

## **CGL ABSOLUTE POLLUTION EXCLUSION**

### **Applying the Absolute Pollution Exclusion in the ISO CGL Form**

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#### **I. INTRODUCTION TO THE CGL ABSOLUTE POLLUTION EXCLUSION**

Commercial General Liability policies provide coverage, in part, for both “bodily injury” and “property damage” as defined. Coverage for bodily injury and property damage, however, is limited by certain exclusions in the policy. Specifically, ISO Form CG 0001 contains an exclusion (f.) known as the “Absolute Pollution Exclusion.” The Absolute Pollution Exclusion (“the APE”) precludes coverage for bodily injury and property damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of “pollutants,” under certain enumerated circumstances. Because of the frequency of claims involving pollution or contamination and the substantial liabilities that can be associated with such claims, the APE is a significant exclusion in the CGL policy that arises frequently.

It has been stated that pollution exclusions originated in insurers’ efforts to avoid potentially open-ended and devastating liability for injury and damage caused by the long-term, gradual discharge of hazardous waste and industrial by-products, as exemplified by the Times Beach and Love Canal disasters. *See, e.g., American States Insurance Co. v. Koloms*, 687 N.E. 2d 72 (Ill. 1997). The first pollution exclusions began appearing in CGL policies in the early 1970s, concurrent with the enactment of new state and federal legislation (such as CERCLA) mandating that polluters be held responsible for cleanup costs in connection with property damage of that type. These first pollution exclusions (known as “qualified pollution exclusions”) appeared in most CGL policies between the early 1970s and 1985. The qualified pollution exclusion broadly excluded coverage for damages “arising out the discharge, dispersal, release or escape of smoke, vapors, fumes, acids, alkalize, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water.” The exclusion typically provided that it would not apply where the polluting discharge or release was “sudden and accidental.”

In part because of litigation over the qualified pollution exclusion and a resulting split in courts nationwide regarding the interpretation of the phrase “sudden and accidental,” the next generation of pollution exclusions began appearing in about 1985. The deletion of the “sudden and accidental” exception to the pollution exclusion ended one debate, but sparked new debate, resulting in coverage litigation that continues to the present. Some courts pronounce the exclusion unambiguous and apply it broadly, even to exclude coverage for incidents that would not be considered as involving classic “environmental” pollution. Numerous courts have found the exclusion ambiguous and interpret it narrowly, holding that it excludes coverage only for claims that involve typical “environmental” pollution.

The goal of this paper, therefore, is to familiarize the reader with the components of the APE and the steps for evaluating a claim under that exclusion, which include: (1) determining whether the substance at issue is a “pollutant,” as defined; (2) determining whether the alleged damage arises out of the actual, alleged or threatened discharge, dispersal, seepage, migration,

release and/or escape of the substance; and (3) determining the impact of the applicable law on whether or not the pollution exclusion is likely to apply to bar coverage for the claim. This paper also addresses some emerging issues concerning the application of the APE and provides a quick checklist to refer to when analyzing claims under the APE.

## II. COMPONENTS OF THE ABSOLUTE POLLUTION EXCLUSION

The full text of the APE, as it appears in the December 2004 version of CG 0001 is as follows:

- f. Pollution
  - (1) “Bodily injury” or “property damage” arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of “pollutants”:
    - (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:
      - (i) “Bodily injury” if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building’s occupants or their guests;
      - (ii) “Bodily injury” or “property damage” for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or
      - (iii) “Bodily injury” or “property damage” arising out of heat, smoke or fumes from a “hostile fire”;
    - (b) At or from any premises, site or location which is or was at any time used by or for any 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; or
  - (d) 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 "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:
    - (i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operation fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;
    - (ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or
    - (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire."
  - (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."
- (2) Any loss, cost or expense arising out of any:
- (a) Request, demand, order or statutory or regulatory requirement that any 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, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, “pollutants.”

However, this paragraph does not apply to liability for damages because of “property damage” that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or “suit” by or on behalf of a governmental authority.

\* \* \*

It should be noted that the APE, as it appears in the December 2004 edition of CG 0001, is substantially similar to the version of that exclusion that initially appeared in CG 0001 in the November 1985 edition of that form, as well as subsequent editions.

Breaking down the APE into its component parts illustrates the steps necessary to evaluating its application to a claim. The APE applies to preclude coverage for:

- “bodily injury” or “property damage” as defined, if arising out of
- the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of
- “pollutants” as defined, if
- the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of such “pollutants” is:
  - at or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured;
  - at or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
  - which are or were at any time transported, handled, stored, treated, disposed of, or processed as, waste by or for any insured or any person or organization for whom the insured may be legally responsible;
  - 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) is performing operations, if the “pollutants” are brought on or to the premises, site or location in connection with such operations

by such insured, contractor or subcontractor (although certain exceptions apply); or

- at or from any premises, site or location on which any insured (or any of its contractors or subcontractors) is performing operations if the operations are investigate, remediate or in any way respond to or assess the effects of “pollutants.”

Part (2) of the APE excludes coverage for certain environmental compliance costs and certain claims or suits by the government. Specifically, Part (2) excludes coverage for any loss, cost or expense arising out of

- any request, demand, order or statutory or regulatory requirements that any insured or others investigate, monitor, remediate or any way respond to or assess the effects of “pollutants”; or
- any claim or suit by or on behalf of a governmental authority for damages because of investigation or remediation of “pollutants,”

UNLESS

- the insured would be liable for damages because of property damage due to the “pollutants” even in the absence of such request, demand, order or statutory or regulatory requirement, or claim or suit by a governmental authority. BUT, Part (1) of the APE could still apply to bar coverage for such loss, cost or expense, if it applies.

Of course, a critical step in the analysis is determining whether or not the substance at issue is a “pollutant.” The term “pollutants” is defined as follows:

“Pollutants” mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalize, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

### **III. IS THERE A POLLUTANT?**

The term “pollutant” is defined, in part, to mean a “solid, liquid, gaseous or thermal irritant or contaminant.” The definition includes as examples of such irritants or contaminants the following: smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, defined as including material to be recycled, reclaimed or reconditioned. One dictionary definition of “irritant” is “something that causes irritation,” defined in part as “incipient inflammation, soreness, roughness or irritability of a bodily part.” (American Heritage Dictionary). One dictionary definition of “contaminant” is “that which contaminates,” defined as “to make impure or corrupt by contact or mixture.” (American Heritage Dictionary). Based on these terms, the term “pollutant” appears broadly defined and arguably should include any substance of a solid,

liquid, gaseous or thermal nature that may give rise to bodily irritation or causes impurity by contact or mixture with other property.

As the following discussion demonstrates, however, courts in many jurisdictions have been unwilling to construe the definition so broadly. This reluctance stems from the position of those courts that the intent of the APE was to exclude coverage for typical “environmental” pollution claims and not to exclude coverage for any and all claims of injury or damage that might or might not arise directly out of potentially hazardous substances other than hazardous waste and/or industrial by-products. Courts have had little trouble consistently deciding that the term “pollutants” includes substances regarded as highly toxic to man or earth, such as metals, petroleum, solvents and radioactive materials, as well as industrial waste by products.

Once we move away from these categories, however, whether or not a substance will be considered a “pollutant” depends to a high degree upon the particular court’s construction of the APE as either broad or narrow. Thus, based upon the definition of the term “pollutants,” moreover, in many instances there is little dispute that smoke, vapors, fumes, soot, acids, alkalis and various chemicals may be considered “pollutants.” Depending upon the circumstances of their use, however, there can be disputes about whether various substances taking the form of vapor, fumes or air particulate matter are necessarily “pollutants” in the context of particular claims. Furthermore, claims involving substances not listed specifically as examples of “pollutants” in the definition of that term frequently result in disputes and can lead to coverage litigation. As we discuss below, in general, courts will take either a “liberal” or “strict” approach to determining whether or not a substance constitutes a “pollutant.”

#### **A. The Liberal Approach**

Some courts have construed the term “pollutant” broadly. For instance, the Michigan Supreme Court recently held that a pollution exclusion barred coverage for damages arising out of a municipality’s practice of discharging sewage into a nearby creek when its sewer system became overtaxed because of heavy periods of rain. *City of Grosse Pointe Park v. Michigan Municipal Liability and Property Pool*, 702 N.W.2d 106 (Mich. 2005). Finding that the sewage was a “pollutant,” the court noted that the term was defined, in part, as “any solid, liquid, gaseous or thermal irritant or contaminant.” The court stated that “the word ‘contaminant,’ given its plain and ordinary meaning, is ‘something that contaminates’ and ‘contaminate’ is defined as ‘to make impure or unsuitable by contact or mixture with something unclean, bad, etc.; pollute; taint.’” Based on similar reasoning, courts have found a wide variety of substances to constitute “pollutants.” For example, in *Atlantic Avenue Associates v. Central Solutions, Inc.*, 24 P3d 188 (Kan. Ct. App. 2001), the Kansas Court of Appeals held that a foaming cement cleaner should be considered a pollutant based on its caustic properties and based on warnings in product literature of possible “irritation” upon use.

Such courts have held that “the plain language of the absolute pollution exclusion clause...makes clear that a [solid, liquid, gaseous or thermal substance] is an excluded pollutant if it may be characterized as an irritant or a contaminant. The dictionary defines contaminant as ‘something that contaminates, and it defines contaminate as to soil, stain, corrupt, or affect by contact or association or to render unfit for use of the introduction of unwholesome or undesirable elements.’” *Camp Delaware, Inc. v. Markel Insurance Co.*, 2001 WL 541451

(Conn. Super. 2001) (holding sewage is a pollutant); *see also Technical Coating Applicators, Inc. v. USF&G Co.*, 157 F. 3d 843 (11<sup>th</sup> Circuit 1998) (applying Florida law) (vapors emitted from roofing products were “pollutants”; product’s ability to produce an irritating effect placed it within definition of “irritant” and product could constitute “pollutant” even though ordinarily benign in everyday use).

Courts broadly construing the term “pollutants” often look to whether the substance at issue is subject to environmental health or safety regulations. For example, in *Allen v. Scottsdale Insurance Co.*, 307 F. Supp. 2d 1170 (D. Haw. 2004), the court found that a claim for damages, based on allergic reactions and other physical injuries allegedly caused by “fugitive dust” particles emitted from the insured’s concrete-crushing facility, involved “pollutants.” In determining that the dust was a “pollutant,” the court relied, in part, on Hawaii statutes, administrative rules and air pollution standards and definitions indicating that fugitive dust was a regulated pollutant and was construed by the government to be an unhealthy and unsafe substance. *See also American States Insurance Co. v. Nethery*, 79 F. 3d 473 (5<sup>th</sup> Circuit 1996) (applying Mississippi law) (relying in part upon listing of trichloroethane as a hazardous substance by U.S. Environmental Protection Agency, court concluded it was a “pollutant”).

Courts may also look to the allegations of the suit – to the extent the suit is alleging that the toxic properties of the substance resulted in injury or damage, this can be seen to support the finding that it is a “pollutant.” *See, e.g., Brown v. Mosser Lee Co.*, 419 N.W.2d 573 (Wis. Ct. App. 1987) (noting that claimant alleged in complaint that airborne moss dust was an “airborne contaminant”); *State Cement Plant Commission v. Wausau Underwriters Ins. Co.*, 616 N.W.2d 397 (S.D. 2000) (as plaintiffs alleged they suffered “contamination” from insured’s cement dust, dust was “pollutant”).

Based upon similar reasoning, the following substances, among others, have been found to constitute “pollutants”:

- Ammonia
- Carbon monoxide
- Adhesives
- Asbestos
- Cement or cement components
- Paint fumes
- Lead paint
- Sealants and coating materials
- Solvents
- Etches
- Cleaners and their fumes
- Pesticides

- Petroleum products
- Smoke
- Municipal waste or garbage
- Radioactive materials

## **B. The Strict Approach**

Many courts, on the other hand, have taken a much stricter or narrower approach to determining whether a substance is a “pollutant” for the purpose of applying the APE. Courts have held frequently that the phrase “any...irritant or contaminant” is too broad to meaningfully define “pollutant,” because a broad interpretation of these terms leads to “absurd” results and “ignores the familiar connotations of the words used” in the APE. *See, e.g., MacKinnon v. Truck Insurance Exchange*, 73 P.3d 1205 (Cal. 2003). Courts taking this approach frequently hold that a reasonable policyholder would not understand the APE to exclude coverage merely because the claim involves injury or damage in some fashion related to a substance that irritates or contaminates, regardless of the circumstances. *Id.*; *see also Regional Bank of Colorado v. St. Paul Fire and Marine Insurance Co.*, 35 F. 3d 494 (10<sup>th</sup> Circuit 1994) (applying Colorado law). These courts hold that the term “irritant” is not to be read literally or in isolation, but must be construed in the context of how it is used in the policy. Thus, as the California Supreme Court has stated, “it seems far more reasonable that a policyholder would understand [the term “pollutants”] as being limited to irritants and contaminants *commonly thought of as pollution* and not as applying to every possible irritant or contaminant imaginable.” (Emphasis in original.) Thus, in the *McKinnon* decision, the California Supreme Court declined to classify pesticides sprayed by a landlord, which resulted in a death of a tenant, as “pollutants.”

Some courts have also applied a particular doctrine of policy construction (“*ejusdem generis*”) to hold that, if a substance is not specifically listed among the examples used in the definition of “pollutants” (smoke, vapor, etc.), the substance at issue will be considered a “pollutant” only if it is very similar to those listed substances in nature and effect. Thus, in *Minerva Enterprises, Inc. v. Bituminous Cas. Corp.*, 851 S.W.2d 403 (Ark. 1993), the court found that the term “waste” had to be considered within the context of the entire list of pollutants, all of which the court believed were related to industrial waste. Thus, where the claim involved damages due to an overflow of the insured’s septic tank system, flooding the claimant’s mobile home with solid and liquid sewage, the court held that the sewage did not constitute a “pollutant.” Similarly, in *Maryland Cas. Co. v. W.R. Grace & Co.*, 794 F. Supp. 1206 (S.D.N.Y. 1991), reversed on other grounds, 23 F. 3d 617 (2<sup>nd</sup> Cir. 1993), the court found that asbestos was not a “pollutant” because it did not bear a close resemblance to other substances listed in the definition of the term “pollutants” - namely, smoke, fumes or waste.

Some of these same courts have gone so far as to state that, unless a substance is “inherently dangerous,” it should not be classified as a “pollutant.” Several courts applying such an approach have determined, for instance, that construction or similar debris did not constitute a “pollutant” on the basis that such material posed no inherent danger as either an “irritant” or “contaminant.” *See In Re Hub Recycling, Inc.*, 106 B.R. 372 (D.N.J. 1989) (pollution exclusion

did not apply to claim for illegal dumping of various materials, including construction debris, rock, brick, wood, glass and aluminum).

Still other courts have determined that otherwise hazardous substances should not be characterized as “pollutants” in situations where those substances were used by the insured on an everyday basis and were indispensable to the insured’s business. For instance, several courts have held that, where the insured was in the business of selling gasoline or petroleum products, coverage for contamination of neighboring property due to tank leaks was not barred by the pollution exclusion. *See, e.g., Hocker Oil Co., Inc. v. Barker-Phillips-Jackson, Inc.*, 997 S.W.2d 510 (Mo. App. S.D. 1999); *American States Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996). The Louisiana Supreme Court has held that the determination of whether an injury-causing substance is a “pollutant” is a complicated, fact-based determination that should encompass a wide variety of factors, including (1) the nature of the injury-causing substance, (2) its typical usage, (3) the quantity of the discharge, (4) whether the substance was being used for its intended purpose when an injury took place, (5) whether the substance is one that would be viewed as a pollutant as the term is “generally understood,” and (6) “any other factor the trier of fact deems relevant to that conclusion.” *Doerr v. Mobile Oil Corp.*, 774 So.2d 119 (La. 2000) (holding that, because the insured municipality was obligated to perform wastewater treatment, contamination of water provided to municipal residents did not fall within the scope of pollution exclusion).

Finally, it is worth noting that not every court agrees that the regulation of a particular substance by an environmental, health or safety statute or regulation renders it a “pollutant.” For instance, in *West Bend Mutual Insurance Co. v. Iowa Iron Works, Inc.*, 503 N.W.2d 596 (Iowa 1993), the Iowa Supreme Court decided that spent river sand was not a “waste” within the meaning of an absolute pollution exclusion. The insured steel manufacturer used ordinary river sand in its molding process. Upon replacing it with fresh sand, the insured delivered spent foundry sand to a third-party’s property for filling and landscaping the site of an old quarry. The State Department of Natural Resources brought suit against the insured, alleging violation of a statutory prohibition against depositing “solid waste” in an unlicensed place. The environmental statute under which the insured was charged defined “solid waste” to include garbage, refuse, rubbish and other similar materials, but excluded “hazardous waste” as defined by the statute. The court determined that the statutory meaning of “waste” was broader than the meaning of the term as used in the absolute pollution exclusion and was not determinative of whether the sand was a “pollutant.” The court concluded that the violation did not invoke the application of the pollution exclusion.

Based on such reasoning, courts have concluded that the following substances were not “pollutants” under the circumstances at issue:

- Ammonia
- Carbon monoxide
- Adhesives
- Asbestos
- Cement or cement components

- Paint fumes
- Lead paint
- Sealants and coating materials
- Solvents
- Etches
- Cleaners and their fumes
- Pesticides
- Petroleum products
- Smoke
- Municipal waste or garbage
- Radioactivity-containing materials

This list is nearly identical to the list of substances that have been found to constitute “pollutants” by other courts. This illustrates the necessity of a choice-of-law analysis in analyzing the APE, as conducting state law specific research is crucial in determining whether a particular substance may be considered a “pollutant.”

### **C. Particular Claims of Recent Significance**

Certain types of so-called “toxic tort” claims are arising with increasing frequency. In particular, as claims involving asbestos-related bodily injuries have been on the rise again, disputes over whether or not asbestos constitutes a “pollutant” have taken on increasing significance, as such claims often involve older policies that do not contain a specific asbestos-related injury exclusion. Although this is an issue that still has not been litigated frequently, whether asbestos is a “pollutant” has been the subject of decisions reaching different conclusions. The following courts determined that asbestos is a “pollutant” under a similar or identical definition: *American States Ins. Co. v. Zippro Const. Co.*, 455 S.E.2d 133 (Ga. App. 1995); *Independent School Dist. No. 197 v. Accident and Cas. Ins. of Winterthur*, 525 N.W.2d 600 (Minn. App. 1995); *American Heritage Realty Partnership v. La Voy*, 618 N.Y.S.2d 125 (N.Y. A.D. 3 Dist. 1994); *Sunset-Vine Tower, Ltd. v. Committee & Indus. Ins. Co.*, No C 738 874 (Cal. Super. Apr. 12, 1993), 7 Mealey’s Ins. Litig. Rep. No. 29, Section G (June 1, 1993); *Great N. Ins. Co. v. Ben Franklin Fed. Sav. & Loan Ass’n.*, 953 F.2d 1387 (9<sup>th</sup> Cir. 1992)(applying Oregon law). The following courts, on the other hand, held that asbestos is not a “pollutant.” *Flintkote Co. v. American Mut. Liab. Ins.*, No. 808-594 (Cal. Super. Aug 17, 1993); *Owens-Corning Fiberglass Corp. v. Allstate Ins. Co.*, 660 N.E.2d 746 (Ohio Ct. Com.Pl. 1993).

Similarly, claims arising out of exposure to silica are also on the increase. Silica is similar to asbestos. Significantly, a recent California appellate court decision held that a pollution exclusion applied to preclude coverage for a series of bodily injury claims arising out of silica exposure. *Garamendi v. Golden Eagle Insurance Co.*, 25 Cal. Rptr. 642 (Cal. Ct. App. 2005).

Claims based on injury due to ingestion or exposure to lead-containing paint are frequently seen in the liability insurance context. Similar to decisions concerning asbestos, decisions concerning whether lead in paint constitutes a “pollutant” are split among the jurisdictions that have addressed this issue. *See, e.g., Auto Owners Insurance Co. v. City of Tampa Housing Authority*, 231 F.3d 1298 (11<sup>th</sup> Circuit 2000) (applying Florida law) (lead is a “chemical” and specifically recognized as a pollutant under state and federal laws governing pollutant discharge, prevention and removal; held, pollution exclusion precluded coverage for injury due to ingestion of old and crumbling lead paint); *but see Insurance Co. of Illinois v. Stringfield*, 685 N.E.2d 980 (Ill. App. Ct. 1997) (lead in paint was not “pollutant”; court found no indication it was an “irritant” or that the injury arising out of ingestion of lead-based paint involved lead as a “contaminant”; also noting that the lead paint had been legally applied to the walls at the time that they were painted).

Another important category of claims in recent years has been those involving exposure to mold. Although the issue of whether the pollution exclusion applies to mold claims has not been the subject of many published decisions, it is important to note that most courts addressing the issue apparently have concluded that mold is not a “pollutant.” *See, e.g., State Farm Fire and Cas. Co. v. MLT Construction Co.* (La. App.); *McKnight v. USAA Casualty Insurance Co.*, 871 A2d 446 (Del. Super. 2005); *see also Keggi v. Northbrook Property and Cas. Insurance Co.*, 13 P3d 785 (Ariz. Ct. App. 2000) (bacteria in drinking water not “pollutants”).

Some recent decisions of note include the following:

In *Clendenin Brothers, Inc. v. U.S. Fire Insurance Co.*, 2006 WL 27432 (Md. 2006), the Maryland high court concluded that bodily injuries arising out of exposure to fumes, created by the use of welding rods during the normal course of business operations, were not excluded under the pollution exclusion, because the fumes could not be considered to constitute “pollutants.”

In *State Auto Mutual Insurance Co. v. Greenrose*, 2005 WL 3444543 (Ky. Ct. App. 2005), a court found that an indoor spill of heating oil, which leaked from a pipe that broke when the tenant leaned on it too heavily, did not invoke the pollution exclusion, implying that heating oil could not constitute a “pollutant” under those circumstances.

On the other hand, the Louisiana appellate court recently held that “naturally occurring radioactive material” (NORM), which fell from or was knocked off of, oil pipes during routine cleaning and maintenance, was a “pollutant” for purposes of determining whether consequential property damage fell within the pollution exclusion. *Grefer v. Travelers Insurance Co.*, 2005 WL 3453784 (La. App. 2005).

In the very recent decision of *Acceptance Insurance Co. v. Powe Timber Co., Inc.*, moreover, wood chips from wood that was treated with chemicals were held to constitute “pollutants” with respect to claims of bodily injury due to inhalation of fumes from both burning and unburned wood chips.

The Washington Supreme Court recently held that injuries, suffered by a rental apartment tenant when fumes from a waterproofing material used in the complex entered his unit,

constituted “pollutants.” *Quadrant Corp. v. American States Insurance Co.*, 110 P3d 733 (Wash. 2005). On the other hand, in *Nav-Its, Inc. v. Selective Insurance Co. of America*, 869 A2d 929 (N.J. 2005), the New Jersey Supreme Court held that fumes from a floor coating or sealant used in a building, which caused bodily injury, did not constitute “pollutants.”

Finally, there are certain claims that have apparently not been decided by courts in any published opinions. Suits in recent years concerning alleged injury, or increased risk of injury, due to exposure to electro-magnetic frequency (“EMF”) radiation, such as from power lines or cell phones, raised fears of claims in numbers comparable to asbestos. As yet, however, there appear to be no published decisions concerning whether EMF radiation constitutes “pollutants.”

More recently, a series of claims has arisen in the context of the manufacture of butter-flavored microwave popcorn and candy, utilizing materials such as “Diacetyl,” including a \$15 million jury verdict in such a case in Missouri. The claims are based upon exposure to fumes from the use of this food ingredient in the ordinary course of the manufacture of microwave popcorn and certain candy. As yet, however, none of the insurers has tested the application of the pollution exclusion to these claims.

Similarly, claims involving a variety of particulate matter in air – for example, cotton dust in the textile industry, concrete grinding in construction and cutting or grinding of metals or other solid materials in a variety of industrial settings – present pollution exclusion issues that have not yet been litigated to conclusion in published decisions.

#### **IV. IS THERE A DISCHARGE, DISPERSAL, SEEPAGE, MIGRATION, RELEASE OR ESCAPE?**

After determining whether the substance at issue is a “pollutant,” the next issue that must be addressed is whether the injury arises out of the actual, alleged or threatened release or escape of such “pollutant.” As was hinted at above, courts are split as to the meaning of the phrase “discharge, dispersal, seepage, migration, release or escape.” Many courts have decided that the phrase is a laundry list of environmental “terms of art,” referring to the means by which “environmental” pollution occurs. Such courts have concluded that the better interpretation of that phrase leads to the conclusion that the APE applies to claims only if they involve “traditional environmental pollution.” On the other hand, there are courts that have concluded that the pollution exclusion does not apply just to situations involving disposal of hazardous waste or pollution of soil, water or outdoor air due to manufacturing or other commercial activity. This split among courts has significant ramifications for liability insurers, because claims of bodily injury due to exposure to potentially toxic substances, in the workplace or otherwise, have dramatically increased in frequency in the last few years.

##### **A. Courts Construing the Phrase as a “Term of Art”**

Courts in some of the largest and most influential states have concluded that the APE should apply only to “traditional environmental pollution,” such as for liability under environmental statutes such as CERCLA, and not to all injuries allegedly caused by exposure to hazardous substances. For instance, in *MacKinnon v. Truck Insurance Exchange*, 73 P. 3d 1205 (Cal. 2003), California’s Supreme Court overturned an appellate court ruling that had given the

absolute pollution exclusion a broad interpretation. Looking at the drafting history of pollution exclusions and the “reasonable expectations” of the insured, the Court concluded that assigning a literal meaning to various words in the pollution exclusion would be overreaching and lead to “absurd results.” The California Supreme Court concluded that the pollution exclusion should apply only to “environmental” pollution. The Court declined to apply the exclusion to preclude coverage for a claim filed against the insured landlord after a tenant allegedly died from exposure to pesticides applied to the building.

In *American States Insurance Co. v. Koloms, supra*, the Illinois Supreme Court declined to apply the APE to a claim of bodily injury caused by an indoor release of carbon monoxide. The Court cited to a North Carolina appellate decision holding that the APE should apply only to liability arising from the gradual or repeated discharge of hazardous substances into the environment. The Illinois Supreme Court agreed, stating that it was improper to extend the exclusion beyond that arena and holding that an indoor release of carbon monoxide did not constitute a “discharge, dispersal, release or escape” of that substance.

Similarly, New York’s high court found that the absolute pollution exclusion contained in the CGL policy was ambiguous. Examining the drafting history of the exclusion, the Court noted that the terms in the exclusion were terms of environmental law. The Court concluded that the APE did not clearly bar claims for indoor exposure to hazardous substances. *Belt Painting Corp. v. TIG Insurance Co.*, 795 N.E. 2d 15 (N.Y. 2003) (pollution exclusion did not apply to injuries of office workers caused by exposure to paint fumes).

Likewise, the high courts in both Maryland and Ohio have concluded that the pollution exclusion was intended to exclude coverage only for environmental pollution damage, on the basis that the terms used in the APE were historically used in reference to damage or injury caused by improper disposal or containment of hazardous waste and resulting gradual environmental degradation, as well as to preclude coverage for government mandated cleanups. *Sullins v. All State Insurance Co.*, 667 A. 2d 617 (Md. 1995); *Anderson v. Highland House Co.*, 757 N.E. 2d 329 (Ohio 2001). In *Anderson*, the court found that carbon monoxide emitted from a malfunctioning residential heater was not a pollutant and that the exclusion did not apply to a claim involving bodily injury due to indoor air contamination.

A similar approach has been taken by other states. In *American States Insurance Co. v. Kiger, supra*, for instance, the Indiana Supreme Court held that if it were to interpret the APE literally, the exclusion would virtually negate all coverage for the insured, because the insured’s business was a gas station. The Court concluded that allowing the insurer to exclude coverage for liability related to gasoline exposure would render the policy’s coverage illusory.

Other courts have also held that the absolute pollution exclusion should apply only to intentional pollution or environmental pollution, because otherwise coverage would be drastically limited. Thus, in *Doerr v. Mobile Oil, supra*, the Louisiana Supreme Court indicated that the APE should be applied only to intentional, active, industrial polluters and the exclusion should not bar coverage for fortuitous accidents or injuries that happen to have been caused by exposure to chemical substances.

Similarly, the Supreme Court of Massachusetts, in *Western Alliance Insurance Co. v. Gill*, 686 N.E.2d 997 (Mass. 1997), stated that the APE should not reflexively be applied to accidents during the normal course of business activities simply because those activities involve a “discharge, dispersal, release or escape” of an irritant or contaminant, as these are terms of art in environmental law generally used with reference to damage or injury caused by improper disposal or containment of hazardous waste. Likewise, in *Ayersman v. West Virginia DEP*, 542 S.E.2d 58 (W.Va. 2000), the West Virginia Supreme Court held the APE did not preclude coverage to the West Virginia Department of Environmental Protection for claims of property damage due to mine runoff, which was caused by cleanup operations performed by state regulators. The West Virginia Supreme Court held it was “skeptical” of any policy language purporting to exclude coverage for damages arising out of a “primary function” of an insured.

The impact of such interpretations of the APE is illustrated starkly in the decision in *Kent Farms, Inc. v. Zurich Insurance Co.*, 998 P. 2d 292 (Wash. 2000). There, the Washington Supreme Court construed coverage under a liability policy containing the APE. The claim involved bodily injuries to a fuel-delivery person who was doused with fuel when a faulty intake valve caused the fuel to backflow over him. The Court refused to apply the APE to bar coverage. The Washington Supreme Court held that the APE applies to exclude claims only if they involve environmental damage, like the massive environmental cleanups required by CERCLA. Incidentally, the court further stated that, in the context of the claim at issue, the fuel was not a “pollutant.”

Although we do not provide an exhaustive list of states giving a strict interpretation to the APE, it should be noted that a strict interpretation of the term “pollutants” ordinarily goes hand in hand with a strict interpretation of the exclusion as a whole.

## **B. Courts Holding the Terms Should Be Construed Using Their Ordinary Meaning**

Although many courts have concluded that the APE applies only to claims involving traditional environmental pollution, there are courts that have concluded otherwise and given a broader interpretation to the exclusion. This is significant, in part, because where the law of one of those states is applicable, the pollution exclusion may operate to bar coverage for toxic tort claims involving bodily injury that does not arise out of traditional environmental pollution, but, rather, arises out of accidental or workplace exposure injuries. For example, in *Terra Matrix, Inc. v. U.S. Fire Insurance Co.*, 939 P.2d 483 (Colo. Ct. App. 1997), the Colorado Court of Appeals concluded that the APE barred coverage for bodily injuries suffered by office workers who inhaled toxic fumes from cleaning substances brought onsite by the building owner’s contractor.

Similarly, in *Haymen Associates No. 1 v. The Insurance Co. of the State of Pennsylvania*, 653 A. 2d 122 (Conn. 1995), the Connecticut Supreme Court upheld the APE and rejected an argument that the exclusion was ambiguous based on the drafting history of the pollution exclusion. The Court concluded that the application of the APE was not limited to traditional environmental pollution. It should be noted, though, that even where a court does not interpret the APE as limited to traditional environmental pollution, the reach of the APE is not unlimited. For example, in a more recent decision, the Connecticut Supreme Court refused to apply the

APE for smoke inhalation injuries suffered by a child when her mentally deranged father burned down her house. *Allstate Insurance Co. v. Barron* (Conn. 2004).

In a decision after the above-referenced *Kent Farms* decision, moreover, the Washington Supreme Court held that the APE applied to preclude coverage with respect to injury claims by apartment tenants who inhaled fumes from a waterproofing material brought onto the site by a contractor. Noting language in the APE indicating that the exclusion applies to the release of fumes at premises owned by the insured or any premises onto which a contractor or subcontractor hired by the insured has brought a pollutant, the court held that the APE applied to preclude coverage for these bodily injuries, despite the fact that the claim was not in the nature of traditional environmental pollution. *Quadrant Corporation v. American States Insurance Co.*, 110 P. 3d 733 (Wash. 2005). This illustrates that consideration should be given to reserving rights or even denying coverage based on the APE, even in jurisdictions where courts appear to construe that exclusion narrowly.

Likewise, the Florida Supreme Court has rejected the restriction of the APE to environmental or industrial pollution. In *Deni Associates of Florida, Inc. v. State Farm Fire & Cas. Insurance Co.*, 711 So.2d 1135 (Fla. 1998), the Court ruled that the APE defeated coverage for bodily injury claims arising out of a spill of copying fluid inside the insured's offices, as well as the claims of injury due to spraying of insecticide on the insured's fruit grove. Similarly, the Eleventh Circuit Court of Appeals, applying Florida law, affirmed the application of the APE to preclude coverage for bodily injuries arising out of "sick building" claims. *West American Insurance Co. v. Band and Desenberg*, 925 F. Supp. 758 (M.D. Fla. 1996), *affirmed*, 138 F. 3d 1425 (11<sup>th</sup> Cir. 1998).

Notable among states giving a broad interpretation to the APE is Minnesota. Minnesota courts have applied the APE to preclude coverage for claims of bodily injury due to causes ranging from lead paint to sick buildings to fumes in an indoor ice arena and fumes from materials utilized by contractors. *See Auto Owners Insurance Co. v. Hanson*, 588 N.W. 2d 777 (Minn. Ct. App. 1999); *Lyman v. Travelers Insurance Co.*, 1996 Minn. App. LEXIS 459 (Minn. Ct. App. 1996); *League of Minnesota Cities Insurance Trust v. City of Coon Rapids*, 446 N.W.2d 419 (Minn. Ct. App. 1989); *American States Insurance Co. v. Technical Surfacing, Inc.*, 50 F. Supp. 2d 888 (D. Minn. 1999). Other states in which courts have similarly given broad interpretations to the APE include Mississippi, Nebraska, South Dakota and Texas.

## **V. THE LIMITATIONS ON THE APE**

The analysis of whether the APE applies does not end after it has been determined that the claim involves the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants." As contained in ISO Form CG 0001, the APE applies only under certain enumerated circumstances. Specifically, the APE applies to the discharge, dispersal, release or escape of "pollutants":

- when the discharge, dispersal, etc. is at or from a site that is or was at any time owned or occupied by, or rented or loaned to, any insured; *but*

- the APE does not apply if the bodily injury arises out of smoke, fumes, vapor or soot produced by or originating from equipment used to heat, cool or dehumidify the building or to heat water for personal use or arising out of heat, smoke or fumes from a “hostile fire”;
- the exclusion also does not apply if the insured is a contractor and the owner or lessee of the premises has been added to the policy as an additional insured with respect to the named insured’s ongoing operations for that additional insured at the premises;
- when the discharge, dispersal, etc. is at or from any premises, site or location that is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
- “pollutants” which are or were at any time transported, handled, stored, treated, disposed of or processed as waste by or for any insured or any person or organization for whom the insured may be legally responsible;
- when the discharge, dispersal, etc. is at or from any premises, site or location on which any insured, or any contractors or subcontractors working directly or indirectly on the insured’s behalf, are performing operations, if the pollutants are brought onto the premises in connection with such operations by such insured, contractor or subcontractor; but
  - the APE does not apply to bodily injury or property damage arising out of the accidental escape of fuels, lubricants or fluids necessary for the operation of “mobile equipment” at the site *or* to bodily injury or property damage sustained within a building, caused by the release of gases, fumes or vapors from materials brought there in connection with operations being performed by the insured or its contractor or subcontractor;
- when the discharge, dispersal, etc. is at or from any premises, site or location on which any insured or its contractors are performing operations to test for, investigate, cleanup or in any way respond to the effects of “pollutants.”

**VI. THE ENVIRONMENTAL COMPLIANCE/GOVERNMENTAL CLAIM PART OF THE ABSOLUTE POLLUTION EXCLUSION**

The APE has a second, stand-alone section. Section (2) of the APE precludes coverage for any loss, cost or expense arising out of any request, demand or statutory or regulatory requirement that an insured investigate, remediate or in any way respond to or assess the effects of “pollutants,” or any claim or “suit” by or on behalf of a governmental authority which seeks damages because of expenses some other entity incurred to do so. Thus, the APE excludes coverage where the insured incurs cost to comply with, or is ordered or requested to comply with, an environmental statute or regulation. Likewise, there is no coverage for costs the insured has incurred because of a claim or suit by a governmental authority seeking damages because that governmental authority has incurred costs to undertake environmental investigation or

remediation. However, to the extent that the insured would have been liable for damages because of “property damage” due to the presence of such pollutants, even in the absence of a compliance order or requirement, or claim or suit by the government, Section (2) does not apply. Thus, to the extent the insured could be found liable to a third party for damages because of “property damage” arising out of “pollutants,” Section (2) of the APE does not apply. Rather, the claim must be examined for purposes of determining whether Section (1) of the APE would apply if, instead of a demand or order or claim or suit by a governmental entity, such damages were being sought by such third party.

## **VII. CHECKLIST FOR THE ABSOLUTE POLLUTION EXCLUSION**

- Bodily Injury or Property Damage Caused by an Occurrence
- Not Known to Insured Prior to Policy Inception
- What State’s Law Applies
- Whether Substance at Issue is a Pollutant
- Whether there is Discharge, Dispersal, Seepage, Migration, Release Or Escape
- Falling Within the “At or From” Limitations

OR

- Costs/Expenses for environmental compliance or governmental enforcement

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