

# ***CONTRACTORS POLLUTION LIABILITY INSURANCE***

Presented by

**Alan J. Bressler**  
**Senior Vice President**  
**Marsh Environmental Practice**

More contractors have come to recognize that environmental exposures are not limited to environmental projects. Even general contractors performing work on sites with no known contamination face potential liabilities for pollution that may be excluded under their CGL policies. In this session, an environmental insurance specialist will help contractors determine their exposure to environmental liability risks and examine how well their current insurance program protects against these risks. An overview of contractors pollution liability insurance products will also be provided, including a review of key policy provisions to watch for in this nonstandard market, suggested modifications to make on the policy, and general underwriting and pricing considerations.

***Tuesday, October 30, 1:30-3:00 p.m. and 3:30-5:00 p.m.***



# Argonaut Insurance Company



## CONSTRUCTION WRAP-UPS

ARGONAUT INSURANCE COMPANY

250 Middlefield Road Menlo Park, California 94025 800.222.7811 [www.argonautinsurance.com](http://www.argonautinsurance.com)

# **Alan J. Bressler**

## **Senior Vice President**

### **Marsh Environmental Practice**

Mr. Bressler is presenting Workshop B, "Contractors Pollution Liability Insurance," on Tuesday. He is a member of Marsh Environmental Group's Corporate Client Development staff, located in Atlanta, and serves as the firm's Brownfields National Practice Leader. His responsibilities include setting and executing Marsh's corporate strategy for sales and delivery of environmental products and services to clients, acting as a corporate technical resource in support of the company's regional and branch office staff, developing new environmental product and service offerings, and training and education of its regional and branch environmental network.

Mr. Bressler has 12 years' experience exclusively in environmental risk management, insurance, and strategic consulting for major industry, including manufacturing, chemical, finance, and construction industries. Mr. Bressler was one of the nation's first insurance brokers to specialize exclusively in the environmental insurance market. Prior to joining Marsh's corporate staff, he was a core member of its Environmental Consulting Group and was responsible for the sale and delivery of a wide array of environmental consulting services for major industry. His expertise is in environmental insurance program development, strategic environmental risk identification and quantification, environmental management systems/ISO 14000 consulting, and contaminated property redevelopment. He serves on the National Brownfields Association Advisory Board. He holds a bachelor of science in risk management and insurance from Florida State University.

## ***Notes***

This file is set up for duplexed printing. Therefore, there are pages that are intentionally left blank. If you print this file, we suggest that you set your printer to duplex.

# **CONTRACTORS POLLUTION LIABILITY INSURANCE**

**Alan J. Bressler**  
**Marsh Environmental Practice**

- I. Introduction**
- II. Construction Industry Studies—Utilization of Contractor’s Pollution Liability (CPL) Insurance**
- III. Contractor’s and CERCLA—Superfund Law**
- IV. History of CPL Insurance**
- V. CGL Response to Environmental-Related Construction Claims**
- VI. Pollution Liability Extensions Offered by Standard Markets**
- VII. Common Reasons Why Contractors Don’t Purchase CPL Coverage**
- VIII. Construction Projects and the Need for CPL Coverage**
  - A. Environmental projects
  - B. Nonenvironmental projects
- IX. Environmental Risks on Construction Projects—Sample Exposures**
  - A. General contractors
  - B. Street/road contractors
  - C. Mechanical contractors
  - D. Demolition contractors
  - E. Design/build contractors
  - F. Excavation contractors
  - G. Utility contractors
  - H. Residential contractors
- X. Who Are the Markets Writing CPL?**
- XI. CPL Coverage Issues**
  - A. Scope of coverage
  - B. Occurrence vs. claims-made forms
  - C. SIR vs. deductibles
  - D. Definition of covered operations
  - E. Completed operations coverage
  - F. Contractual liability
  - G. Additional insureds
  - H. Subcontracted operations
  - I. Joint ventures
  - J. Transportation
  - K. Nonowned disposal site coverage
  - L. Defined terms
  - M. Major exclusions
  - N. Claims provisions
- XII. Combining CPL and E&O Coverages**
- XIII. Conclusion—Q&A**

# **Notes**

# CONTRACTORS POLLUTION LIABILITY INSURANCE

**GREENWICH INSURANCE COMPANY**  
**GREENWICH, CONNECTICUT**  
(A Stock Insurance Company Herein Called the Company)

## OCCURRENCE GENERAL CONTRACTOR'S POLLUTION LEGAL LIABILITY POLICY

THE POLICY CONTAINS PROVISIONS WHICH LIMIT THE AMOUNT OF LEGAL DEFENSE EXPENSE THE COMPANY IS RESPONSIBLE TO PAY IN CONNECTION WITH CLAIMS. LEGAL DEFENSE EXPENSES SHALL BE APPLIED AGAINST ANY RETENTION AMOUNT AND ARE SUBJECT TO THE LIMITS OF LIABILITY STATED IN ITEM 3. OF THE DECLARATIONS.

In consideration of the payment of the Policy Premium stated in Item 6. of the Declarations and in reliance upon the statements contained in the Declarations and any other supplemental materials and information submitted herewith, and subject to all the terms and conditions of this Policy, the Company agrees with the NAMED INSURED as follows:

### I. INSURING AGREEMENT

#### CONTRACTOR'S POLLUTION LEGAL LIABILITY

To pay on behalf of the INSURED all LOSS in excess of the Retention amount stated in Item 4. of the Declarations which the INSURED becomes legally obligated to pay as a result of an OCCURRENCE during the POLICY PERIOD which arises out of COVERED OPERATIONS. In the event the OCCURRENCE continues through more than one policy placed with the Company, only one policy will respond. The policy that will respond to any resulting LOSS is the policy in which the POLLUTION CONDITION commenced.

The Company has the right and duty to defend the INSURED against any CLAIM for LOSS to which this Policy applies. However, the Company has no duty to defend the INSURED against any CLAIM for BODILY INJURY, PROPERTY DAMAGE or CLEANUP COSTS to which this Policy does not apply. The Company's right and duty to defend any CLAIM ends when the Company has paid the applicable Limits of Liability in the payment of judgments and settlements in connection with LOSS under the Policy.

### II. DEFINITIONS

- A. **BODILY INJURY** means bodily injury, sickness, disease, mental anguish or shock sustained by any person, including death resulting therefrom, caused by POLLUTION CONDITIONS arising out of COVERED OPERATIONS stated in Item 5. of the Declarations.
- B. **CLAIM(S)** means the assertion of a legal right alleging liability or responsibility on the part of the INSURED or the NAMED INSURED, arising out of POLLUTION CONDITIONS, and shall include but not necessarily be limited to lawsuits, petitions, arbitrations or other alternative dispute resolution requests filed against the INSURED.

C. CLAIMS EXPENSE means:

1. legal fees and expenses incurred by the Company in the investigation, defense and appeal of a CLAIM for LOSS arising from COVERED OPERATIONS by attorney(s) retained by the Company; or
2. all other fees, costs, pre-judgment interest, post-judgment interest and expenses resulting from the investigation, adjustment, defense and appeal of such CLAIM, if incurred by the Company, or with the written consent of the Company, by the INSURED;

CLAIMS EXPENSE does not include salary charges of regular employees or officials of the Company or fees and expenses of supervisory counsel retained by the Company. The time and expense incurred by the INSURED in assisting in resolving a CLAIM, including but not limited to the costs of the INSURED's in-house counsel, are not CLAIMS EXPENSE.

D. CLEANUP COSTS means costs, charges and expenses incurred in the investigation, removal or neutralization of POLLUTION CONDITIONS, provided that such costs, charges and expenses are caused by POLLUTION CONDITIONS arising out of the performance or lack thereof by or on behalf of the NAMED INSURED of COVERED OPERATIONS stated in Item 5. of the Declarations.

E. COVERED OPERATIONS means those operations stated in Item 5. of the Declarations that are performed by or on behalf of the NAMED INSURED.

F. INSURED means the NAMED INSURED and:

1. any director, executive officer, current partner, employee or LEASED WORKER thereof while acting within the scope of their duties as such.
2. all clients of the NAMED INSURED, but only when required by written contract or agreement and solely for COVERED OPERATIONS performed by or on behalf of the NAMED INSURED.
3. any NAMED INSURED with regard to its participation in a joint venture, but solely for the NAMED INSURED's liability for the NAMED INSURED's performance of COVERED OPERATIONS under the respective joint venture.

G. INSURED CONTRACT means that part of any contract or agreement under which the NAMED INSURED assumes tort liability of the INSURED's client to pay compensatory damages to persons other than an INSURED because of CLEANUP COSTS, BODILY INJURY or PROPERTY DAMAGE resulting from POLLUTION CONDITIONS. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

H. LEASED WORKER means a person leased to the INSURED by a labor leasing firm under an agreement between the INSURED and the labor leasing firm, to perform duties related to the conduct of the INSURED's business. LEASED WORKER does not include TEMPORARY WORKER.

I. LOSS means monetary judgment, award or settlement of compensatory damages, including CLEANUP COSTS and CLAIMS EXPENSE.

- J. NAMED INSURED means the individual, partnership, trust or corporation stated in Item 1. of the Declarations.
- K. OCCURRENCE means a POLLUTION CONDITION, including continuous or repeated exposure to the same POLLUTION CONDITION.
- L. POLICY PERIOD means the period from the inception date of this Policy to the Policy expiration date as stated in Item 2. of the Declarations or its earlier termination date, if any.
- M. POLLUTION CONDITIONS means the discharge, dispersal, release, seepage, migration or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, which results in BODILY INJURY, PROPERTY DAMAGE or CLEANUP COSTS.
- N. PROPERTY DAMAGE means:
  1. physical injury to or destruction of tangible property including the resulting loss of use thereof, or
  2. loss of use of tangible property that has not been physically injured or destroyed;
 which is caused by POLLUTION CONDITIONS arising out of the performance of COVERED OPERATIONS stated in Item 5. of the Declarations.
- O. TEMPORARY WORKER means a person who is furnished to the INSURED to substitute for a permanent employee on leave or to meet seasonal or short-term workload conditions.

III. TERRITORY

The coverage afforded by this Policy applies to CLAIMS based upon or arising out of COVERED OPERATIONS rendered worldwide.

IV. EXCLUSIONS

This Policy does not apply to LOSS arising from:

1. Known Condition(s)  
POLLUTION CONDITIONS existing prior to the inception of this Policy, and reported to any officer, director, partner or other employee responsible for environmental affairs of the INSURED provided such POLLUTION CONDITIONS were caused by operations performed by or on behalf of the INSURED. This exclusion shall apply to any CLAIM, suit, demand, notice or governmental order or directive seeking damages of any kind, including, but not limited to, money, repairs or remediation for POLLUTION CONDITIONS and prohibits any defense of the INSURED where the INSURED knew or should have known of the POLLUTION CONDITIONS, injury or damages prior to the effective date of this policy.
2. Multiplied Damages/Fines/Penalties  
any CLAIMS seeking payment of fines, taxes, penalties or punitive, exemplary or multiplied damages, injunctive or equitable relief, or the return of fees or charges for operations performed;

3. **Workers' Compensation**  
any CLAIM based upon any worker's compensation, unemployment compensation or disability benefits law or similar law;
4. **Employer Liability**  
any CLAIM based upon injury to any employee, director, officer, partner or LEASED WORKER of the NAMED INSURED. With respect to injury to any employee, director, officer, partner or LEASED WORKER, this exclusion does not apply to liability assumed by the NAMED INSURED while actively participating in COVERED OPERATIONS under an INSURED CONTRACT;
5. **Contractual Liability**  
any CLAIM based upon a result of liability of others assumed by the INSURED under any contract or agreement except when such liability is imposed upon the NAMED INSURED under an INSURED CONTRACT;
6. **Vehicles**  
any CLAIM based upon the ownership, maintenance, use or operation of any automobile, aircraft, watercraft or rolling stock beyond the boundaries of the job sites where COVERED OPERATIONS are being performed;
7. **Nuclear Hazard**
  - a. Under any Liability Coverage, to BODILY INJURY or PROPERTY DAMAGE
    - (1) with respect to which an INSURED under this Policy is also an INSURED under a nuclear energy liability policy issued by the Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an INSURED under any such policy but for its termination upon exhaustion of its limits of liability; or
    - (2) resulting from the HAZARDOUS PROPERTIES of NUCLEAR MATERIAL and with respect to which:
      - (a) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or
      - (b) the INSURED is, or had this Policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.
  - b. Under any Liability Coverage, to BODILY INJURY or PROPERTY DAMAGE resulting from the HAZARDOUS PROPERTIES of NUCLEAR MATERIAL, if
    - (1) the NUCLEAR MATERIAL
      - (a) is at any NUCLEAR FACILITY owned by, or operated by or on behalf of, an INSURED or
      - (b) has been discharged or dispersed therefrom; or
    - (2) the NUCLEAR MATERIAL is contained in SPENT FUEL or WASTE at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an INSURED; or

- (3) the BODILY INJURY or PROPERTY DAMAGE arises out of the furnishing by an INSURED of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any NUCLEAR FACILITY, but if such facility is located within the United States of America, its territories or possessions or Canada, this Exclusion 7.b.(3), applies only to PROPERTY DAMAGE to such NUCLEAR FACILITY and any property thereat.
- c. As used in this exclusion:
  - (1) "HAZARDOUS PROPERTIES" include radioactive, toxic or explosive properties;
  - (2) "NUCLEAR MATERIAL" means SOURCE MATERIAL, SPECIAL NUCLEAR MATERIAL or BYPRODUCT MATERIAL;
  - (3) "SOURCE MATERIAL", "SPECIAL NUCLEAR MATERIAL" and "BYPRODUCT MATERIAL" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof;
  - (4) "SPENT FUEL" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a NUCLEAR REACTOR;
  - (5) "WASTE" means any waste material:
    - (a) containing BYPRODUCT MATERIAL; and
    - (b) resulting from the operation by any person or organization of any NUCLEAR FACILITY included within the definition of NUCLEAR FACILITY under paragraph 5(a) or 6(b) thereof;
  - (6) "NUCLEAR FACILITY" means:
    - (a) any NUCLEAR REACTOR,
    - (b) any equipment or device designed or used for separating the isotopes of uranium or plutonium, processing or utilizing SPENT FUEL, or handling, processing or packaging WASTE,
    - (c) any equipment or device used for the processing, fabricating or alloying of SPECIAL NUCLEAR MATERIAL if at any time the total amount of such material in the custody of the INSURED at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235,
    - (d) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of WASTE, and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations;
  - (7) "NUCLEAR REACTOR" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material;
  - (8) "PROPERTY DAMAGE" includes all forms of radioactive contamination of property.
- 8. Products Liability/Own Products  
any CLAIM based upon goods or products manufactured, sold and/or distributed by the INSURED or by others under license or trade name from the INSURED. This includes, but is not limited to, any PROPERTY DAMAGE to the INSURED's own goods or products themselves;

9. **Intentional Damages and Dishonest Acts**  
any CLAIM based upon POLLUTION CONDITIONS which are based upon or attributable to the INSURED's dishonest, intentional, fraudulent, malicious, deliberate or knowingly wrongful act or non-compliance with any statute, regulation, ordinance, administrative complaint, notice of violation, notice letter, executive order, or instruction of any governmental agency or body. Furthermore, such insurance as would otherwise be afforded under this Policy shall be applicable with respect to each and every INSURED who did not personally commit or personally participate in committing or personally acquiesce in or remain passive after having personal knowledge of one or more of the dishonest, intentional, fraudulent or malicious or knowingly wrongful acts described above;
10. **Hostile Acts**  
any CLAIM based upon any consequence, whether direct or indirect, of war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power, strike, riot or civil commotion;
11. **Professional Liability**  
any CLAIM based upon the rendering of or the failure to render professional services by the INSURED, except when POLLUTION CONDITIONS arise as a result of COVERED OPERATIONS;
12. **Asbestos**  
any CLAIM based upon the removal, cleanup, encapsulation or disposal of asbestos, asbestos products, asbestos fibers or asbestos dust performed by the NAMED INSURED;
13. **INSURED'S Property/Bailee Liability**  
any CLAIM based upon the INSURED's ownership, rental, lease, maintenance, operation, use, repair, voluntary or involuntary sale, transfer, exchange, gift, abandonment or condemnation of real property. This exclusion does not apply to any CLAIM arising from property rented or leased by the NAMED INSURED during the course of providing COVERED OPERATIONS for parties other than the NAMED INSURED.

#### V. LIMITS OF LIABILITY AND RETENTION

- A. This Policy is to pay for LOSS in excess of the Retention amount stated in Item 4. of the Declarations. The Retention amount is to be borne by the INSURED and is not to be insured. To the extent a LOSS first occurs during the POLICY PERIOD, all LOSS arising out of the same or related POLLUTION CONDITIONS shall be considered a single LOSS, and the "each occurrence" Limit of Liability stated in Item 3. of the Declarations shall apply.
- B. Subject to the foregoing, the Company's total liability for all LOSS from CLAIMS first made against the INSURED and reported to the Company shall not exceed the "total for all occurrences" Limit of Liability stated in Item 3. of the Declarations.
- C. The Company's right and duty to defend any CLAIM ends when the applicable limits of the Company's liability have been exhausted by payment of LOSS, including CLAIMS EXPENSE.

VI. CLAIM PROVISIONS

- A. In the event of a CLAIM, immediate written or oral notice containing particulars sufficient to identify the INSURED and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the INSURED to the Company or any of its authorized agents. In the event of oral notice, the INSURED agrees to furnish a written report as soon as possible.
- B. If a CLAIM is made or suit is instituted against the INSURED, the INSURED shall immediately forward to the Company every demand, notice, summons, order or other process received by the INSURED or the INSURED's representative.
- C. No costs, charges or expenses shall be incurred without the Company's consent which shall not be unreasonably withheld. The Company shall have the right and the duty to designate legal counsel for the investigation and defense of CLAIMS. The INSURED shall not admit liability or settle any CLAIM without the Company's consent. If the Company recommends a settlement of a CLAIM:
  - 1. for an amount within the Retention amount and the INSURED refuses such settlement, the Company shall not be liable for any LOSS in excess of the Retention amount; or
  - 2. for a total amount in excess of the balance of the Retention amount and the INSURED refuses such settlement, the Company's liability for LOSS shall be limited to that portion of the recommended settlement and the costs, charges and expenses as of the INSURED's refusal which exceed the Retention amount and fall within the Limits of Liability.
- D. The Company shall have the right and the duty to assume the defense and/or adjustment of any CLAIM. In case of the exercise of this right the NAMED INSURED, on demand of the Company, shall promptly reimburse the Company for any element of LOSS falling within the NAMED INSURED's Retention amount. The NAMED INSURED shall assist and cooperate with the Company.
- E. This policy does not apply to any CLAIM(S) and/or OCCURRENCE(S) which have been first reported under another General Contractor's Pollution Legal Liability policy provided by the Company.

VII. CONDITIONS

- A. Application. By acceptance of this Policy, the INSURED agrees that the statements in the application and any supplemental materials and information submitted therewith are complete, true and truthful representations, that they shall be deemed material, that this Policy is issued in reliance upon such representations, and that this Policy embodies all agreements existing between the INSURED and the Company, or any of its agents, relating to this insurance.
- B. Inspection and Audit: The Company shall be permitted but not obligated to inspect, sample and monitor on a continuing basis the INSURED's property or operations, at any time during the POLICY PERIOD and after the final termination of the Policy, as far as they relate to the subject matter of the Policy. Neither the Company's right to make inspections, sample and monitor nor the actual undertaking thereof nor any report thereon shall constitute an undertaking, on behalf of the INSURED or others, to determine or warrant that property or operations are safe, healthful or conform to acceptable engineering practice or are in compliance with any law, rule or regulation.

- C. **Cancellation:** This Policy may be canceled by the NAMED INSURED by surrender thereof to the Company or any of its authorized agents or by mailing to the Company written notice stating when the cancellation shall be effective. This Policy may be canceled by the Company by mailing to the NAMED INSURED at the address shown in this Policy, written notice stating when not less than sixty (60) days (ten (10) days for non-payment of premium) such cancellation shall be effective. The mailing of notice shall be sufficient proof of notice. The time of surrender or the effective date and hour of cancellation stated in the notice shall become the end of the POLICY PERIOD. Delivery of such written notice either by the NAMED INSURED or by the Company shall be equivalent to mailing.
- If the NAMED INSURED cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the Company cancels, earned premium shall be computed pro rata. Premium adjustment may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.
- D. **Action Against Company:** No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this Policy, nor until the amount of the INSURED's obligation to pay shall have been finally determined either by judgment against the INSURED after final judgment has been rendered or by written agreement of the INSURED, the claimant and the Company. Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this Policy to the extent of the insurance afforded by this Policy. No person or organization shall have any right under this Policy to join the Company as a party to any action against the INSURED to determine the INSURED's liability, nor shall the Company be impleaded by the INSURED or his legal representative. Bankruptcy or insolvency of the INSURED or of the INSURED's estate shall not relieve the Company of any of its obligations hereunder.
- E. **Assignment:** This Policy shall be void if assigned or transferred without written consent of the Company.
- F. **Subrogation:** In the event of any payment under this Policy, the Company shall be subrogated to all the INSURED's rights of recovery therefor against any person or organization and the INSURED shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The INSURED shall do nothing after a CLAIM to prejudice such rights.
- G. **Changes:** Notice to any agent or knowledge possessed by any agent or by any other person acting on behalf of the Company shall not effect a waiver or a change in any part of this Policy or stop the Company from asserting any right under the terms of this Policy; nor shall the terms of this Policy be waived or changed, except by endorsement issued to form a part of this Policy.
- H. **Sole Agent:** The NAMED INSURED first stated in Item 1. of the Declarations shall act on behalf of all INSUREDS for the payment or return of premium, receipt and acceptance of any endorsement issued to form a part of this Policy and the giving and receiving notice of cancellation or non-renewal.
- I. **Headings:** The headings of this Policy and any endorsements are for reference only and form no part of the Policy terms and conditions or the endorsements.



## Objectives of Workshop

- Evolution of CPL
- Understanding the Need for CPL Cover
- Who are the Markets?
- Key Coverage Provisions
- Key Exclusions
- Expanding Scope of Basic CPL Cover
- Q&A

## Contractors & CERCLA

- CERCLA = Superfund
  - GC's now included as PRP's
    - joint, several, and retroactive liability
  - Case Studies: Kaiser Aluminum & SW Bell
    - excavation contractors tagged as PRP's
    - excavated/graded to specs
    - material contaminated
    - contractor exacerbated contamination
- Ignorance is no excuse.....by law!!!

## Construction Industry Studies

- 1998 study by IMM (PA) found:
  - < \$100mm annual revenues, most going “bare”
  - > 60% not purchasing CPL
  - 21% not even aware CGL excludes pollution!
- Larger construction firms purchasing CPL
  - are aware of CGL exclusion
  - have had pollution-related claim(s)
  - have seen growing requirement in contracts

## History of CPL

- Evolved late 1980's as a claims-made form
  - limited capacity, few markets
  - asbestos/lead abatement the exception
- DOD/DOE project indemnification
  - cut back as insurance market evolved
  - 1994 Superfund sites eligible for coverage
- 1996: Occurrence CPL first offered
- Today: every major env. market offers CPL
  - \$100mm in-house capacity +

## **CGL Response to Pollution**

- Pre 1986
  - “sudden and accidental” coverage
  - only gradual pollution excluded
- Post 1986
  - absolute pollution exclusion
  - completed operations a “gray” area
- Today
  - standard carriers vigorously deny coverage for, and broadly define, pollution conditions

## **Why Don't Contractors Purchase CPL?**

- “No reason”
- “My company does not need it”
- “We don't have environmental exposure”
- “Advised not to by my broker”
- “Never considered it”
- “Don't know much about it”
- “I think it's part of my liability coverage”

## **Pollution Liability Extensions Offered by Standard Market**

- Sudden & accidental
- Time element
- Named Peril

## **Construction Projects & The Need for CPL**

- Environmental-related projects:
  - Hazardous waste remediation
    - petroleum, VOC's, metals, pcb's, etc.
  - UST/AST installation and/or removal
  - Asbestos/lead based paint abatement
  - Superfund/ RCRA corrective action projects

## **Construction Projects & The Need for CPL**

- Traditional (non-env.) construction:
  - Buildings (commercial, industrial, office, etc.)
  - Stadiums
  - Street/road/bridge/rail/tunnel
  - Demolition/Renovation
  - Airport construction/expansion
  - Utility
  - Residential

## **CPL Coverage**

- 3rd Party Liability Coverage
  - Bodily injury
  - Property damage (incl. delay, loss of use/income, diminution in value, NRD)
  - Cleanup costs
  - Defense expenses
- Written as CPL for env. contractors
- Written as GCPL for non-env. contractors

## **When Things Go Wrong...**

- Environmental risks from construction
  - Bodily injury (“toxic tort”)
  - Property damage
  - Cleanup costs
  - Economic loss (delay, loss of use/income, etc.)
  - Defense costs
  - Contract damages
  - Natural resources damages

## **Sample Construction Exposures General Contractors**

- Use of chemicals (air, soil, groundwater)
- Site preparation work
- Use of materials which “off gas”
- Portable AST’s/refueling/use of equipment
- Demolition/renovation activities which disturb asbestos or lead-based paint
- Subcontracted work

**Sample Construction Exposures**

**Street/Road Construction**

- Portable AST's/refueling of equipment
- Site grading/preparation work
- Use of chemicals and petroleum compounds
- Lead-based paint released during bridge rehabilitation
- Drilling, excavation, dewatering operations
- Transportation exposures

**Sample Construction Exposures**

**Demolition Contractors**

- Asbestos/lead-based paint
- Misclassification of construction debris
- Portable AST's/fueling of equipment
- PCB's from transformer equipment
- Air emissions
- Rupture of unknown UST's/piping, drums

**Sample Construction Exposures**

**Mechanical Contracting**

- Incomplete/improper HVAC hookup - IAQ
- Fumes, emissions, spills from chemicals
- Asbestos/lead-based paint
- Field equipment fueling/spills

**Sample Construction Exposures**

**Design/Build Contractors**

- Specification of materials which offgas
- Unknown UST's/buried drums
- Use of chemicals during construction
- Excavation/site preparation
- Subcontracted activities

**Sample Construction  
Exposures**

**Excavation Contractors**

- Excavation/grading of contaminated soil
- Dewatering operations
- Unknown UST's, pipelines, buried drums
- Fueling of equipment
- Portable AST's

**Sample Construction  
Exposures**

**Residential Construction**

- Painting
- Renovations which disturb asbestos/lead
- Use of chemicals, solvents
- Portable AST's
- Refueling of equipment
- Excavation/grading

**Sample Construction  
Exposures**

**Utility Construction**

- Improper line hookup
- Unknown UST's and buried drums
- Excavation of contaminated soil
- Unknown pipelines
- Overuse of herbicides

**Claims Examples  
General Contractors**

- Unsafe HVAC system in office building
- Renovation of hospital wing leads to organic dusts in HVAC system
- Renovation disturbs asbestos

**Claims Examples**  
**Street/Road Contractors**

- Abrasive sandblasting on bridge releases lead dust
- Sprayed tack coat washes into stream
- Dewatering pulls contaminated groundwater on to site

**Claims Examples**  
**Excavation/Grading Contractors**

- Spreading of contaminated soil
- Rupture of pipeline
- Stockpiling of contaminated soils

**Claims Examples**  
**Demolition Contractors**

- Misclassification of construction debris
- Lead dust contaminates HVAC system
- Asbestos release

**Claims Examples**  
**Residential Contractors**

- Toxic vapors from paint removal solvents
- Fumes from sealants and solvents in dumpster
- Sewage contaminates residential wells

## Markets Writing CPL

- Major Carriers:
  - AIG: \$100mm capacity
  - ECS/XL: \$100mm capacity
  - Kemper Environmental: \$100mm capacity
  - Zurich: \$50mm capacity
- Niche Markets:
  - Gulf, American Safety, United Capitol, others

## CPL Coverage Issues Occurrence vs. Claims-Made

- All 4 major carriers offer both forms
- Occurrence - slightly higher cost
- Occurrence responds to claims beyond policy expiration
- Claims-made responds only if policy renewed, retroactive date maintained, and/or extended reporting period purchased

## CPL Coverage Issues Scope of Coverage

- Insuring Agreement:

*“To pay on behalf of the insured all sums in excess of the retention (or deductible) amount the Insured shall become legally obligated to pay as Loss arising from pollution conditions resulting from covered operations rendered by or on behalf of the insured, provided:*

  - a) the BI/PD is caused by an occurrence
  - b) the occurrence takes place during policy period
  - c) pollution conditions are unexpected/unintended

## CPL Coverage Issues Definition of Occurrence

- Similar to ISO definition, except:
  - Most policies include a “Deemer” clause
    - continuous exposure deemed to occur on first day
    - exposure which occurs before policy but continues into policy period, deemed to occur only on inception date of first policy
- Serves as anti-stacking of limits feature....

### CPL Coverage Issues Deductibles vs. SIR's

- Deductible is preferable
  - carrier gets involved earlier
  - insured reimburses carrier
- Self-Insured Retention
  - carrier pays after SIR exhausted
  - notice requirements still apply
  - generally less carrier involvement early in claims process

### CPL Coverage Issues Completed Operations

- Standard policy language - “gray” area:
  - BI/PD must “occur” during policy period
  - Policy that responds is the one in which pollution condition “commenced”
- If policy renewed, no problem
- Endorse policy to clarify coverage trigger
  - Tie coverage to manifestation of BI/PD
  - some carriers offer 36 month extension

### CPL Coverage Issues Definition of Covered Operations

- “Covered Operations” means the performance of those activities described in the declarations/specified by endorsement
  - blanket is preferable
  - specified definition limits coverage to those operations *specifically identified* in policy
    - if it's not specified, it's not covered
    - might contractor do something outside the ordinary?

### CPL Coverage Issues Contractual Liability

- Early CPL products excluded it
- Current products all include coverage
  - By definition of “insured contract”
  - Most forms’ definition similar to ISO CGL
  - Third party action over covered

## **CPL Coverage Issues Additional Insureds**

- All carriers offer for:
  - project owners, contractors, engineers, etc.
- Provides same basic scope of coverage for owner
- Blanket vs. project-specific
- Blanket endorsement wording:
  - “when required by written contract...”
  - “not to exceed limits of policy or contract..”

## **CPL Coverage Issues Key Definitions**

- Pollution Conditions
  - should include medical waste, radiation, EMF’s
  - should include all exposure paths: air, soil, GW
  - should tie to BI/PD/cleanup costs definitions
- Property Damage
  - should include diminution in value
  - should include loss of use
  - must include cleanup costs (if not separate)

## **CPL Coverage Issues Subcontracted Operations**

- Early CPL policies: operations “by Insured”
- Most policies today:
  - “operations by *or on behalf of* Insured”
- Must be addressed in:
  - Insuring Agreement
  - Definition of “Covered Operations”

## **CPL Coverage Issues Transportation**

- Most policies include:
  - loading & unloading ON project site; or
  - transportation while ON project site
- All policies exclude transportation off-site
- Policy may be endorsed
  - primary: transportation risks in own vehicles
  - excess/DIC: over underlying coverage in Auto

### **CPL Coverage Issues Non-Owned Disposal Sites**

- No coverage provided in basic forms
  - by exclusion
  - by definitions
- Policy may be endorsed:
  - to provide coverage to the Insureds for BI/PD/cleanup costs
  - for facilities which receive waste from project
    - no NPL sites...

### **CPL Coverage Issues Major Exclusions**

- Contractual liability
  - except for “Insured Contract”
- Vehicles
  - can add pollution transportation exposure
- Nuclear
  - exception for low level radioactive work
- Products
  - exclusionary language should provide cover for products incorporated into work (e.g valves)

### **CPL Coverage Issues Major Exclusions**

- Known conditions
  - limit to conditions caused by Insured
  - limit to specific classes of employees
- Fines, penalties, punitive damages
  - include “where allowable by law”
- Employee BI
  - “does not apply to liability assumed in an Insured Contract” (action over)

### **CPL Coverage Issues Major Exclusions**

- Intentional acts
  - limit to intentional, knowing, deliberate acts
  - provide separation of Insureds
- Professional liability
  - can be addressed via combined form (CPL/E&O)
- Asbestos/lead-based paint
  - can be amended by endorsement

## CPL Coverage Issues Claims Provisions

- Defense is *inside* limits
  - some carriers will modify:  
outside, separate
- Right *and duty* to defend
- Multiple claims/losses - treated as singular
  - subject to only one deductible/SIR
- Claim notification
  - “as soon as practicable”
  - no time element limitation

## Final Thoughts

- Every construction project has some degree of environmental risk
- CPL is an excellent risk transfer mechanism
  - broad in scope
  - reasonable in price
  - flexible terms
- Owner/Contractor Controlled Environmental Insurance Programs

## Combining CPL and E&O

- All major carriers offer combined forms
- For construction firms that subcontract or self-perform *any* testing, design, analysis...
- E&O section is always claims-made
- Picks up “gray area” exposures; e.g.:
  - well drilling
  - geotechnical work
  - soil, GW, IAQ analysis

## Questions & Answers...