by a project owner or purchased by a contractor out of concern for its negligent acts that may result in a pollution incident away from its fixed site. A CPL is not a blanket approach to pollution coverage as it will be underwritten for specific operations that will be identified in the policy as being covered. While CPL is available to most contractors it is more commonly purchased by remediation contractors. The policies offered are not based on ISO and differ by insurer. Review of these policies is beyond the scope of this article.

CONCLUSION

Many pollution insurance options are available to the construction industry whether purchased for their own concerns for exposure or when required by contract with a project owner. While a stable insurance market exists for pollution coverage the catastrophic nature of a pollution incident is still a concern for insurers. Policy language will be specific and at times considered narrow. The contractor will need to read each policy thoroughly to understand coverage as based policy forms, ISO or other, may be endorsed to narrow or more closely define the extent of coverage.