



## Pollution Liability: Contract and Jobsite Exposures

Pollution liability insurance has been available for more than 15 years, so why aren't more subcontractors purchasing this coverage? Do they realize that pollution claims are excluded from general liability policies? Are they aware of how reasonable premiums are, starting at less than \$5,000 a year for \$1,000,000 of coverage?

Many subcontractors are caught off-guard when they discover that they have to contractually purchase the coverage, especially when they feel the requirement in the contract doesn't apply to them. A typical subcontract insurance requirement may read as follows:

### ***Pollution Liability Insurance***

1. *Contractor's Pollution Liability insurance with limits no less than \$1,000,000 per occurrence and \$2,000,000 aggregate is required if subcontractor or their subcontractors or suppliers of any tier:*
  - a. *Bring pollutants to the jobsite; or*
  - b. *If their operations create a pollution exposure; or*
  - c. *If they are performing work on or penetrating or sealing the building envelope, or dealing with water; or*
  - d. *If their work could in anyway contribute to or cause airborne silica to be released.*

The requirements are vague as to which trades are required to purchase pollution liability insurance; and this is done for a reason – every project is different. With that said, there are a number of trades where having pollution coverage is vital; both for the subcontractor's own good, as well as the general contractors and owners that they work for, and to whom they are legally bound to protect.

Whether the subcontractor carries the coverage or not, any indemnity agreement worth its salt will push a claim back onto the responsible subcontractor, which will then either be covered on the subcontractor's pollution policy, or will come out of the subcontractor's pocket.

The following is a list of some of the trades that should purchase pollution liability insurance:

Trade	Water Intrusion / Mold	Chemicals	Dust/Asbestos/ Fungus (Valley Fever*)
Demolition		X	X
Remediation		X	X
Landscaping	X	X	X
Plumbing	X		
Painting	X	X	
Drywall	X		
Masonry	X		
Framing	X	X	
Paving & Grading		X	X
Excavation / Underground		X	X
Concrete	X		X
Roofing	X		
Flooring	X	X	X

**\*Valley Fever** (coccidioidomycosis or "cocci") is an illness caused by a fungus found in the soil and dirt of some areas of the southwestern United States, and parts of Mexico and Central and South America. In California, the fungus is found in many areas of the San Joaquin Valley (Central Valley). People with jobs that require digging in the soil have the greatest chance of getting valley fever. This includes people who work on farms, in construction, etc.

## Commercial General Liability (CGL)

The vast majority of general liability insurance policies have what is known as an absolute pollution exclusion. This exclusion is very strict in its application. It excludes bodily injury and property damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants. "Pollutants" means 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. This exclusion is routinely cited by general liability adjusters and their attorneys when denying coverage for pollution claims or incidents.

## Pollution Insurance Coverages

Contractors Pollution Liability (CPL) is a coverage available to any type of contractor. Coverage can be purchased on a per project, or a blanket program basis, and there are over 20 insurers offering the coverage today, at very competitive premiums. The definition of pollutant is broad and typically includes smoke, soot, vapors, fumes, acids, alkalis, chemicals, hazardous substances, hazardous materials, or waste materials. Coverage for mold and naturally occurring hazardous substances (e.g. asbestos, mercury, etc.) and pollution clean-up expense are also readily available, and can be negotiated by an insurance broker upfront. Coverage applies during construction, and for your completed operations after the job is finished.

## **Four Actual Examples of Pollution Claims:**

**UC Berkeley Project:** A subcontractor that applied grout to the interior of a building on the campus was served with a lawsuit for water pollution affecting the San Francisco Bay. The subcontractor was absolutely puzzled by the service of the lawsuit. It turned out that the gravamen of the lawsuit was a diesel generator that supplied emergency electrical power to the campus. The 500 gallon fuel tank failed and discharged its contents into a fully enclosed building designed to contain a fuel spill. A campus security guard walking his assigned beat late at night smelled and saw diesel fuel running out of the building into a nearby creek that emptied into the San Francisco Bay. The clean-up cost was in excess of \$5,000,000. The subcontractor was accused by the general contractor of having sealed the interior of the building with an inadequate grout application and was being held accountable for the claim.

**Apartment Project:** A general contractor hired a subcontractor to apply gypsum concrete for floors of apartments under construction. The mix had to be exact to properly cure. The subcontractor mix was too wet for its intended purpose, but still workable. Unfortunately, the subcontractor did not inform the general contractor that fans would be required to help cure the wet mix. As the project continued forward, the general contractor noticed that the drywall sheets that were in contact with the gypsum concrete had mold at the bottom. The owner would not accept the work, and the general contractor sought insurance coverage for the \$200,000 loss that was denied by his CGL insurer.

**AT&T Project:** A general contractor hired a subcontractor to remove an underground gasoline tank in Fresno, California. The subcontractor followed excavation protocols, but when loading the tank onto a flatbed truck, gasoline vapor drifted into an adjacent building. The gasoline vapor affected an AT&T worker inside the building, and she brought a \$10,000,000 bodily injury lawsuit against the subcontractor and the general contractor.

**Remodeling of School:** A general contractor hired several subcontractors to remodel a Bay Area elementary school. Earth movement and other activity on the site raised dust that drifted from the construction site onto adjacent residential land. The earth movers also emitted diesel fumes. This was nothing serious like asbestos, mainly dust. Months passed by without any notice of citizen complaints to the school district, the general contractor or its subcontractors. Near completion of the project, an elderly land owner directly across the street from the project claimed that her preexisting medical condition was exacerbated by fine particle pollution. The claimant was looking to the general contractor to pay her mounting medical bills, as well as additional consideration for her pain and suffering. There was a threat of a lawsuit if her claim was not resolved to her satisfaction. This claim was completely unexpected by the general contractor.

Luckily, all of these contractors had the benefit of pollution insurance coverage, so the claims were tendered to pollution insurers for a complete defense and reimbursement for the damages that would otherwise be denied by a commercial general liability insurer.



General contractors would be wise to strictly enforce pollution liability insurance requirements in their contracts, and consider the pollution exposure for each and every subcontractor on a given project. Subcontractors need to be aware of the wide array of exposures out there, and should purchase a pollution policy accordingly. The absence of pollution insurance does not absolve a subcontractor from having to pay up at the time of a pollution loss. It isn't worth the financial risk!

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