



ENVIRONMENTAL & POLLUTION LIABILITY

Why should businesses purchase pollution liability insurance?

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This article outlines some of the reasons why businesses should purchase a stand-alone Premises Pollution Liability policy to cover their environmental risks. It also highlights the issues that can result from relying solely on a Commercial General Liability or Business Insurance Package for these exposures.

Most businesses carry Commercial General Liability (CGL) insurance at a minimum, as it is the mainstay coverage that will protect them in the event of a third party claim for bodily injury or property damage arising out of their premises and operations. Other businesses may choose instead to carry a Business Insurance Package that includes different types of coverage such as CGL, Property, Crime and Boiler & Machinery.

While some CGL and Business Insurance Package policies include limited coverage for environmental losses, relying on a CGL or Business Insurance Package to fully cover environmental exposures is not prudent risk management. This is particularly important given the complex legal issues, and regulatory and contractual requirements facing business owners today. **So, why should business owners and operators consider buying Victor's Environmental Cleanup and Liability Insurance for Premises policy?** Here are our top reasons why.

Reason #1

Most CGL policies contain a pollution exclusion clause.

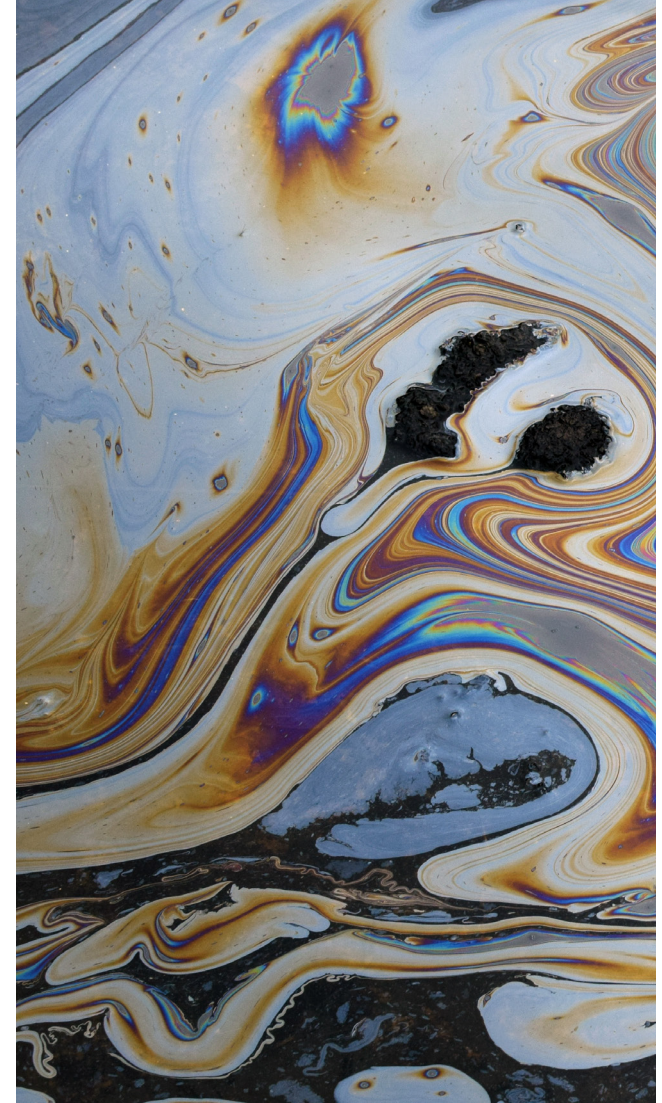
The Pollution Exclusion is a standard clause often found in CGL policies. Its purpose is to exclude losses arising out of the discharge or escape of pollutants into the environment. Such exclusions were first introduced by insurers in the early 1970s as an industry response to litigation arising out of that type of loss. However, the exclusion back then was very different than today's exclusions. It contained an exception for losses that were sudden and accidental.

By the mid-1980s, insurers found themselves exposed to many court decisions interpreting the sudden and accidental exception to apply to situations involving the discharge of pollutants over long periods of time. As a result of these decisions, and perhaps also due to the increasing frequency and severity of environmental claims, the insurance industry introduced the Absolute Pollution Exclusion. The **Absolute Pollution Exclusion** eliminated the exception for loss that was sudden and accidental, and also removed coverage for government-mandated environmental cleanup.

In the mid-1990s, the CGL's pollution exclusion was further modified to what is often referred to as the **Total Pollution Exclusion**. This, more onerous, exclusion eliminates many of the exceptions contained in the Absolute Pollution Exclusion.

One of the common exceptions found within the pollution exclusion is with respect to bodily injury or property damage arising out of heat, smoke or fumes from a hostile fire. This exception for hostile fire does not always apply to cleanup of pollutants as determined by the Supreme Court of Canada in *Precision Plating Ltd. v. Axa Pacific Insurance Company et al* (see: [Victor's Environmental & Pollution Liability Legal Bulletin: "Pollution Exclusion: Court holds that CGL policy does not cover escape of chemicals caused by fire"](#)).

As the coverage under a CGL policy for environmental accidents has become more restrictive over time, it has become much more important for businesses to buy a stand-alone Pollution Liability policy to cover their environmental exposures.





Reason #2

There are limitations in the Land and Water Pollution extension provided by a Business Insurance Package.

In conjunction with CGL coverage, most insurers also provide an extension for Land and Water Pollution in their Business Insurance Package. The primary intent of this extension is to cover expenses incurred to clean up pollutants from land and water at an insured premises.

There are two important requirements to trigger this extension. The spill or escape of pollutants must be:

1. in conjunction with loss or damage to insured property; and
2. sudden, unexpected and unintended.

While this extension does provide coverage that will apply in certain situations, businesses should be aware of its limitations. For example, consider the loss scenario of a manufacturing business that moved a piece of machinery from their shop floor as part of a process-line reorganization. In this scenario, a leak from the piece of machinery was discovered that migrated into an unsealed trench pit. Contrary to the two important requirements mentioned above, there was no damage to insured property, and the machinery was found to be causing contamination over a long period of time. As a result, the coverage provided by the Land and Water Pollution extension was rendered ineffective.

In addition, there is a third major limitation that business owners need to understand. As previously indicated, the Land and Water Pollution extension specifically applies only to “expenses incurred to clean up pollutants from land and water at an insured premises.” As such, there appears to be no coverage available for third party claims for bodily injury or property damage regarding a spill or escape of pollutants. Similarly, the Land and Water Pollution extension does not cover cleanup costs at a third-party premises. This is of particular importance to note because when pollutants enter surface water or ground water, they can migrate to adjacent premises and waterways very quickly.

Victor’s Environmental Cleanup and Liability Insurance for Premises policy provides both on- and off-site cleanup, and third-party liability, for pollution incidents on, under or emanating from a covered location. Pollution incidents can be gradual or sudden, and the coverage is not consequent upon any other form of loss or damage. Limits up to \$10 million are available. In contrast, the Land and Water Pollution extension referenced above is typically capped at \$50,000.



Reason #3

Responding to an environmental crisis can be a costly undertaking.

A crisis that is managed poorly can result in serious reputational and financial damage to a business. In some cases, if public confidence is diminished severely enough, it may even threaten the ability of the business to continue operations.

Victor offers coverage for crisis management expenses by endorsement that can be attached to the Environmental Cleanup and Liability Insurance for Premises policy. This endorsement provides reasonable and necessary fees, costs and expenses when a pollution condition results in regional or national media reports that diminish public confidence in the business that is insured by this policy. It will cover public relations services provided by a crisis management firm that is approved by Victor. A public relations firm would help to mitigate actual or potential negative publicity for the business.

Reason #4

Civil fines, penalties, assessments and punitive damages can be costly.

Public awareness and concern for the fragility of our natural environment has heightened in recent years. In response, legislation to protect the environment has been introduced at all levels of government in Canada, with fines and penalties for environmental infractions. It is important that business owners be aware of the environmental risks posed by their businesses, given that in some cases the assessment of fines and penalties has been as high as \$300,000.

The list of environmental legislation in Canada is lengthy. The federal government has imposed the *Canadian Environmental Protection Act* along with the *Fisheries Act* and *Transportation of Dangerous Goods Act*. The provinces and territories each have their own environmental protection and clean water statutes. Even some municipalities have had environmental regulatory powers delegated to them. Businesses that fail to comply with this profusion of regulations may be hit with fines and penalties from each level of government.

As a result, it is important to note that CGL policies typically only cover the insured for compensatory damages. These are damages that are payable to compensate for actual

injury or economic loss. Compensatory damages **do not include punitive or exemplary damages**, or the multiple portion of any multiplied damage award. Compensatory damages also **do not include civil fines, penalties or assessments**.

But, there is a way that business owners can protect themselves. Victor's Environmental Cleanup and Liability Insurance for Premises policy is one of very few insurance policies available in Canada that includes protection against exemplary or multiplied damages as well as coverage for civil fines, penalties or assessments. This means that assessed fines and penalties could be covered with respect to pollution claims for bodily injury or property damage which the insured is legally obligated to pay.

Of course, coverage for government fines and penalties is not the only reason that businesses should purchase environmental liability insurance. There is a myriad of complex legal issues, as well as regulatory and contractual requirements that are making environmental liability coverage part of the standard insurance portfolio that any business should carry.



These are just a few of the reasons for purchasing a stand-alone Premises Pollution Liability policy—if you have not already. Consider the risks and protect yourself, your employees and your business against environmental risks.

#avoidtheCGLgap

Learn more about our [Environmental & Pollution Liability program](#) or contact one of [our underwriters](#) for assistance.

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