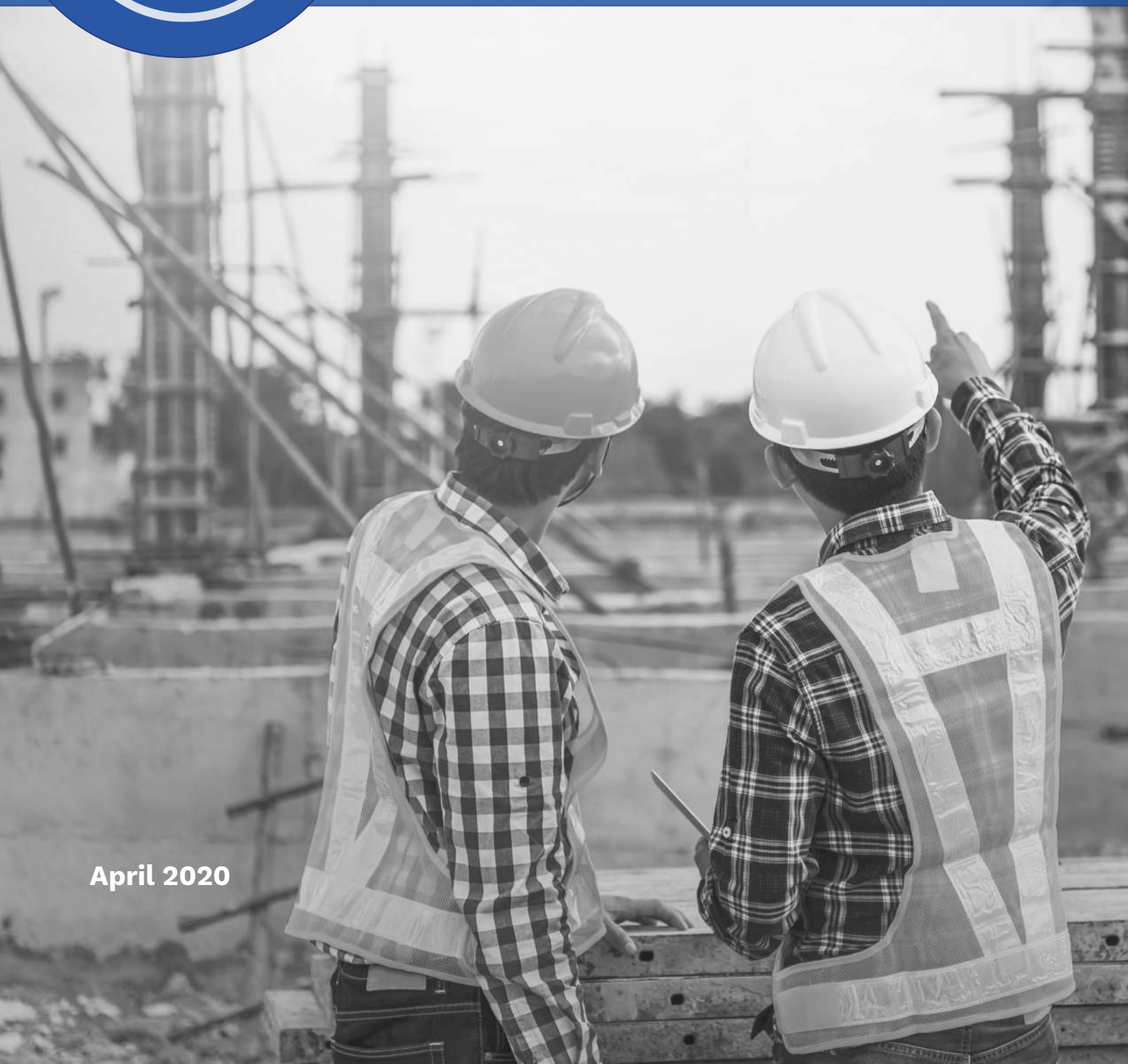




Managing Environmental Risk in the Construction Industry

April 2020





envriskpros.com

About Environmental Risk Professionals

Environmental Risk Professionals is a team of highly experienced risk professionals determined to help contractors and other business owners minimize pollution claims. Through Pollution Prevention Practices, Operation and Maintenance Plans and other services, Environmental Risk Professionals helps businesses understand their risk exposure and in turn, mitigate potential claims and effects on the environment.

Abstract

Construction projects inherently involve a multitude of risks that are addressed through compliance with applicable safety standards. To survive in this ultra-competitive business, contractors establish strict health and safety cultures to protect their employees and reduce the risk on injuries on the job. However, risks associated with environmental pollution are often overlooked and not addressed until after they happen. Contractors are often left relying on insurance policies that are often vague in the coverage they provide, or in many cases, exclude pollution incidents altogether.

This paper presents the importance of hiring contractors that are trained and insured to mitigate the many environmental risks that are unique to each project and to respond to pollution incidents when they happen. This paper focuses on understanding the relationships of all parties involved in a construction project, the risks they face, the possible inadequacy of insurance policies, and the challenges project owners and general contractors face with procuring contractors who are properly trained and insured to mitigate environmental risks and respond to environmental incidents. Additionally, this paper offers a solution for project owners and general contractors that will streamline the procurement process and ensure the hiring of competent, trained and properly insured contractors.



This special report presented by Environmental Risk Professionals addresses

Relationships and Success Factors

Construction Activities

Project Stakeholders

Project Owner Liability

General Contractor Liability

Pollution Liability for Subcontractors/Trade Contractors

Contractual Risk Transfer & Indemnification

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Lack of Employee Training

When Things Go Wrong - Claims Against Contractors

A Better Way of Contractor Procurement



Prepared in conjunction with Brock Insurance Agency, Inc.



Delivering a construction project completed, on schedule and within the agreed budget is crucial for everyone involved. Delays due to product availability, staffing issues, or equipment malfunction are challenges all projects must overcome. However, unaddressed environmental risks can ultimately derail a project and significantly impact the schedule and budget. Although project impacts due to environmental incidents are less frequent, the resulting cleanup costs associated with these incidents can be significant. Therefore, it is imperative that project owners hire qualified contractors they can trust to execute the project successfully and avoid being left with costly environmental issues.

Relationships

Relationships are an integral part of a project's success and are solidified with dedication and consistent performance with each project. They are built on trust and take time to develop. For a project owner, the relationship with the public may be dependent on the performance of the general contractor. However, even if the project owner has a strong relationship with the community built on past project success, one negative experience could jeopardize that relationship. The same can be true with the relationship between a project owner and general contractor.



Due to the cyclical nature of the construction industry, there are times when general contractors need to make adjustments to the workforce. To accommodate these situations, a general contractor will engage subcontractors to complete various tasks associated with a project. Some of these tasks may require workers with a certain skill set, contractors with specialized equipment, or an individual with a required certification (e.g. a professional engineer or land surveyor). Due to the variability in demand, contractors face the challenge of finding qualified workers and may rely solely on relationships. The **lack of training and experience** in the workforce increases the chances of an environmental incident occurring at a job site. Therefore, contractors must vet the training of all subcontractors to ensure they are managing potential environmental risks.

Success Factors

There are many factors that can be considered when determining whether or not the goals of a project have been achieved. At the end of the day, a successful project is dependent on the project owner working together with the contractor to deliver a project that meets the owner's expectations. It is critical that the contractor develop a project schedule that is realistic

and matches available resources with each task. Time constraints for a given task may require a contractor to assign additional resources to ensure the task is completed successfully. A comprehensive, well-thought-out project schedule can provide realistic budgetary estimates and help avoid last minute change orders that drive up costs. During project execution, an environmental incident can negatively impact both the schedule and budget.

In most cases, projects are financed with the project owner bearing the responsibility of meeting the terms of a loan agreement. Failure to meet the project schedule could jeopardize the terms of the project's financing and increase costs for the project owner. Furthermore, if a project is thrown off schedule due to a contractor error or environmental incident, there could be additional costs to consider that were not originally covered by the project's financing, including costs to cover litigation expenses. In addition, delays in the project schedule and negative press due to a contractor incident could alter the public's image of the project owner and potentially jeopardize their relationship and ability to secure future work. It is imperative that general contractors build in schedule flexibility and confirm that their subcontractors are trained and insured and can **financially respond to an environmental incident**. Contractors that do not properly vet their subcontractors are not properly managing their environmental risks and leave the project owner open to unexpected financial loss.



Construction Activities

According to the Environmental Protection Agency (EPA), construction activities are defined as “earth-disturbing activities, such as the clearing, grading, and excavation of land, and other construction-related activities (e.g., stockpiling of fill materials; placement of raw materials at the site) that could lead to the generation of pollutants.”¹ During periods of precipitation, stormwater can pick up sediment, debris and chemicals as it flows across a construction site, transporting them to nearby waters, causing a range of physical, chemi-

¹National Pollution Discharge Elimination System General Permit for Discharges from Construction Activities, Appendix A, 2017.

cal and biological impacts. Construction sites can also contain a number of other pollutants (e.g., metals, organic compounds and nutrients) that may become absorbed by or adsorbed onto mineral or organic particles found in fine sediment as the result of stormwater flow. These pollutants may be transported offsite and end up being discharged to nearby waters **resulting in degradation of aquatic systems and aesthetic value** along with a potential increase in treatment costs associated with drinking water.

In addition to impacts associated with stormwater runoff, construction activities involve the use of heavy equipment and the potential generation, storage, transportation and disposal of both non-hazardous and hazardous waste. Heavy equipment utilizes hydraulic oil and requires frequent refueling, which can lead to releases onto the surface. When pollution incidents occur, various stakeholders on the project may be affected and file claims against those involved. Projects that are executed by inexperienced or inadequately insured contractors are risks that project owners and general contractors must address to mitigate potential environmental risks.

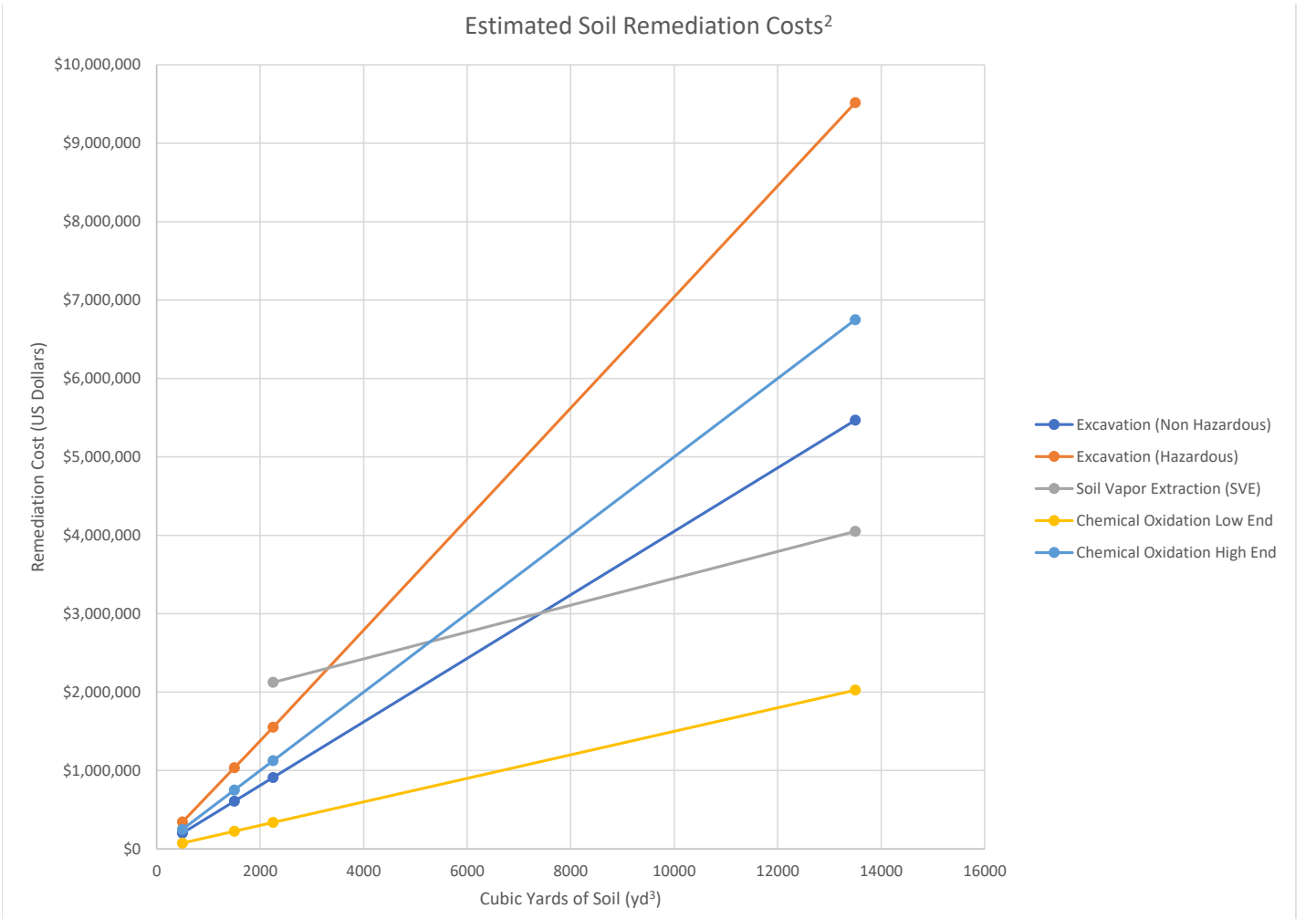


Project Stakeholders

When pollution claims arise due to the work completed by a contractor, the project owner may be held responsible. Projects being completed in commercial and residential areas alike have the potential to affect many different groups of stakeholders which may include:

- + Nearby Residents
- + Nearby Businesses
- + Employees, both of the project owner & contractor
- + Customers/Patients
- + Guests
- + Lenders/Investors
- + Users of natural resources

Those who experience property damage, bodily injury or cleanup costs may seek retribution



²Federal Remediation Technologies Roundtable (FRTR), Remediation Technologies Screening Matrix and Reference Guide, Version 4.0

against the project owner. The following are examples of how a pollution incident can negatively affect a project owner:

- Residents who are required to evacuate the premise due to a pollution incident may seek monetary damages to repair their property and cover medical or living expenses.
- Nearby businesses, which may be forced to close temporarily, may seek compensation for their lost revenue.
- Contractors working on the site of the project owner may opt to sue the project owner for negligence and failure to provide a safe workplace instead of filing a claim on their employer's workers compensation policy.
- Employees of the project owner may be exposed to harmful pollutants which can lead to workers' compensation claims and reduced employee moral.
- Customers and all other visitors to the site during and after construction can also be adversely affected and may seek compensation. Such events bring negative publicity that can damage the project owner's image for years.
- Lenders may have collateral impairment, and investors may lose money on their investments. Both may demand retribution in the face of a loss.
- An environmental incident can be a public relations challenge for project owners.

Project Owner Liability

Although the project owner may not be involved in any of the construction activities, the ultimate responsibility lies with them. These activities include any waste generated on their property from contractors, transportation from the generation point to the disposal facility, and at the disposal facility after the waste has been disposed.

There are many ways a construction project could be left with an environmental incident that must be addressed. When these incidents occur, oftentimes there can be finger-pointing in an effort to avoid responsibility. When everything has been taken into account, the project owner is responsible for any incidents that occur during their project. Therefore, hiring a competent, qualified and trustworthy general contractor should be a top priority for a project owner.

Some common risks that project owners are subjected to include:

- **Pollutants Introduced by Contractors** - Contractors bring a wide variety of materials onto a construction site. These materials depend upon the nature of the project but can include contaminated backfill, solvents, petroleum and other hazardous materials. As more contaminants are introduced onto a site, the risk of having an environmental incident increases.
- **Disturbing Pre-Existing Pollutants** - In many cases, environmental exposures occur as a result of pre-existing pollutants on a site. Project owners have the responsibility to disclose any known conditions to their contractors that may affect the project execution. However, there is always the risk of the contractor disturbing existing contamination on a property that was not previously disclosed to the project owner.
- **Illicit Abandonment** - Illicit abandonment or "midnight dumping" is the illegal dumping of waste in private or public areas instead of using proper recycling or safe and legal disposal methods. It poses a significant environmental exposure, but is rarely considered prior to an occurrence. In cases of illicit abandonment when the responsible party cannot be located or is unable to pay for the cleanup, the burden of properly removing and disposing of the waste falls on the property owner. Construction sites without fencing or sufficient lighting and surveillance are at a higher risk of midnight dumping.
- **Waste Management, Disposal & Transportation** - Throughout the duration of a construction project, waste generation is occurring and may include both solid and hazardous waste. Although the contractor may be handling the characterization and disposal of the waste, the project owner is ultimately responsible for the waste from the time it is generated, and during transportation, treatment, storage and disposal.
- **Damage to Underground Utilities** - Prior to commencement of any subsurface construction activity, it is vital to properly locate any buried utilities on the property. Project owners should ensure that all subsurface utility lines are marked and have been surveyed prior to construction, as accidents can lead to a release of regulated materials or other environmental incidents, resulting in costly cleanup expenses.

General Contractor Liability

When a general contractor is hired to complete a project, they oversee the entire project and may hire subcontractors to complete a portion of the work. Although the project owner retains some liability, the work performed, either by the general contractor or its subcontractors, is the responsibility of the general contractor, including adverse environmental incidents.

General contractors can be held liable for the property damage or bodily injury of others due to their contracting operations. This is typically manifested in a couple of different ways. For example, if a contractor creates an unsafe environment and the public has access to that environment, they can be found liable for any injury that occurs. Far more common though is damage or injury to third parties that are the result of the contractor failing to do their work in a proper manner. These contracting errors could include something as simple as failing to secure a railing, or as elaborate as the concrete mixture and proper curing of a hydroelectric dam. In cases where the contractor fails to do their work properly, and the failure results in property damage or bodily injury to others, they can be found liable.

Contractors are exposed to environmentally-related property damage and bodily injury in the same fashion. For example, a contractor who, through their work, releases toxic chemicals that harm neighbors adjacent to a job site would be held liable. Contractors could also be responsible for failing to prevent moisture intrusion in a building that results in mold contamination later on and bodily injury issues for tenants.

In addition to potential claims for bodily injury or property damage, environmental issues also carry with them the responsibility for clean-up. Pollution cleanup in the United States falls under the doctrine of Strict Liability, and there is no negligence standard required. Generally speaking, the contractor does not have to be negligent in order to be found liable for an environmental cleanup. If they are found to be a Potentially Responsible Party (PRP), for contributing to the situation in any way (e.g. they supplied the pollutants, even though they didn't spill them), they can also be found liable. Therefore, general contractors must address and mitigate environmental risks through the procurement process by vetting subcontractors that are properly trained and insured. In addition, project owners should require this of their general contractors.

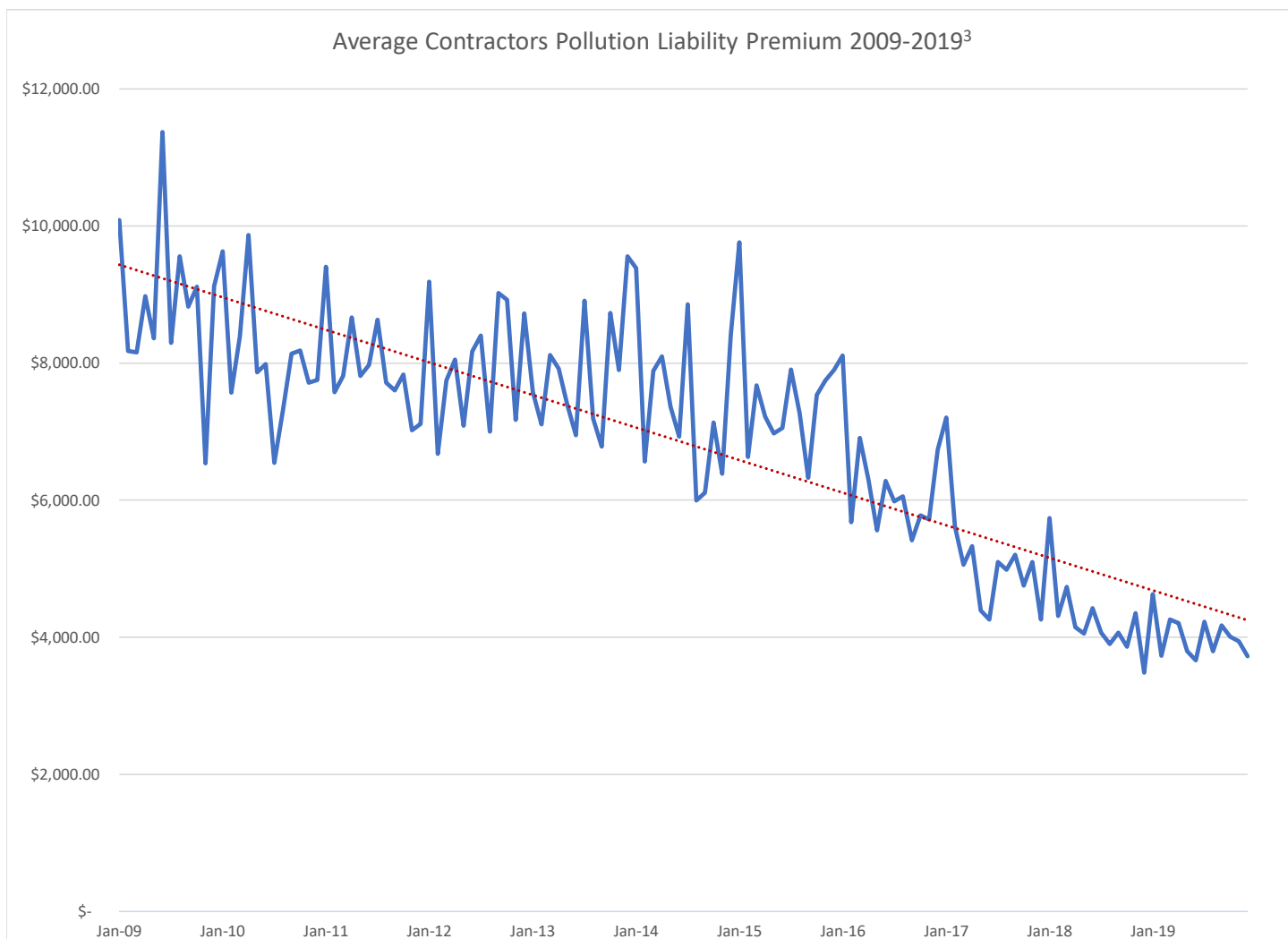
Pollution Liability for Subcontractors/Trade Contractors

Trade contractors or other subcontractors who perform work on behalf of others face similar liability issues that general contractors face. When an environmental issue occurs, trade contractors or subcontractors may be found liable for the pollution condition. Therefore, they are often required by owners or general contractors to have indemnity agreements in place that hold themselves accountable for their own work.

Contractual Risk Transfer And Indemnification

Project owners and contractors can protect themselves from subcontractor errors by requiring them to obtain their own liability insurance. In addition, they can protect themselves from liability issues caused by their subcontractors through contractual risk transfer (CRT). CRT can indemnify and hold the project owner harmless for specific actions, inactions, injuries or damages caused by the general contractor and/or the subcontractor, and places the financial risk on the party responsible for the activity that results in a liability issue. CRT usually involves a written contract, insurance requirements, requirements to name the project owner as an additional insured, a copy of the certificate of insurance and an indemnity clause. A general contractor will have a similar agreement in their contract with any subcontractors.

An essential component of any construction contract, and part of CRT, is the indemnification clause, which is basically an agreement to transfer risk from one party to another. When you indemnify someone, you agree to hold them harmless from damages caused by your actions or the actions of those under your control. For construction projects, indemnification clauses are written such that the indemnification starts at the bottom (trade contractor) and flows back towards the top (project owner). Essentially, the project owner will hire a general contractor, who will indemnify the project owner against any losses or claims occurred during the project. Any subcontractors that are hired by the general contractor will then indemnify the general contractor and the project owner. These provisions require one party to assume responsibility for third-party claims made against the other party.



When a properly worded indemnification clause is agreed upon between project owners, general contractors and their subcontractors, the project owner is protected against losses incurred by contractors during the project, including those due to an environmental incident. Therefore, in addition to standard insurance (e.g. general liability, auto and workers' compensation) **it is critical for contractors to have adequate pollution liability insurance** to respond to an environmental incident.

Pollution Liability Insurance

Insurance needs for the construction industry are evolving and more often include the need for pollution and/or professional liability to meet contractual requirements, address exposures and protect assets. Contractors Pollution Liability (CPL) provides third-party coverage for bodily injury, property damage, defense expenses and cleanup costs for pollution conditions arising from covered contracting operations performed by or on behalf of the insured.

Prior to the 1970s, pollution liability was covered under the standard commercial general liability (CGL) policy. However, this began to change during the 1970s as the public started becoming more aware of the impacts of pollution on human health and the environment. During this time, the federal government created the Environmental Protection Agency (EPA) and enacted the Comprehensive Environmental Response Compensation Liability Act (CERCLA), better known as Superfund. As insurance companies became more concerned with the liability associated with pollution incidents, they began excluding pollution liability under the CGL policy. Due to litigation, the pollution exclusion language has been updated over the years in an attempt to clarify that no pollution coverage is available on a CGL policy. This has created the **need to purchase separate coverage for pollution liability**. Contractors looking to cover pollution risks must now purchase CPL coverage to ensure protection. Project owners and general contractors must ensure that subcontractors have the appropriate CPL coverage that will respond in the event of an environmental incident.

³UCPM Environmental Insurance, Inc., March 2020



Gambling with Project Owner Money

People are generally inclined to avoid risk when they have a sure gain available, but they turn to risk takers when it comes to potential losses. Given the option, most people would take a chance on driving without car insurance because the majority of them haven't been involved in a serious car accident, and likely believe they are above average drivers. The same thought process would be true for many businesses, who buy general liability, property or workers' compensation insurance only because they are required to do so by customers, by lenders or by law.

Successful contractors must learn to live with the high levels of risk associated with construction. The financial effects of an environmental incident, however, are not limited to the contractor who has caused the problem. Other contractors may incur costly project delays and significant losses if their employees are injured. The project owner is ultimately responsible for all financial losses arising from a pollution event on the project, but the decision to forego environmental insurance, saving 0.2% of the project cost, was made by the contractor. The un-

insured contractor's decision to not purchase environmental insurance may pay off if there isn't a pollution event, but **when environmental incidents on a job site occur, everyone loses.** Therefore, project owners must verify that any contractor working on their job site has adequate pollution liability insurance or they may be exposed to unwanted claims, project delays and costly cleanup.





Inadequacy of GL Endorsements

In some cases, carriers have made available limited pollution coverage endorsements to the standard general liability policy. **These endorsements fail to meet some key standards when it comes to providing meaningful coverage for contractors in the event of a pollution condition.** Here are a few key areas that are often lacking:

Cleanup Costs

The most frequent, and often the costliest, element of a pollution claim is the remediation expense. Full pollution coverage explicitly covers cleanup costs in addition to bodily injury (BI) and property damage (PD). Most limited pollution coverage endorsements do not redefine “Property Damage” to include cleanup costs, making it unlikely the policy would respond to many environmental claims.

“Your Premises”

Some limited coverage endorsements appear to include just coverage for the insured’s premises. It is only paying for third-party BI and PD, not cleanup costs, so the value of this “on-site coverage” is very minor and often misleading.

Limited Time Element

This restriction limits the discovery time frame (usually to 72 hours). This would then exclude any pollution that goes undiscovered over time, migrates or grows.

Reasonable Cost

This limiting language often reads “necessary in scope”. True pollution coverage pays to remediate the problem to the standard required by governing environmental law or at least a professional standard (there is no legal standard in regard to mold, for instance). The environmental laws are concerned only with ensuring public health, and the standards required for cleanup are often anything but “reasonable” in cost.

UST Exclusion

Many of these endorsements specifically exclude any claim that results in any way from an underground storage tank. You can’t dismiss the relevance of this exclusion because your client doesn’t own an underground storage tank. Leaking USTs that have been abandoned and buried are a real environmental risk for property owners or contractors involved in excavation work.

Burden of Proof

If there is a dispute over the validity of a claim, some of these limited coverage endorsements put the burden of proof and the resulting expense squarely on the insured. Determining when the pollution conditions first commenced can be contentious and expensive.

Government Triggers

Language varies widely and can be difficult for a contractor or a project owner to unravel. A government trigger would exclude any cleanup coverage unless action was mandated by government laws or guidelines.

Claims Made, Occurrence or Neither?

Some endorsements require that the BI or PD take place during the policy period (like an occurrence form) AND that the claim be reported during the policy period (like a claims made form, only without extended reporting options).



The result of this hybrid approach is coverage that is far inferior to both occurrence and claims made coverage. This issue has particular relevance for bodily injury claims, where the alleged injury is often reported well after the exposure to the harmful contamination.

Sub-Limits

These limited coverage endorsements often have much smaller limits than a traditional pollution policy (\$250K or less is common). Policyholders should be aware that a pollution claim can use up most of this limit in defense alone.

Asbestos or Lead

Many limited pollution coverage endorsements exclude any claims arising in any way from asbestos or lead. These exclusions are not just relevant for contractors performing abatement operations. Most contractors are at risk because of asbestos or lead within older buildings. Naturally occurring asbestos can even be an exposure for excavation contractors or developers.

“Entirely Above Ground”

Coverage provided under limited pollution endorsements may be limited to pollution incidents that happen entirely above ground. Excluding pollutants that seep into the ground poses a serious issue.

Products-Completed Operations

Completed operations are frequently excluded from coverage provided by limited pollution endorsements. Sometimes the exclusion is obvious and labeled as such. Other times carriers take a more subtle approach, such as limiting coverage to locations on which you are performing operations. Once the job is finished, their limited pollution coverage is finished as well.

Injurious Presence of Pollutants

The definition of “Pollution Incident” in some forms states that “such emission, discharge, release or escape results in the injurious presence of pollutants.” The standard used in excluding pollution events from the GL policy, by way of the Total Pollution Exclusion, has included a far lower standard. Events that could be excluded under the GL may not meet the injurious presence of pollutants standard created by the limited coverage endorsement.

Loading/Unloading

When standard carriers provide limited transit pollution liability coverage, it often excludes loading or unloading and may also exclude carried cargo.

Suit from a Governmental Agency

This exclusion is very common on limited coverage forms, and it states that it will not pay for loss resulting from a claim or suit by or on behalf of a governmental agency for damages as a result of testing or remediation.

| Potential Differences - Limited CGL Endorsement vs Contractors Pollution Liability Policy | | |
|---|-----------------------------------|-------------------------------|
| Coverage | Limited Pollution CGL Endorsement | CPL Policy |
| Cleanup Costs | Limited to BI and PD | Included |
| Work Performed at a Job Site | May Not Include | Included |
| Time Element | Limited | Included |
| Transportation Pollution | Not Included or Limited | Included |
| Non-Owned Disposal Sites | Generally Not included | Included |
| Legionella | Generally Not included | Included |
| Natural Resource Damage | Generally Not included | Included |
| Claims Handling | CGL Claims Adjuster | Environmental Claims Adjuster |
| Limits | \$1M or Less Shared with CGL | \$1M and up |
| Excess Limits | Excluded | up to \$25M |
| Completed Ops Coverage | Cannot Satisfy | Extended Reporting Periods |
| Owned or Leased Ops | Limited to BI and PD | Includes Onsite Cleanup |

Shortcomings of Acord Certificates

Contractors are regularly asked by project owners or general contractors to produce an Acord Certificate of Liability Insurance. These certificates are intended to demonstrate that the contractor has the type of insurance required and sufficient limits to pay potential claims. The limited information conveyed is often adequate for the standardized insurance coverages shown in the first four sections (commercial general liability, automobile liability, umbrella/excess liability and workers' compensation) but falls short when it comes to pollution liability.

Contractors pollution liability is not at all uniform in what is covered, and yet it is addressed, at best, on the Acord with a single line typed into the "Other" section. **It is nearly impossible to determine from an Acord certificate whether a contractor has a comprehensive pollution liability policy or merely a limited endorsement to their CGL policy.** There is a very real possibility that the certificate holder, with this limited information, may be engaging a contractor with no meaningful coverage at all, and very little chance that a potential claim would be paid.

Although even the most risk-conscious owners or general contractors require contractors working on their behalf to obtain comprehensive pollution liability coverage, they simply **cannot rely on certificates of insurance alone** to determine if the hired contractor is carrying proper environmental insurance.

Contractors & Environmental Consulting Services

We live in a world that is constantly changing. In the past, it was not uncommon to address situations as they came up, often waiting until it was necessary before reacting. Now more than ever we see governments, businesses and society in general becoming more proactive, whether it be related to climate change, health and safety of employees, or a heightened awareness of the importance of recycling in our homes. The same can be said with the construction industry. Contractors obtain insurance as a reactive approach to protecting a company against a potential future loss. Installing health and safety protocols is a proactive approach to protect employees and improve an employer's experi-

ence modification factor (E-mod), which affects workers' compensation premiums. However, many construction contractors do not, or have not taken into consideration, protocols to prevent a pollution incident from happening.

Depending on the size of the contractor, those that serve the construction industry do not typically engage in environmental consulting services. The larger contractors may have a safety professional on staff in charge of environmental awareness, but in most cases **true environmental consulting services are lacking.** Contractors that do not participate in pollution prevention leave themselves and stakeholders exposed. As project owners and general contractors become increasingly more aware of the environmental risks at job sites, they should be looking to hire contractors that will mitigate those risks. **A contractor that is both proactive (e.g. has pollution prevention measures in place) and reactive (e.g. financial responsibility via pollution insurance) should find themselves on the preferred vendor list for project owners and general contractors.**

Having a resource that can provide Best Management Practices (BMPs) to mitigate environmental incidents and promote pollution prevention, improves a contractor's reputation and provides them with employee training opportunities. BMPs were introduced by the U.S. Environmental Protection Agency (EPA) in the late 1970s to prevent the release of toxic and hazardous pollutants to surface waters as part of the National Pollutant Discharge Elimination System (NPDES) permitting process. Many companies currently implement successful measures to reduce and control environmental releases of all types of pollutants, both formally as part of BMP plans, and informally as part of unwritten standard operating procedures (SOPs).

In the construction industry, BMPs can be used to address environmental, health and safety concerns. However, when specifically looking at reducing the risk of having a pollution incident, BMPs may be referred to as Pollution Prevention Practices (PPPs). Regardless of whether you are using BMPs or PPPs, **their implementation provides an opportunity for pollution prevention**, which in turn may help minimize the risk for a spill or release of hazardous materials to the environment. They

Pollution Prevention Practices (PPPs)

| | | |
|---|--|---|
| Aerosol Cans Antifreeze Asbestos Aboveground Storage Tanks Batteries Chemical Application Chemical Storage Concrete Truck Washout Demolition Debris | Crystalline Silica Fluorescent Lamps Fugitive Dust Control Hazardous Waste Management Illicit Abandonment Lead-Based Paint Legionella Medical Waste Mold | Oil Water Separators Polychlorinated Biphenyls Refrigerants Responding to Spills Scrap Metal Recycling Solid Waste Management Stockpile Management Stormwater Universal Waste |
|---|--|---|

may also help reduce long term costs through operational changes, reduction in health and safety risks to employees, substitution to more environmentally safe products, and reduction in waste generation through recycling/reuse.

The table above presents typical environmental exposures contractors are faced with that can be mitigated with PPPs.

A contractor will eventually need to dispose of waste generated during construction activities at a job site. Therefore, written procedures (e.g. PPPs) should be available to employees that outlines the proper identification and characterization of both solid and hazardous waste. These procedures are necessary and identify the proper storage, handling, labeling, shipping and disposal of the waste once it has been generated. Improper characterization and disposal of solid waste can result in air, water and soil pollution, damage to natural resources, insurance claims and litigation.

Lack of Employee Training

Without BMPs or PPPs in place, or adequate employee training, **companies leave themselves vulnerable for costly mistakes on the job.** For example, during excavation and removal of contaminated soil, a contractor that fails to properly label waste containers, which have been segregated to minimize the amount of hazardous waste generated, may end up sending hazardous waste to a non-hazardous waste facility.



If this were to happen, it is unlikely the waste would be able to be recovered once it has been disposed, which could lead to additional environmental investigations and litigation. If it was able to be recovered, the remediation costs to uncover and remove the waste would likely be more than the contractor could cover without appropriate insurance. In either case, the contractor would most likely be facing a large penalty from either the federal, state and/or local regulatory agency. The error made by this contractor, which **may have been avoided with proper training and implementation of BMPs or PPPs**, would likely result in severe damage to the contractor's reputation and removal from the project. The contractor's relationship with the general contractor and the project owner may also be permanently damaged, potentially hindering their ability to be considered for future projects.

When Things Go Wrong - Claims Against Contractors

No contractor wants to be put into a situation where they are brought into a claim either by their own employee or a third party. Unfortunately, this can happen to anyone, and contractors that have not planned for claims situations by protecting themselves through CRT, may struggle to recover from such a significant financial loss.

In addition, the **failure of a property owner or general contractor to properly vet subcontractors can leave property owners footing future remediation costs** associated with construction defects. A subcontractor's inadequate pollution coverage can leave a property owner high and dry years down the road. For example:



- A few years following construction of an upscale apartment community, the property owner began receiving complaints from tenants about mold in bathrooms. Over the next several months, the property owner continued to receive similar complaints affecting multiple buildings and apartment units. An extensive investigation revealed that construction defects associated with showers and the HVAC systems resulted in severe water intrusion and moisture build-up, leading to widespread mold growth. Through litigation, loss of rent, cleanup costs and settlements with injured tenants, the property owner was left with a bill for over \$2 million.

Although most contractors have secured general liability and workers' compensation insurance, many do not consider a CPL policy, instead they rely on a pollution coverage endorsement to their standard General Liability policy. These endorsements, however, are **limited and fail to respond to true pollution incidents**. For example:

- A contractor was hired to construct and install a new refrigeration system at a food distribution center. Under the direction of the facility owner's refrigeration expert, the contractor cut a section of pipe releasing approximately 50 pounds of ammonia gas inside the facility. As a result of the release, four workers and two medical technicians were hospitalized. After some investigation by the contractor's pollution liability carrier, it was determined that the facility owner was partially liable for the release. The carrier facilitated a reduction in the initial demand based on the refrigeration expert's involvement. The general liability carrier paid their \$100,000 pollution limit with the contractor's pollution insurance policy covering remaining payments and obtaining a full release of liability for the contractor. The total cost was over \$500,000.

Although the General Liability policy covered some of the damages, without the pollution liability policy in place, the contractor would have been responsible for an additional \$400,000.

With the demand on the construction industry, **contractors are faced with a lack of qualified workers able to recognize and prevent a pollution event** from happening. For example:

- A property owner hired a paving contractor to complete an expansion of their asphalt parking lot and driveway. The contractor placed a layer of crushed aggregate down and then sprayed an oil-based binding agent on the crushed aggregate before leaving with the intention to finish the project the following day. Overnight, a heavy rain washed the binding agent offsite and into the groundwater supply, contaminating nearby residential wells. The resulting cleanup costs to bring the residential wells into compliance with drinking water standards was in excess of \$500,000.

Employees that are properly trained to recognize potential environmental risks are able to implement best practices to prevent the release or migration of pollutants. **Employees who lack sufficient training are more prone to causing environmental incidents** on job sites. For example:

- A general contractor was responsible for overseeing the renovation of a hospital wing. When two patients died in the intensive care unit adjacent to the construction zone, the contractor was sued for inadequate monitoring and containment of the construction zone. The patients' cause of death was determined to be an organic fungus found in the ventilation system and traced back to dust generated during renovation activities in the construction zone. The contractor was responsible for \$10 million in damages.



A Better Way of Contract Procurement

Put yourself in the shoes of a project owner or general contractor looking to secure subcontractors to complete a multimillion-dollar project. You are looking to hire qualified, responsible contractors that can perform the work within a desired budget. You prepare a detailed Request for Proposal (RFP) and put the job out to bid. Part of the procurement process is for the contractor to carry pollution liability insurance and provide a certificate of insurance with their bid.

As previously discussed, these certificates are inadequate in identifying if the contractor's insurance would respond to a true pollution incident. To verify their insurance, many project owners and general contractors have in-house attorneys that review insurance certificates and obtain copies of contractors' insurance policies to confirm they have met the minimum requirements of the RFP. However, assuming the contractor had secured true pollution insurance, a pollution incident is something you would like to avoid altogether. Hiring a contractor that is both proactive and reactive to pollutions incidents would satisfy your requirement for a qualified, responsible contractor.



To position themselves as qualified and responsible, contractors advertise they are licensed, bonded and insured. In addition, they may seek various other certifications that are available to them, including but not limited to:

- Project Management Professional
- Certified Contractor (as opposed to a Registered Contractor)
- Green Business Certification
- Certified Construction Manager
- [Certified Environmentally Responsible Contractor](#)

Although the first four certifications listed above can set contractors apart from their competitors, none of them indicate if the contractor is equipped to prevent a pollution incident or respond to a pollution incident (with financial backing) if one should occur. **Certified Environmentally Responsible Contractor (CERC) is a certification that provides contractors with Pollution Prevention Practices designed to assist contractors with identifying environmental risks and preventing pollution incidents.** These practices, which have been prepared by an environmental consulting firm, provide an opportunity for contractors to train their employees on how to identify and mitigate environmental risks typically associated within their industry. As part of the certification process, the contractor is required to obtain true pollution insurance that is verified prior to the contractor receiving their certification.

Contractors who receive the CERC certification and include it with their bid proposals, reduce the time project owners and general contractors spend verifying insurance requirements and provide assurance they are trained to mitigate environmental risks on projects.

Go to c-e-r-c.com for more information.



As government, businesses, and society become more sensitive to environmental issues, the pressure on contractors to manage their environmental risk will increase. Contractors must become more proactive with employee training to recognize potential pollution risks and mitigate these risks before they become incidents. Contractors must also **stop relying on their GL insurance endorsement to respond to a pollution incident** and instead obtain a CPL policy that will protect their business and the contractors and owners that hire them. Project owners and general contractors must be diligent in vetting their subcontracts to make sure they are properly trained and insured. Anything less opens up the potential for environmental exposure and a black eye on their projects and reputation.



