

**WHITE PAPER**

Unmasking Coverage Gaps:  
Pollution Exclusion and the Need for

# **ENVIRONMENTAL SITE POLLUTION INSURANCE**

**BY CATHY CLEARY**

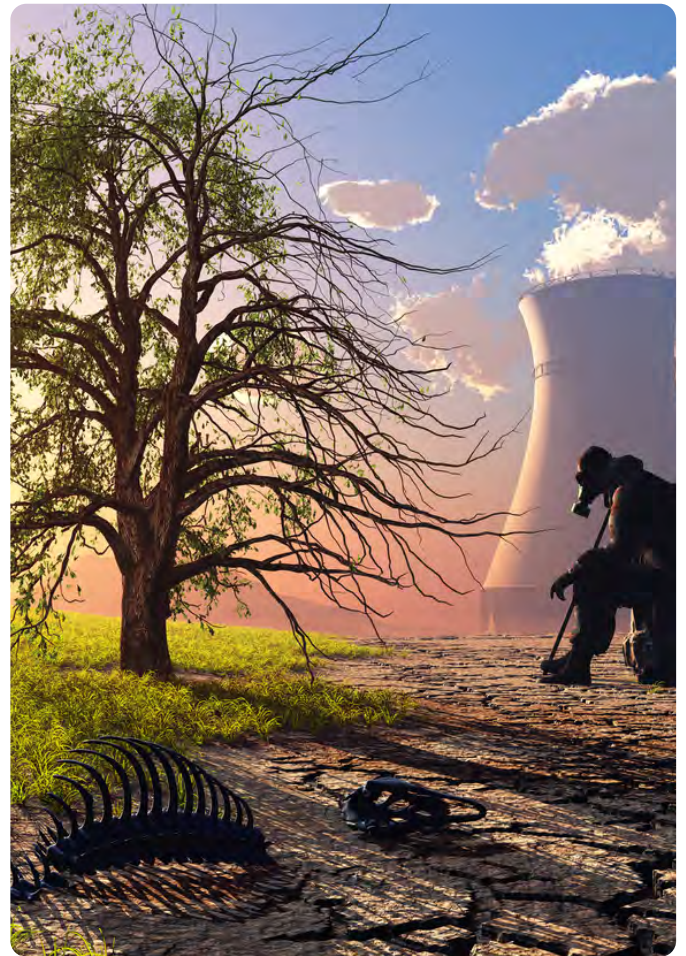


# Executive Summary

**This white paper discusses the coverage gaps in commercial general liability (CGL) policies for pollution-related losses. It highlights the need for environmental insurance, such as environmental site pollution insurance, to fill these gaps and protect businesses and landowners from costly consequences.**

## Introduction

Whether it is the increased frequency or intensity of natural disasters from climate change, or man-made environmental conditions, environmental pollution-related losses are firmly in the spotlight and at the forefront of costly consequences on a reoccurring basis. Many policyholders and brokers mistakenly believe coverage for environmental losses and damages are provided through their commercial general liability (CGL) or property policies. However, these policies either restrict or exclude coverage, leaving the policyholder exposed. Pollution conditions can be financially devastating and negatively impactful to reputation, placing the impacted business or landowner in a precarious position. Despite this risk, only a small percentage of commercial insurance buyers are adequately insured for pollution-related events.



**Environmental insurance is the stop-gap solution to protect companies and business from this ever-increasing risk. Fortunately, the breadth of environmental insurance has kept pace with new exposures and increased coverage needs.**

## Historical Regulatory Landscape

The late 1970s and early 1980s saw three major environmental enactments. Beginning with the establishment of the Environmental Protection Agency (EPA) in 1970, the nation assumed the enormous task of setting and implementing environmental standards to protect human health and the environment. The Resource Conservation and Recovery Act (RCRA) was enacted in 1976 to track the life cycle of hazardous waste, providing cradle-to-grave regulation of that waste. RCRA imposes strict waste management requirements upon generators and transporters of hazardous waste treatment, storage, and disposal facilities but only regulates active, not abandoned, waste disposal sites.

In 1980, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), commonly known as “Superfund legislation,” was enacted to provide a liability scheme whereby the EPA received authority to clean up abandoned or uncontrolled sites containing hazardous substances, locate Potentially Responsible Parties (PRP) and recover remediation costs from the PRP. CERCLA is funded under a “Let the Polluter Pay” scheme which features legislated, retroactive, strict (applies without regard to fault), and joint and several liability on polluters for the costs of remediating environmental contamination. A broad net is cast as the government identifies the PRP responsible for the costs of remediating a site. PRP can be current owners of the property, past owners, operators, generators of waste disposed of at the property, the transporters that hauled it away, and those that arranged for the disposal of waste and materials. Today, these and a multitude of other state and federal statutes and regulations govern environmental liability. An in-depth review is beyond the scope of this article.<sup>[1]</sup>

<sup>[1]</sup> Sources for additional information on this topic are numerous. Two such examples: Bearden, David M, et al. “Environmental Laws: Summaries of Major Statutes Administered by the Environmental Protection Agency.” Congressional Research Service, vol. 7-5700, ser. RL30798, 20 Dec. 2013. RL30798, <https://doi.org/https://sgp.fas.org>. and Brown, Lisa. Overview of Environmental Law. 2016, <https://calepa.ca.gov/wp-content/uploads/sites/6/2016/10/CUPA-Documents-Inspection-OvrviwEnvlaw.pdf>.



## **CGL Pollution Exclusions**

The first pollution exclusion was introduced by the Insurance Services Offices (ISO) in the early 1970s. Today CGL policies contain a Pollution Exclusion<sup>[2]</sup> dubbed the “absolute pollution” exclusion, designed to make no distinction between sudden and accidental or gradual pollution events. CGL policies may also be amended by Total Pollution Exclusion endorsements that remove coverage for bodily injury or property damage that “would not have occurred in whole or in part but for” a pollution event. The CGL policy excludes most pollution-related claims for bodily injury, property damage, cleanup costs, and remediation related to pollution claims. While there are some exceptions, what little coverage may remain is inadequate to address expansive environmental regulations, liabilities, and potential risks facing businesses and landowners alike.

## **Environmental Insurance**

Environmental insurance was created to fill the void created by the pollution exclusion and provide a financial protection mechanism to promote real estate transactions, mergers and acquisitions, and cleanup of contaminated property. Today the environmental pollution insurance marketplace offers broad coverage for all types of businesses and landowners and the risks they face. Coverage is often manuscripted to meet unique needs of these persons and entities.

<sup>[2]</sup> CG 00 14 04 13 Commercial General Liability Coverage Form, April 2013 edition, Insurance Services Office, Inc.

# CGL Gaps that Environmental Site Pollution Insurance Can Address

The following issues are excerpts taken from Section I.2. Exclusions, f. Pollution of the CGL Coverage Form, CG 00 14 04 13<sup>[3]</sup> for illustrative purposes:

## CGL Issue #1

(1) “Bodily injury” or “property damage” arising out of the actual, alleged, or threatened discharge, dispersal, release, or escape of pollutants:

- a. At or from premises, site, or location which is or was at any time owned or occupied by, or rented or loaned to, any insured.

\* \* \* \*

### Effect:

While there are limited exceptions to this portion of the exclusion, coverage for pollution conditions at or from a premises, site or location of any insured are generally excluded.

### Concern:

A concern for any insured who has any type of hazardous or bulk materials at a location of an insured (toxic chemicals to household and industrial chemicals; even benign materials can be considered pollutants if released into the wrong environment).

### Solution:

Environmental insurance can provide coverage for 1st party discovery (cleanup) and 3rd party claims for bodily injury and property damage from hazardous materials at insured locations.



<sup>[3]</sup> Id.

**CGL Issue  
#2**

(1) “Bodily injury” or “property damage” arising out of the actual, alleged, or threatened discharge, dispersal, release, or escape of pollutants:

\*\*\*\*

b. At or from any premises, site, or location which is or was at any time used by or for an 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;

**Effect:**

Subparagraphs (b) and (c) apply to waste, which includes materials to be recycled, reconditioned, or reclaimed. Excluded are regulated and nonregulated treatment storage and disposal facilities, along with transportation and disposal exposures. This portion of the exclusion has no exceptions.

**Concern:**

A concern to any insured who operates a waste disposal facility or has transported or disposed of such waste.

**Solution:**

Environmental insurance can provide coverage for 1st party discovery (cleanup) and 3rd party claims for bodily injury and property damage from waste facilities and transportation and disposal risks.



**CGL Issue  
#3**

(1) “Bodily injury” or “property damage” arising out of the actual, alleged, or threatened discharge, dispersal, release, or escape of pollutants:

\*\*\*\*

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.”

**Effect:**

Coverage is excluded if the insured or its contractors or subcontractors are performing environmental operations, services, or consulting to access, address or remove pollutants. There is no exception to this part of the exclusion.

**Concern:**

Liability and damages from such operations or services can result. For example, inadvertent disturbance and spread of contamination or cross-contamination.

**Solution:**

Environmental insurance can provide coverage for pollution conditions arising out of such operations and resulting damages.

## CGL Issue #4

(2) Any request, demand, order, or statutory or regulatory requirement that any:

- a. 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, detoxify, or neutralizing, or in any way responding to or assessing the effects of “pollutants”.

\*\*\*\*

**Effect:**

This part of the exclusion is not tied to bodily injury or property damage. Any request by a governmental entity that the insured clean up pollutants is excluded.

**Concern:**

Business owners, landowners and contractors are not afforded coverage for cleanup costs or PRP claims.

**Solution:**

Environmental insurance can provide coverage for cleanup costs and PRP claims.

# Exposure Examples – Pollution Legal Liability Plus Policy

Environmental Site Pollution Insurance is available to handle these types of claims and many more.



## HVAC Repairs

An insured tenant in a commercial office park had HVAC repairs made within the building.

Both claimant workers and customers complained of headaches and nausea due to vapors from sealants used during repairs. The commercial office park was evacuated until the fumes were gone, and several people went to the hospital. The HVAC contractor who caused the problem did not carry pollution insurance and was unable to pay for the claims, leaving the insured owner exposed.



## Fill Material

An insured property owner and their developer demolished an office building at the site as part of a high-rise apartment complex redevelopment project. Following demolition, fill material was found beneath the building slab of the former office building. Soil and groundwater samples collected confirmed that the fill material was contaminated and had impacted offsite surrounding properties. The insured owner was responsible for remediation, disposal, and lawsuits from surrounding property owners.



## Pesticide

An insured golf course owner is sued by a neighboring claimant property homeowner for contamination, bodily injury from that contamination, and diminution in their property value because of run-off from the golf course onto the claimant's property caused by the insured's prolonged pesticide use.



## Groundwater

The insured owner of an industrial park warehouse was notified by the state environmental regulatory agency that its operations had caused groundwater contamination at neighboring sites. The state ordered the insured owner to remediate the site. The owner also faced lawsuits from surrounding claimant property owners.



## Mold

A child living in an apartment complex began experiencing breathing problems allegedly from mold found in the bedroom of his parent's apartment from a leak in the apartment unit above it. The parents of the family sued the insured apartment owner for bodily injuries to their child.



# How Distinguished Can Help

## **Pollution Legal Liability Plus Policy**

**Single or multi-year terms**

**Location-specific – fixed site coverage**

**Single location or portfolio of locations**

**At its minimum, can address historical and/or operational exposures from pollution conditions and indoor contaminant (mold and legionella) conditions, including coverage for emergency expenses, diminution in value, business interruption, transportation, and non-owned disposal sites**

**Other coverages available: mortgage protection, contracting services for work performed for third parties, disaster management costs, subpoena expense, and natural and cultural resource protection**

**Built in coverage enhancements: defense outside the limits, litigation expense, mediation credit, waiver of subrogation, and acceptance of another carrier's application**

**Limits of liability up to \$25M/\$25M**

**Policy terms up to 10 years and 13 years for lenders**

## **Follow Form Excess Liability Policy**

**Simple, short, streamlined, follow-form policy**

**Covers loss in excess of the underlying limits of insurance**

**No built-in exclusions**

**Limits of liability up to \$25M/\$25M**

**Policy terms up to 10 years and 13 years for lenders**

# Conclusion

Specialized environmental site pollution insurance policies are a valuable and necessary risk management tool for businesses and landowners. Although environmental insurance has been in the marketplace since the 1970s, it is estimated that only a small portion of environmental risks are properly insured. A wide range of coverage is available to structure a policy that meets the unique needs of your insureds at attractive prices. We pride ourselves on our expertise, responsiveness, and best-in-class policy forms and claims handling in this market space. Reach out to us to see how we can help you structure an environmental site pollution policy to meet the needs of your insureds, their business, and their operations.



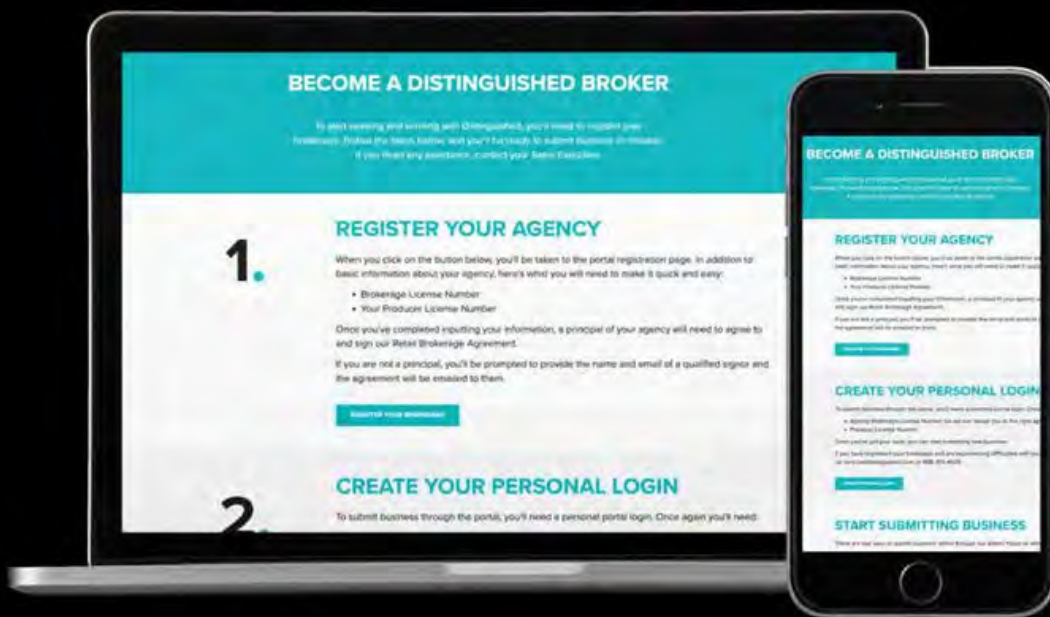
## About the Author

### Cathy Cleary

SVP, Environmental and Construction Professional Program

Cathy Cleary, JD, CPCU, RPLU, is a Senior Vice President with the Environmental and Construction Professional Program at Distinguished Programs. Ms. Cleary has over 27 years of combined experience in underwriting, claims, and legal servicing in support of environmental and construction insureds.

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