CONSTRUCTION SERVICES

Technical Briefing
Insurance for Construction
Environmental and Pollution Liabilities
INTRODUCTION

Construction activities, especially on brownfield sites, have significant potential to cause adverse environmental impacts through pollution and/or release of existing contamination.

Examples of typical causes are:
• Handling and storage of fuels, solvents and other harmful substances at work sites
• Impact on Controlled Waters by surface water run-off into watercourses and soaking of pollutants into groundwater
• Creation of migration pathways for existing contamination by piling or excavating through impermeable ground
• Mobilisation of existing contamination by dewatering
• Disturbance of asbestos or lead paint through demolition/renovation activities

This could result in responsible parties facing liabilities as a result of:
• Third party claims for bodily injury, property damage, loss of use of assets/business interruption, common law nuisance, etc. (tort liability)
• Regulatory actions to clean up the pollution/contamination and/or abate the resulting statutory/public nuisance (statutory liability)
• Under National Laws implementing the EU Environmental Liability Directive, responsible parties could also face obligations as an “operator” to prevent and remediate serious environmental damage and to restore the environment (especially biodiversity/natural resources) to its pre-damaged state (environmental damage liability).

Whilst tort liability usually requires fault and/or foreseeability on the part of the polluter, statutory liability (including environmental damage liability) is mainly strict.

The main responsible party will usually be the contractor (as “the polluter”), but developers and site owners/employers can also potentially face liabilities where construction activities cause environmental impacts.
COVERAGE FOR ENVIRONMENTAL AND POLLUTION LIABILITIES UNDER YOUR EXISTING INSURANCES

Pollution liability coverage under your existing Public Liability policy is probably limited to third party claims (for bodily injury and property damage) resulting from a sudden identifiable, unintended and unexpected incident which takes place in its entirety at a specific time and place during the period of insurance (a “sudden and accidental” incident).

If you do not have a specific statutory liability extension on your Public Liability policy, you may not be covered for the cost of remediation enforced or incurred by a regulatory authority, such as the Environment Agency (for example, clean up of pollution of a watercourse) even after a “sudden and accidental” incident.

If you do have a statutory liability extension, it is likely to have a low sub-limit (typically between £250k and £1m in the aggregate)

The extension is likely to exclude clean up of your owned/occupied property (even where such clean up is enforced by a regulatory authority)

The extension is likely to also exclude restoration of flora and fauna (i.e. environmental damage liabilities)
THIS MEANS

- Your existing insurances probably provide no cover whatsoever for any liabilities resulting from gradually occurring pollution
- Your existing insurances probably provide no cover for environmental damage liability (biodiversity/natural resources restoration)
- Your existing insurances probably provide only limited cover for statutory pollution liabilities
- Any pollution coverage provided by your existing insurances is probably in the form of a complete exclusion, except where the stated conditions are met (“sudden identifiable, unintended, unexpected…” etc.). This places the onus of proving that coverage should be provided more on you than the insurer
- The events surrounding pollution incidents tend to be quite complex, which means it can be difficult to prove that all the stated conditions required for pollution coverage under a policy have been met
- The inevitable consequence of the limitations highlighted in the points above is that, at present, there is probably significant potential for you to incur uninsured losses if your business activities cause pollution or release existing contamination
CONTRACTORS POLLUTION LIABILITY INSURANCE

The main option available to significantly increase your insurance coverage for pollution liabilities is to put in place specialist Contractors Pollution Liability (CPL) insurance to cover your construction-related activities.

Annual Blanket Cover

CPL policies are available on an annually renewable claims-made and reported basis for all your business activities (blanket cover). Cover under these policies is for:

- regulatory and third party clean-up costs (clean-up to the extent required by environmental laws or third party claims) including mitigation/ emergency costs
- natural resource/biodiversity damage (environmental damage)
- third party claims for bodily injury and property damage (including loss of use of property)
- statutory, public or common-law nuisance
- investigation/assessment and legal defence costs (including specialist environmental claims management services)

where these result from new pollution conditions (including the release/exacerbation of pre-existing [historic] pollution conditions) caused by your Covered Operations.

CPL policies make no distinction between pollution conditions resulting from “sudden and accidental” incidents and gradually occurring causes and therefore cover both.

Some CPL policies can also cover pollution liabilities resulting from i) migration of contamination from your owned properties and ii) transportation associated with your business activities. Cover can potentially also be obtained for non pollution-related environmental damage.

Project-Specific Cover

CPL policies are also available for specific projects that you undertake, on either a claims-made and reported, or an occurrence basis. Cover is available for the duration of the project up to a maximum of typically 5 years and can potentially include up to 3 years completed operations cover. For longer-term projects, the policies are usually renewable on expiry.

Cover is as described above for annual blanket cover, but for Covered Operations associated with the specific project.

Policies can be placed for just the contractor as the Insured, or they can be placed on a project-wide basis to include all interested parties (e.g. the site owner/project employer, lenders, specified sub-contractors, etc.). The latter is a common requirement when the policy is specified by the site owner/project employer and/or the lender as a required insurance to be taken out by the project contractor.

Alternatively, policies can be placed on an owner-controlled basis by the site owner/project employer – either on a project-wide basis, as above, or on a contingent basis to cover only those liabilities faced by the site owner/project employer and any lenders, etc. (i.e. no cover for the contractor and any sub-contractors).

This approach is most commonly taken on brownfield (re)development projects, where the CPL policy is combined with a site-specific pollution legal liability policy to cover historic contamination associated with the site, in order to avoid potential gaps in coverage.
BENEFITS OF A CPL POLICY

The principal benefit of an annually renewable blanket CPL policy is that it can fill in the most significant gaps in pollution liability coverage that exist under your current insurances and thereby significantly reduce your exposure to future uninsured pollution losses.

The principal benefit of a project-specific CPL policy is that it can provide comprehensive long-term protection for you and other interested parties (as necessary) against future liabilities arising as a result of any pollution/contamination caused/released by works on the project.

Cost

The cost of CPL policies has decreased significantly in recent years, owing to greater competition in the environmental insurance market and a greater understanding of, and appetite for, construction-related risks. Premiums can now be as low as a few thousand pounds and typically represent an extremely small proportion of a project Contract Value or contractor’s annual turnover (premium levels can, of course, be significantly higher, depending on the particular risks associated with the general or project-specific activities and on the coverage required).

An increasing number of the major construction insurance markets are also now offering CPL, which presents the opportunity for further premium savings through purchase of CPL as part of a package of annual or project-specific construction insurances.

Availability

Cover for both annually renewable blanket CPL and project-specific CPL policies can usually be placed on the basis of existing environmental reports and other information that you already hold. It is unlikely that insurers will want any further surveys or assessments conducted specifically for their benefit, prior to insuring you. All available existing environmental reports and other material information must, of course, be disclosed.
SUMMARY

Significant gaps in coverage for pollution liability are likely to exist under your current insurances. You are therefore likely to incur significant uninsured losses if any of your construction-related activities cause pollution or release/mobilise existing contamination at a works site.

“The availability and affordability of these policies has increased greatly in recent years”

Contractors Pollution Liability is available, on an annual blanket operations or project-specific basis, to fill in gaps in your existing coverage and significantly reduce your exposure to uninsured pollution liabilities.

The availability and affordability of these policies has increased greatly in recent years.

The extent of cover provided as standard under these policies has increased significantly to deal with the range of new pollution liabilities that you now face, such as those under the EU Environmental Liability Directive.

If you are concerned about how limited your existing insurance cover is for pollution liabilities resulting from your construction-related activities, then find out how much it would cost to fill the gaps with a Contractors Pollution Liability policy – it will probably be much less than you expected!
CONSTRUCTION POLLUTION CASE STUDIES

• During a large building refurbishment project, power for the site office and storage compound was provided by a power unit comprising a generator and integral bunded fuel tank. Following several months of use a leak was discovered in the tank and base of the bund. The leaked fuel had seeped into the soil and groundwater and eventually migrated into the river, where it was spotted and the leak was eventually discovered. Actions were quickly taken to clean up the river and prevent further migration of the leaked fuel into the river. An extensive cleanup operation, taking several months, was then required to remove the fuel contamination from the impacted soil and groundwater. The contractor was liable for the resulting costs.

• As part of a significant regeneration project a contractor was appointed to remediate, through excavation and off-site disposal, an area of buried waste. During the excavation, a number of chemical drums were discovered but not before several of the drums had been pierced by the earth-moving equipment used. This resulted in the release of hazardous liquid solvents into the surrounding soils and groundwater. The release of these contaminants significantly increased the volume of material that required excavation and off-site disposal and also required the installation and long-term monitoring of a containment system to prevent migration of the residual contamination to off-site receptors. The contractor was liable for the resulting increase in project costs.

• A groundworks sub-contractor was excavating a large trench for the installation of services on a major brownfield site development. The water table was very shallow in the area, so excessive dewatering of the excavation was required. After a few days of dewatering, an oily smell and sheen were apparent in the groundwater that was being extracted. It was subsequently found that petrol had previously leaked from an underground storage tank located elsewhere on the site into the soil and groundwater and the dewatering operations had mobilised the contaminated groundwater and spread it under the site and into the excavation. The main contractor was held to be vicariously liable for the sub-contractors actions in exacerbating the existing contamination and was required by the regulators to conduct an extensive soil and groundwater remediation programme to remove the bulk of the petrol contamination and prevent the residual contamination from migrating off-site to third party land and a nearby stream that flowed into to an ecologically important estuary.
FURTHER INFORMATION AND GUIDANCE

The following document from the Environment Agency gives practical advice and guidance to help you prevent pollution being caused by your construction, demolition and associated activities and is supported by various case studies of pollution incidents caused by construction-related activities:

Working at construction and demolition sites: preventing pollution guidance PPG 6, March 2012 (PDF, 8MB)

ABOUT THE AUTHOR

Graeme is an Environmental Director in the Arthur J. Gallagher, Construction Services team. He provides environmental liability solutions to client organisations facing environmental risks, using the most appropriate mix of risk reduction, control, financing and transfer.

With over 20 years’ experience in the environmental profession, primarily in consulting and insurance, and knowledge of environmental risk Graeme is an insurance specialist in his field. His specialist consulting areas are environmental risk and insurance, environmental liability assessment, environmental due diligence, environmental management and contaminated land investigation and remediation.

Throughout his career, Graeme has worked as an environmental insurance underwriter, in New York and then London and has worked as an environmental risk advisor and environmental insurance broker since 1997.

Graeme’s unique background of experience in environmental consulting, environmental insurance underwriting, insurance broking and risk management means that he is able to deliver the full range of environmental risk and insurance services to clients, from consulting through to negotiation and placement of financial risk protection solutions.

For a discussion on your requirements or to explore cover options please contact:

GRAEME MERRY
Environmental Director
T: +44 (0) 1305 839425
M: +44 (0) 7917 599691
E: graeme_merry@ajg.com

MATHEW HUSSEY
Environmental Director
T: +44 (0) 1392 357544
M: +44 (0) 7977 251456
E: mathew_hussey@ajg.com