

**IN THE SUPREME COURT OF OHIO**

AKC, INC.,	)	CASE NO. 2020-0405
	)	
Appellee,	)	
	)	On Appeal from the Summit County
vs.	)	Court of Appeals, Ninth Appellate
	)	District,
UNITED SPECIALTY INS. CO.,	)	Case No. 2019-CA-29197
	)	
Appellant.	)	

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**MERIT BRIEF OF *AMICI CURIAE* THE OHIO INSURANCE INSTITUTE AND THE  
AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF  
APPELLANT UNITED SPECIALTY INSURANCE COMPANY**

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**THIS CASE RAISES ISSUES OF GREAT PUBLIC AND SPECIFIC INTEREST FOR**  
**AMICI CURIAE**

The **Court of Appeals** below has **created confusion** in the Ohio law on **pollution exclusions** by:

- **Inexplicably upending settled interpretation of plain policy language that sewage is “pollution” excluded from coverage by the standard pollution exclusion of traditional first-party property insurance coverage; and**
- **allowing for coverage of the sewage spill at Appellant’s property under an out-of-context reading of the separate Water damage exclusion.**

This decision **will lead to confusion** among Ohio courts **on the boundaries of pollution exclusions** and is of great public interest and particular interest to *amici curiae* The Ohio Insurance Institute (“OII”) and the American Property Casualty Insurance Association (“APCIA”). **Absent clarification** from this Court that the term “pollution” plainly includes sewage that escapes municipal sewers and contaminates a property, **the exclusion will be rendered meaningless and provide policyholders with un-bargained-for and unpaid-for benefits.** Separate coverages for these much more expensive risks and the associated cleanup costs are available to business in exchange for additional premium payments.

**The plain language, the history of the pollution exclusion, the legislative enactments defining sewage as a “pollutant,” and the weight of authority** from the Ohio courts and courts around the country **make clear that the pollution exclusion at issue was always meant to prevent coverage for sewage escaping onto the insured’s property.** The Court of Appeals’ failure to recognize this fact and properly apply the exclusion has added to the **confusion among Ohio courts** that **began with *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 2001 Ohio 1607, 757 N.E.2d**

329 (2001). In that case, the Court narrowly determined that parties to an insurance contract could reasonably expect carbon monoxide contamination of a residential apartment to be covered and not excluded by the pollution exclusion. In *dicta*, the Court referenced **a view that the historical purpose behind the pollution exclusion was to address “traditional” industrial-type pollution**—the kind with respect to which an insured would not have to “guess” whether coverage exists. *Id.* at 550-552.

The Appellee AKC, Inc. plans to advance before this Court the **view held by some that after *Andersen*, only “traditional” industrial pollution is covered by the pollution exclusion. Others**—as the Court of Appeals should have done here—**correctly chose not to look beyond plain policy language** that broadly **excludes coverage for all types of pollution**, whether “traditionally” “environmental” or not. The **Court of Appeals** unnecessarily **added to this confusion by leaving sewage—universally viewed as “pollution”** by federal and state governments and other courts—**out of what the pollution exclusion excludes from coverage.**

**This Court should clarify the scope of the standard pollution exclusion clause and affirm the trial court’s findings here.** Parties concerned with having specific types of pollution exposure covered by their insurance are always free to bargain for additional coverage or purchase separate environmental liability/pollution policies. **Precisely because the Pollution Exclusion exists, separate policies are available to businesses to cover injuries or property damage caused by pollution or contamination and expenses of the associated clean-up<sup>1</sup>.**

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<sup>1</sup> See e.g. <https://www.thebalance.com/do-you-need-pollution-liability-insurance-1969926> (last visited August 20, 2020); <https://www.travelers.com/business-insurance/environmental-liability> (last visited August 20, 2020);

### **STATEMENT OF INTEREST OF AMICI CURIAE**

OII and APCIA are uniquely qualified to provide this Court with a broad perspective on the principles of insurance law relevant to this appeal, as well as practical insight into the negative consequences for insurers and insureds alike if the ruling below is upheld.

**OII is the professional trade association for property and casualty insurance companies** in the State of Ohio, and its members include twenty-seven domestic property and casualty insurers, twelve foreign property and casualty insurers and reinsurers, seven insurance trade associations, and four insurance-related organizations. OII's member companies represent 87% of Ohio's private passenger auto insurance market, 81% of the homeowners' market and 50% of the commercial market (based on 2017 market share data from the Ohio Department of Insurance).

OII provides a wide range of services to its members and to the public, media, and government officials in three primary areas: education and research, legislative and regulatory affairs, and public information. In connection with these activities, OII closely monitors judicial decisions in Ohio that address important issues of insurance law, and it has participated as an amicus in several landmark insurance cases decided by this Court.

**APCIA is the preeminent national trade association representing property and casualty insurers** doing business in Ohio, nationwide, and globally. APCIA's

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[https://www.willis.com/Documents/Publications/Services/Environmental/5328\\_Environmental\\_Insurance\\_Product\\_Fact\\_Sheet.pdf](https://www.willis.com/Documents/Publications/Services/Environmental/5328_Environmental_Insurance_Product_Fact_Sheet.pdf) (last visited August 20, 2020);

[https://www.aig.com/business/insurance/environmental#accordion-child\\_po\\_accordion\\_2](https://www.aig.com/business/insurance/environmental#accordion-child_po_accordion_2) (last visited August 20, 2020);

members, which range from small companies to the largest insurers with global operations, represent nearly 60 percent of the U.S. property and casualty marketplace. APCIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files amicus curiae briefs in significant cases before federal and state courts, including in Ohio. This allows APCIA to share its broad national perspectives on matters that shape and develop the law. APCIA's interests are in the clear, consistent, and reasoned development of law that affects its members and the policyholders they insure.

The **legal questions presented in this case directly concern OII and APCIA and their members because the outcome could significantly reduce consistency and predictability of first-party property insurance policies' interpretation. This may in turn result in significant reduction in affordability and availability of first-party property insurance policies that may now have to double as environmental/pollution coverage policies.** But, not everyone requires such coverage. Inability to secure or afford insurance coverage **can cause bankruptcies in productive enterprises, with consequent disappearance of jobs, and leave certain segments of society unprotected, or insufficiently protected, against truly significant liabilities.**

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<https://www.trustedchoice.com/business-insurance/liability/pollution/> (last visited August 20, 2020) and *infra* pages 11-16.

## **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

### **I. PROPOSITION OF LAW NO. I: THE STANDARD WATER BACKUP AND POLLUTION EXCLUSIONS IN A FIRST-PARTY PROPERTY INSURANCE POLICY BAR LOSS CAUSED BY OR RESULTING FROM RAW SEWAGE.**

**The plain reading of the pollution exclusion language should guide its evaluation and leaves no doubt that sewage is “pollution” under the plain language of the exclusion**

**When the policy language is clear and unambiguous, “courts cannot alter the provision of the policy and may not stretch or constrain unambiguous provisions to reach a result not intended by the parties.”** *Tate v. Pirnat*, 10th Dist. Franklin No. 98AP-1189, 1999 Ohio App. LEXIS 4824, at \*6 (Oct. 14, 1999) (citing *Gomolka v. State Auto. Mut. Ins. Co.*, 70 Ohio St.2d 166, 168, 436 N.E.2d 1347 (1982)). Exclusions of coverage for “discharge, dispersal, seepage, migration, release or escape of ‘pollutants’,” where, as here, “pollutants” are defined to include any state of matter that is an “irritant or contaminant, including ... waste” are unambiguous and commonly understood to exclude coverage for sewage contamination.

**There is no reason to look to “traditional” or other supposed technical underpinnings of the exclusion given the exclusion’s plain language.** See *McKusick v. Travelers Indem. Co.*, 246 Mich. App. 329, 632 N.W.2d 525, 531 (Mich. Ct. App. 2001) (recognizing that other jurisdictions view the terms “discharge,” “dispersal,” “release,” and “escape” to be “environmental terms of art” requiring “traditional environmental pollution” to result before the exclusion is applicable, this limitation cannot be judicially engrafted. “This Court **must enforce the insurance policy in accordance with its terms as interpreted in light of their commonly used, ordinary, and plain meaning.**”). See also *CBL & Assocs. Mgt., Inc. v. Lumbermens*

*Mut. Cas. Co.*, E.D.Tenn. No. 1:05-cv-210, 2006 U.S. Dist. LEXIS 51240, at \*21-22 (July 25, 2006) (same, finding that **commonly understood meaning of “contamination” and “waste” in the pollution exclusion clearly indicates the intent to exclude sewage from coverage**); *City of Grosse Pointe Park v. Michigan Mun. Liab. & Property Pool*, 473 Mich. 188, 199-200, 702 N.W.2d 106 (2005) (same); *Philadelphia Indemn. Ins. Co. v. Yachtsman's Inn Condo Assn.*, 595 F.Supp.2d 1319, 1324-1325 (S.D.Fla.2009) (same); *E. Quincy Servs. Dist. v. Continental Ins. Co.*, 864 F.Supp. 976, 979-980 (E.D.Cal.1994) (“**the terms of the exclusion ‘emission, discharge, dispersal, seepage, migration, release, or escape’ -- cover every conceivable manner in which a person could experience exposure to a pollutant” and sewage is plainly a “pollutant”**”).

Modern pollution exclusion language is a result of a lengthy process through which carriers worked to make clear that policies which include such exclusions are not the proper instruments to cover waste and pollution contamination. Such risks require careful coverage planning, analysis of particular businesses’ exposure potential, and tailored pricing. See *infra* pages 11-16.

**History of the pollution exclusion at issue unequivocally indicates that it was designed broadly to eliminate all pollutant- and contaminants-related liability exposure**

The *Andersen* decision **focused on the conceptual origins of the pollution exclusion** and reasonable party expectations **because of the unique concerns** of that case **with residential carbon monoxide poisoning** caused by defective devices. Outside of such unique circumstances, **the proper focus should be purely on the historical evolution of the language of the pollution exclusion** from its 1973

“Qualified Pollution Exclusion” origins to today’s Absolute Pollution Exclusion—the same exclusion that is at issue in this case.

**In the 1960s and 1970s**, America’s growing concern for the environment led to the **passage of a number of federal and state laws regarding liability for environmental cleanups**. Many of these laws imposed liability for cleanup on polluters. **Polluters**, in turn, **sought protection under their general liability policies** and extensive litigation concerning relevant coverage ensued. The **original standard pollution exclusion was “qualified” in that it allowed coverage for “sudden and accidental” incidents** and further contained references to “toxic chemicals” and contamination of “land, the atmosphere, or any . . . bod[ies] of water.” William P. Shelley and Richard C. Mason, *Application of Absolute Pollution Exclusion to Toxic Tort Claims: Will Courts Choose Policy Construction or Deconstruction*, 33 TORT & INS. L.J. 749 (1998).

**Following much litigation and controversy** where courts frequently made decisions in favor of unintended coverage, especially for gradually accumulated pollution, insurance carriers **introduced the standard Absolute Pollution Exclusion language in 1985**<sup>2</sup>. It is indisputable that **the 1985 revision substantially broadened the pollution exclusion** when it:

- removed “sudden and accidental” clause,
- dropped “toxic” from before the word “chemicals,”

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<sup>2</sup> While variations of this Absolute Pollution Exclusion exist, it, like the clause at issue here, excludes coverage for “‘bodily injury’ or ‘property damage’ arising out of . . . discharge, dispersal, release, or escape of pollutants . . . [where] ‘pollutants’ means solid, liquid, gaseous, or thermal irritants or contaminants, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned, or reclaimed.” Shelley and Mason at 752-53.

- deleted the language limiting the exception to pollution on/in “land, the atmosphere or any water course or body of water,” and
- replaced it with the language making exclusion applicable to premises “own[ed], rent[ed] or occup[ied]” by the policy holder.

*Id.* The deluge of pollution claims and the courts’ unfavorable interpretation of sudden and accidental language, also led insurance carriers to change the name of the revamped Comprehensive General Liability form to the Commercial General Liability form. All **these changes were intended “unambiguously” to make clear that the pollution exclusion applied to much more than the “traditional” industrial pollution.** *Peace v. Northwestern Natl. Ins. Co.*, 228 Wis.2d 106, 141-142, 596 N.W.2d 429 (1999). *See also Mt. Vernon Fire Ins. Co. v. Valencia*, E.D.N.Y. 92 CV 1253 (RR), 1993 U.S. Dist. LEXIS 13265, at \*22 (July 6, 1993) (“Modification of this [land, the atmosphere or any water course or body of water] language was clearly intended to expand the pollution exclusion to permit insurers to deny coverage for within-premises contamination, as well as broadly dispersed environmental pollution.”)

**As the trial court correctly noted**, with respect to raw sewage that flooded the property in this case, **the interpretation of the exclusion requires no analysis beyond acknowledging the plain meaning of the words “waste” in the definition of “pollutants” and “discharge, dispersal, seepage, migration, release or escape” as it related to sewage/human waste escaping the pipes** that normally contain it. (Trial court’s decision, CV-2016-11-5009 at 10).

**Federal and state legislatures have made clear that  
sewage contamination is “pollution”**

Even if the plain policy language were not enough, **the very types of environmental laws that caused the pollution exclusion to come into existence in**



the first place clearly **define sewage/human waste as one of the types of “pollution”** the government will require companies to control and clean up.

Both the **Clean Water Act** and the comparable Ohio statute **define sewage as a pollutant**. See **33 U.S.C.A. § 1362(6)** (“**The term ‘pollutant’ means** dredged spoil, solid waste, incinerator residue, **sewage**, garbage, **sewage sludge** . . . discharged into water.”). Section 1362(19) further defines “**pollution**” as “the **man-made** or man-induced **alteration of** the chemical, physical, biological, and radiological **integrity of water**.” Even though this case involved a sanitary sewer, the general body of law on water pollution shows just how far off the court was in its finding of ambiguity in the water exclusion.

**Ohio Revised Code Section 6111.01 defines pollution** as (A) . . . the **placing of any sewage**, sludge, sludge materials, industrial waste, or other wastes **in any waters of the state**. Notably, the **Ohio Legislature has made clear that “water” flowing through “sewers”—is not water free from pollution**, contrary to what the Court of Appeals appears to insist in also misreading the Water exclusion in the same policy. **Sewers carry “waste water,”** which is defined as both “storm water and **any water containing sewage** or industrial waste **or other pollutants or contaminants** derived from the prior use of the water.” O.R.C. 6119.011(K).

Sewer system overflows are some of the earliest “traditional” environmental claims in the sense that environment regulations were designed to control and remedy the effects of, among other things, contamination from improper sewage management and spills. See *Sierra Club v. Hamilton Cty. Bd. of Cty. Commrs.*, 504 F.3d 634, 637 (6th Cir.2007) (“Sanitary system overflows are a violation of the [Clean Water] Act and

have been since 1972.”). Consequently, **even if the determination of whether sewage constitutes a “traditional” type of pollutant were required to give the pollution exclusion proper meaning (and it is not, because the exclusion is unambiguous), the legislatures clearly see sewage as “pollution” that falls under the exclusion.**

**Majority of courts agree that sewage is “pollution”  
excluded from coverage by the pollution exclusion**

Courts in Ohio and elsewhere have consistently held that sewage is a “pollutant” under the unambiguous modern pollution exclusion language

- **fecal waste** from septic system **is a pollutant**. *Siemienkowski v. State Farm Ins. Co.*, 8th Dist. App. No. 85323, 2005-Ohio-4295, ¶¶1-8, 31;
- **raw sewage** from “a city’s sewage system” **that “backed up and spilled into their homes” was a “pollutant”**. *United States Fire Ins. Co. v. City of Warren*, 87 Fed.Appx. 485 (6th Cir. 2005);
- **fecal contaminant is a pollutant**. *WPC Industrial Contractor, LTD. v. Amerisure Mut. Ins. Co.*, 720 F.Supp.2d 1377, 1382 (S.D. Fla. 2009)
- feces, **raw sewage . . . fall within the policy’s pollutant definition** of “any solid, liquid, gaseous or thermal irritant or contaminant.” *Philadelphia Indem. Ins. Co. v. Yachtman’s Ins. Condo Ass’n, Inc.*, 595 F.Supp.2d 1319, 1324 (S.D. Fla. 2009)
- **the plain meaning of the term “sewage” is waste, and waste is clearly included in the definition of “pollutants” under the policy**. *Figuli v. State Farm Mut. Fire & Cas*, 304 P.3d 595, ¶14 (Ct. App. Co. 2012)
- fecal coliform and other **sewage-bacteria surely are “pollutants” under the policy** . . . raw sewage is clearly a contaminant. *East Quincy Serv. Dist. v. Cont’l. Ins. Co.*, 864 F.Supp. 976, 979, 980 (E.D. Cal. 1994)
- **wastewater containing human waste** and other raw and improperly treated wastes **constitutes pollutant**. *Certain Underwriters at Lloyds London v. B3, Inc.*, 262 P.3d 397 ¶14 (Ct. App. Ok. 2011).
- decomposing **waste from septic system constitutes a pollutant**. *Preisler v. Gen. Cas. Ins. Co.*, 360 Wis.2d 129, 857 N.W.2d 136, ¶2 (2014).

The **agreement among the courts on human waste being a pollutant** excluded from first-party property insurance coverage under the pollution exclusion **makes the Court of Appeals’ decision to rule in favor of coverage in this case that much more inexplicable.**

Modern first party property insurance policies are underwritten and priced with the understanding that they exclude pollution-related liability from coverage. **Separate environmental liability/pollution damage-related policies are available for purchase to parties who find such coverage necessary.** See *supra* note 1 and below.

**Tailored, affordable pollution event coverage is available to businesses large and small to compensate them for precisely the type of damage at issue in this case**

In the decades since pollution exclusions came into existence, “**coverages have broadened, premiums have fallen greatly, risks became better defined, and terms [became more flexible].**”<sup>3</sup> Industry leaders offer combined industry-standard CGL coverage with added insuring agreements or separate add-on policies for pollution-related coverages tailored to the insured’s business and potential exposure risks.<sup>4</sup> Costs of securing such policies as a combined policy or an add-on vary by business, but can start as low as \$1,000 for a \$500,000 policy limit.<sup>5</sup> **Small businesses can easily find**

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<sup>3</sup>[https://www.epa.state.oh.us/portals/30/Brownfield\\_Conference/docs/Kent%20Johnson2.pdf](https://www.epa.state.oh.us/portals/30/Brownfield_Conference/docs/Kent%20Johnson2.pdf) (last accessed August 20, 2020).

<sup>4</sup>See e.g. [https://www.aig.com/business/insurance/environmental#accordion-child\\_po\\_accordion\\_1](https://www.aig.com/business/insurance/environmental#accordion-child_po_accordion_1) (last accessed August 20, 2020).

<sup>5</sup> See e.g. [https://www.willis.com/Documents/Publications/Services/Environmental/5328\\_Environmental\\_Insurance\\_Product\\_Fact\\_Sheet.pdf](https://www.willis.com/Documents/Publications/Services/Environmental/5328_Environmental_Insurance_Product_Fact_Sheet.pdf) (last accessed August 20, 2020); <https://www.irmi.com/articles/expert-commentary/a-users-guide-to-pollution-exclusions> (last accessed August 21, 2020)

**affordable first party environmental property loss coverage**—policies which are designed to protect insureds from pollution losses related to property that they own, rent or occupy.<sup>6</sup>

A **typical first party environmental property loss policy provides coverage for losses resulting from** a “pollution condition,” defined as “**discharge, dispersal, release ... of any [form of matter that is an] irritant, contaminant, or pollutant, including ... waste materials ... on, in, into, or upon land and structures thereupon...**” (see screenshots below of a specimen Premises Pollution Liability Insurance Policy, attached at Appendix 1-16<sup>7</sup> (emphasis added); another example of a similar sample policy is attached at Appendix 17-36<sup>8</sup> (emphasis added)).

#### I. INSURING AGREEMENTS

Solely to the extent that the coverages below are identified on the Declarations to this Policy as being underwritten by the Insurer, the Insurer agrees to pay on behalf of the “insured” for “loss”, in excess of the “self-insured retention” or deductible period (as applicable), resulting from:

##### A. POLLUTION CONDITIONS OR INDOOR ENVIRONMENTAL CONDITIONS COVERAGE (Coverage A.)

“Claims” and “first-party claims” arising out of: **1)** a “pollution condition” on, at, under or migrating from a “covered location”; or **2)** an “indoor environmental condition” at a “covered location”, provided the “claim” is first made, or the “insured” first discovers the “pollution condition” or “indoor environmental condition” that is the subject of such “first-party claim”, during the “policy period”. Any such “claim” or “first-party claim” must be reported to the Insurer, in writing, during the “policy period” or within thirty (30) days after the expiration of the “policy period”, or during any applicable “extended reporting period”.

The coverage afforded pursuant to this Coverage A. only applies to “pollution conditions” or “indoor environmental conditions” that first commence, in their entirety, on or after the retroactive date identified in Item 5. of the Declarations, if applicable, and prior to the expiration of the “policy period”.

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<sup>6</sup> See e.g. <https://www.coverwallet.com/insurance/environmental-impairment> (last accessed August 20, 2020).

<sup>7</sup> Available at <https://www.chubb.com/us-en/business-insurance/premises-pollution-liability-ppl-policy.aspx> (last accessed on August 20, 2020).

<sup>8</sup> Available at <https://axaxl.com/insurance/products/pollution-and-remediation-legal-liability-north-america> (last accessed on August 20, 2020).

LL. “Pollution condition” means:

1. “Illicit abandonment”; or
2. The discharge, dispersal, release, escape, migration, or seepage of any solid, liquid, gaseous or thermal irritant, contaminant, or pollutant, including soil, silt, sedimentation, smoke, soot, vapors, fumes, acids, alkalis, chemicals, electromagnetic fields (EMFs), hazardous substances, hazardous materials, waste materials, “low-level

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radioactive waste”, “mixed waste” and medical, red bag, infectious or pathological wastes, on, in, into, or upon land and structures thereupon, the atmosphere, surface water, or groundwater.

Thus, **separate affordable coverage is available** to businesses **for the types of risks** excluded from CGL coverage by the pollution exclusion—the risks for which **the owner of the property at issue simply chose not to purchase insurance**. This individual business decision is not a reason to expand the reach of the policy in this case.

**While Appellant is likely to rely on *Andersen* to continue to argue that “sewage” is not a “pollutant,” *Andersen* is limited to its own facts and any further extension of its reach will be contrary to predictability and consistency expected by the policyholder and insurers**

As discussed above, **the Absolute Pollution Exclusion language history is clear that its intent is to exclude coverage for all irritants and contaminants, regardless of where they occur—at an industrial site or in a private residence and regardless of whether the particular hazard is a known industrial-Superfund-type emission or an unknown incipient hazard arising from a potentially toxic substance**. Coverage for damages arising out of pollution and contamination events must be bargained for and purchased separately. In addition, *Andersen* was a third-party liability case and not a first-party property insurance case. *Andersen* should be limited to third party liability cases only.

Nevertheless, over time, some courts have imposed an “environmental restriction” on the application of this exclusion based on a perceived “historical purpose” of the exclusion to reduce liability for cleanup of “traditional” industrial environmental damage. Shelley and Mason at 756-764. This gloss allowed a line of cases to develop—like *Andersen*—in which, in extreme circumstances, like residential monoxide poisoning, the courts felt compelled to sidestep the express language of the exclusion and instead attempt to surmise what a policyholder would “reasonably” expect to be covered by the policy, or what would be historically “traditional” pollution. *Id.*

However, even before *Andersen* was decided, such **departures from the plain meaning of the exclusion language have always been rare, and since then both this Court and the other Ohio courts have been clearly pulling back from these expansive interpretive devices.** See e.g. *Wallace v. Balint*, 94 Ohio St.3d 182, 189, 2002-Ohio-480, 761 N.E.2d 598 (“there is not yet a majority on this court willing to accept the reasonable-expectations doctrine”); *Rybacki v. Allstate Ins. Co.*, 9th Dist. Medina No. 03CA0079-M, 2004-Ohio-2116, ¶10 (rejecting the rationale that clear Absolute Pollution Exclusion language can be rejected in favor of a subjective view of what amounts to “traditional” environmental claim); *United States Fire Ins. Co.* 87 F.App'x 485 at 489 (exclusion provision language governs over dicta on what may constitute “traditional” environmental pollution).

Policy language—the actual pollution exclusion language—should be the objective guide for the courts and the parties to an insurance contract. **History-based or reasonableness of expectation-based approaches to insurance contract**

**interpretation are contrary to “the predictability, consistency, and veracity in the law” that are the “lifeblood of commercial affairs.”** Shelley and Mason at 782.

Finally, OII and APCIA agree with the argument of Appellant United Specialty Insurance Company (“USIC”) with respect to the scope of the standard water back-up exclusion. The overwhelming majority of states have held that raw sewage entering private property from sewer lines is barred by the standard water back-up exclusion—particularly when the policy in question includes anti-concurrent causation language. But even if the minority view were embraced—that the water back-up exclusion was limited to water, the combination of the standard water back-up exclusion and the pollution exclusion would still unambiguously exclude the loss in this case. Such water-sewage back-up circumstances are not unusual, but rather are a common form of raw sewage intrusion into or onto private property.

**To reach its incongruous conclusion, the Court of Appeals ignored history, precedent, and plain policy language**

**The historical and developmental background of the pollution exclusion** provides necessary context for the trial court’s proper conclusion and **lays bare the Court of Appeal’s aberrant understanding of the development of environmental insurance products** that, by this point, brook no dispute.

**The Court of Appeals misread the Trial Court’s opinion to find the Pollution Exclusion issue “moot”**

The Court of Appeals entirely misread the Trial Court’s findings to declare the issue of applicability of the pollution exclusion to the current case “moot.” **The Trial Court**, however, based on the plain unambiguous policy language and relevant facts,

answered three questions critical to finding that the pollution exclusion applied with a “yes,” and two non-critical question with a “no”—see the Trial Court’s opinion excerpted below (emphasis added):

Does the exclusion for *water* backing up or overflowing from a sewer include *raw sewage* that backs up or overflows from that same sewer line? **Yes.** Is raw sewage to be included in the definition of pollutant? **Yes.** Does the definition of waste include human waste? **Yes.** Do the stated terms “discharge, dispersal, seepage, migration, release or escape” encompass the terms back-up or overflow, where those two terms are defined independently elsewhere in the policy? **No.** However, this determination is not key to the resolution of the motion. Does water damage as noted in the definition of “specified causes of loss” include damage caused by water or raw sewage that backs up or overflows sewer line? **No.** But this determination is not key to resolution of the motion.

While the issue has been capably argued, under the circumstances present in this matter, the court finds the language of the policy to be unambiguous as to these questions. For these reasons, **the court grants United’s motion for summary judgment as to the pollution exclusion.**

The Trial Court, by finding that “this determination is not key to the resolution of the motion” meant that the nos didn’t matter. If the nos had mattered, the Trial Court would not have found in favor of the pollution exclusion.

Yet, **the Court of Appeals took the trial court’s “no” responses as a reason to declare the entire issue of pollution exclusion “moot,”** ignoring the second paragraph where the trial court expressly (Court of Appeals decision at ¶11); it did so



**even though the Trial court expressly went beyond those “nos” to find that plain pollution exclusion language precluded coverage.**

Regardless, as the foregoing historical, legislative, and decisional perspectives make clear, even if the Court of Appeals were somehow correct in its interpretation of the Trial court’s findings, it should have independently found that by its plain language, the Pollution Exclusion applied and prevented coverage in this case.

**In its quest to find coverage here and to deem the Water exclusion inapplicable, the Court of Appeals reached back to authority that predated implementation of the Absolute Pollution Exclusion and further development of authority regarding sewer overflows**

Further, in rejecting the Water exclusion, the Court of Appeals almost exclusively relied on its reasoning in its 1982 *Fairlawn Properties Inc. v. Liberty Mut. Ins. Co.* case. ***Fairlawn* predates the majority of modern jurisprudence on damages caused by sewer backup/overflows and on Clean Water Act requirements that must be taken into consideration when evaluating whether “water” that backs up through a sewer into a property can be limited to its purest form—liquid free from any pollution—as the Court of Appeals did here.**

As the above-cited **legislative and decisional history makes clear, there is no longer any “ambiguity” in CGL policies on the question of whether sewer overflows are excluded from coverage.** “Water” flowing through sewer pipes is unambiguously the type of substance that was the subject of the Clean Water Act and of the mid-1980s revisions of the CGL policy form. See *Sierra Club*, 504 F.3d at 637 (“Sanitary system overflows are a violation of the [Clean Water] Act and have been since 1972.”). **The fiction** in which the Court of Appeals indulges—that “water” in the Water

**exclusions can be separated from “sewer” appearing in the same sentence—is unsustainable. “Water” flowing through “sewers”—is not water free from pollution; sewers carry “waste water,” which is defined as both “storm water and any water containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water.” O.R.C. 6119.011(K).**

The Court of Appeals should have read the plain language of the Water Exclusion to preclude coverage in this case, as that exclusion clearly covers sanitary sewer overflows. Regardless, the law has evolved since *Fairlawn* to make clear that sewer overflows are excluded.

## **CONCLUSION**

Consequently, the Court should clarify that the pollution exclusion broadly precludes coverage for damages arising from all types of irritants and contaminants, including sewage, find that the issue was properly raised and decided and was not moot, and affirm the trial court's ruling. Furthermore, this Court should hold that the combination of the standard water back-up exclusion and the pollution exclusion unambiguously exclude coverage for the common situation of water-borne sewage entering private property by backing up a sewer or drain.

Respectfully submitted,  
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### **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served on all counsel of record by electronic mail.

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## **APPENDIX**

**This Policy is issued by the stock insurance company identified in the Declarations (hereinafter *the Insurer*).**

**THIS POLICY PROVIDES LIABILITY COVERAGE ON A CLAIMS-MADE AND REPORTED BASIS, WHICH COVERS ONLY CLAIMS FIRST MADE AGAINST THE INSURED DURING THE POLICY PERIOD AND REPORTED TO THE INSURER, IN WRITING, DURING THE POLICY PERIOD OR WITHIN THIRTY DAYS THEREAFTER, UNLESS AN EXTENDED REPORTING PERIOD APPLIES. THIS POLICY ALSO PROVIDES FIRST-PARTY COVERAGES ON A DISCOVERED AND REPORTED BASIS, WHICH COVERS ONLY POLLUTION CONDITIONS AND INDOOR ENVIRONMENTAL CONDITIONS, AS APPLICABLE, FIRST DISCOVERED DURING THE POLICY PERIOD AND FOR WHICH A FIRST-PARTY CLAIM IS REPORTED TO THE INSURER, IN WRITING, DURING THE POLICY PERIOD OR WITHIN THIRTY DAYS THEREAFTER. FINALLY, THIS POLICY PROVIDES COVERAGE FOR EMERGENCY RESPONSE COSTS THAT IS LIMITED BY MORE SPECIFIC REPORTING CRITERIA AND COVERS ONLY EMERGENCY RESPONSE COSTS INCURRED, AND REPORTED TO THE INSURER, IN WRITING, WITHIN THE SPECIFIC TIMING REQUIREMENTS IDENTIFIED IN THIS POLICY. PLEASE READ THIS POLICY CAREFULLY. SOME OF THE PROVISIONS CONTAINED IN THIS POLICY RESTRICT COVERAGE, SPECIFY WHAT IS AND IS NOT COVERED AND DESIGNATE YOUR RIGHTS AND DUTIES. LEGAL DEFENSE EXPENSES ARE SUBJECT TO AND SHALL ERODE THE LIMITS OF LIABILITY AND ANY APPLICABLE SELF-INSURED RETENTION.**

Throughout this Policy the words *the Insurer* shall refer to the company providing this insurance. Other words and phrases that appear in quotation marks have special meanings and are defined in Section V., **DEFINITIONS**.

In consideration of the payment of the premium and in reliance upon all statements made in the Application to this Policy, including the information furnished in connection therewith, and subject to all terms, definitions, conditions, exclusions and limitations of this Policy, the Insurer agrees to provide insurance coverage to the “insured” as described herein.

## **I. INSURING AGREEMENTS**

Solely to the extent that the coverages below are identified on the Declarations to this Policy as being underwritten by the Insurer, the Insurer agrees to pay on behalf of the “insured” for “loss”, in excess of the “self-insured retention” or deductible period (as applicable), resulting from:

### **A. POLLUTION CONDITIONS OR INDOOR ENVIRONMENTAL CONDITIONS COVERAGE (Coverage A.)**

“Claims” and “first-party claims” arising out of: **1)** a “pollution condition” on, at, under or migrating from a “covered location”; or **2)** an “indoor environmental condition” at a “covered location”, provided the “claim” is first made, or the “insured” first discovers the “pollution condition” or “indoor environmental condition” that is the subject of such “first-party claim”, during the “policy period”. Any such “claim” or “first-party claim” must be reported to the Insurer, in writing, during the “policy period” or within thirty (30) days after the expiration of the “policy period”, or during any applicable “extended reporting period”.

The coverage afforded pursuant to this Coverage **A.** only applies to “pollution conditions” or “indoor environmental conditions” that first commence, in their entirety, on or after the retroactive date identified in Item **5.** of the Declarations, if applicable, and prior to the expiration of the “policy period”.

### **B. TRANSPORTATION COVERAGE (Coverage B.)**

“Claims” and “first-party claims” arising out of a “pollution condition” resulting from “transportation”, provided the “claim” is first made, or the “insured” first discovers the “pollution condition” that is the subject of such “first-party claim”, during the “policy period”. Any such “claim” or “first-party claim” must be reported to the Insurer, in writing, during the “policy period” or within thirty (30) days after the expiration of the “policy period”, or during any applicable “extended reporting period”.

The coverage afforded pursuant to this Coverage **B.** only applies to “pollution conditions” that first commence, in their entirety, on or after the retroactive date identified in Item **5.** of the Declarations, if applicable, and prior to the expiration of the “policy period”.

### **C. NON-OWNED DISPOSAL SITE COVERAGE (Coverage C.)**

“Claims” arising out of a “pollution condition” on, at, under or migrating from a “non-owned disposal site”, provided the “claim” is first made during the “policy period”. Any such “claim” must be reported to the Insurer, in writing, during the “policy period” or within thirty (30) days after the expiration of the “policy period”, or during any applicable “extended reporting period”.

The coverage afforded pursuant to this Coverage **C.** only applies to “pollution conditions” that are attributable to a “named insured’s” waste generated at a “covered location” and received at the “non-owned disposal site”, in its entirety, on or after the retroactive date identified in Item **5.** of the Declarations, if applicable, and prior to the expiration of the “policy period”.

## **II. LIMITS OF LIABILITY AND SELF-INSURED RETENTION**

- A.** It is expressly agreed that the Insurer’s obligation to pay for any covered “loss” (exclusive of “business interruption loss”) pursuant to this Policy shall attach to the Insurer only after the “first named insured” has paid, or has provided evidence to the Insurer that another “named insured” has paid, the full amount of the “self-insured retention” with respect to any covered “pollution condition” or “indoor environmental condition”. Under no circumstances, including, but not limited to, an “insured’s” insolvency and/or bankruptcy, shall the Insurer be liable to pay any amount within the “self-insured retention”. In the event that the “first named insured” cannot provide satisfactory evidence that a “named insured” has paid the full amount of the “self-insured retention” with respect to any covered “pollution condition” or “indoor environmental condition”, the “first named insured” shall remain responsible to pay the “self-insured retention” before the Insurer’s payment obligation pursuant to this Policy shall attach with respect to coverage sought by any “insured”.

Notwithstanding the foregoing, if the “insured” agrees with the Insurer to use “mediation” to successfully resolve any “claim” for which “legal defense expenses” have been incurred, then the “self-insured retention” applicable to the “pollution condition” or “indoor environmental condition” that corresponds to such “claim” shall be reduced by fifty percent (50%), subject to a maximum reduction in the “self-insured retention” of twenty-five thousand dollars (\$25,000).

In addition to the foregoing, it is expressly agreed that the Insurer’s obligation to pay for any covered “business interruption loss” pursuant to this Policy shall attach to the Insurer only after the relevant “insured” has also borne the full amount of the “business interruption loss” within the deductible period identified in Item **4.** of the Declarations to this Policy.

- B.** One “self-insured retention” shall apply to all “loss” (exclusive of “business interruption loss”) arising out of the same, continuous, repeated, or related “pollution condition” or “indoor environmental condition”. If the same, continuous, repeated, or related “pollution condition” or “indoor environmental condition” triggers coverage pursuant to multiple coverage parts, or otherwise involves multiple exposures that have been assigned exposure-specific “self-insured retention” amounts by endorsement to this Policy, the single largest of the associated “self-insured retention” amounts identified in: **1)** Item **4.** of the Declarations; **2)** any Supplemental Coverage added by endorsement to this Policy; or **3)** any exposure-specific “self-insured retention” endorsement identified as part of this Policy, shall apply to all “loss” and other covered exposures arising out of such “pollution condition” or “indoor environmental condition”, except for any “catastrophe management costs” that are assigned an exposure-specific “self-insured retention” by endorsement to this Policy, if any (hereinafter Catastrophe Management-Specific SIR Obligation). Amounts within any such Catastrophe Management-Specific SIR Obligation shall be independent of, and shall not otherwise erode, the single largest “self-insured retention” applicable to all other covered exposures arising out of the same “pollution condition” or “indoor environmental condition” as contemplated herein.
- C.** One deductible period shall apply to all “business interruption loss” arising out of the same, continuous, repeated, or related “pollution condition” or “indoor environmental condition”.
- D.** Subject to Subsections **E.** and **F.**, below, the most the Insurer shall pay for all “loss” arising out of the same, continuous, repeated, or related “pollution condition” or “indoor environmental condition” is the Per Pollution Condition or Indoor Environmental Condition Limit of Liability identified in Item **3.a.** of the Declarations to this Policy.
- E.** Subject to Subsection **D.**, above, and Subsection **F.**, below, **\$250,000** shall be the maximum amount the Insurer shall pay for all “catastrophe management costs” arising out of all “pollution conditions” and “indoor environmental conditions”.
- F.** Subject to Subsections **D.** and **E.**, above, the Total Policy and Program Aggregate Limit of Liability identified in Item **3.b.** of the Declarations shall be the maximum liability of the Insurer pursuant to this Policy with respect to all “loss”.

**G.** If the Insurer or an affiliate has issued pollution liability coverage afforded on a discovered and reported basis or claims-made and reported basis consistent with coverage afforded pursuant to this Policy in one or more policy periods, and a “pollution condition” or “indoor environmental condition” is first discovered and reported to the Insurer, or a “claim” is first made and reported to the Insurer with respect to a “pollution condition” or “indoor environmental condition”, in accordance with the terms and conditions of this Policy, then:

- 1.** Any continuous, repeated, or related “pollution condition” or “indoor environmental condition” that is subsequently reported to the Insurer during later policy periods shall be deemed to be one “pollution condition” or “indoor environmental condition” discovered during this “policy period”; and
- 2.** All “claims” arising out of:
  - a.** The same, continuous, repeated, or related “pollution condition” or “indoor environmental condition” that was discovered during this “policy period”; or
  - b.** The same, continuous, repeated, or related “pollution condition” or “indoor environmental condition” that was the subject of a “claim” first made and reported in accordance with the terms and conditions of this Policy,

shall be deemed to have been first made and reported during this “policy period” and no other policy shall respond.

### **III. DEFENSE AND SETTLEMENT**

**A.** The Insurer shall have the right and, subject to the “self-insured retention” obligation, the duty to defend the “insured” against a “claim” to which this insurance applies. The Insurer shall have no duty to defend the “insured” against any “claim” to which this insurance does not apply. The Insurer’s duty to defend the “insured” ends once the Limits of Liability are exhausted or are tendered into a court of applicable jurisdiction, or once the “insured” refuses a settlement offer as provided in Subsection **E.**, below.

**B.** The Insurer shall have the right to select legal counsel to: **1)** represent the “insured” for the investigation, adjustment, and defense of any “claims” covered pursuant to this Policy; and **2)** assist the “insured” with clarifying the extent of, and to help minimize, any “first-party remediation costs”. Selection of legal counsel by the Insurer shall not be done without the consent of the “insured”; such consent shall not be unreasonably withheld.

In the event the “insured” is entitled by law to select independent counsel to defend itself at the Insurer’s expense, the attorney fees and all other litigation expenses the Insurer shall pay to that counsel are limited to the rates the Insurer actually pays to counsel that the Insurer normally retains in the ordinary course of business when defending “claims” or lawsuits of similar complexity in the jurisdiction where the “claim” arose or is being defended. In addition, the “insured” and the Insurer agree that the Insurer may exercise the right to require that such counsel: **1)** have certain minimum qualifications with respect to their competency, including experience in defending “claims” similar to those being asserted against the “insured”; **2)** maintain suitable errors and omissions insurance coverage; **3)** be located within a reasonable proximity to the jurisdiction of the “claim”; and **4)** agree in writing to respond in a timely manner to the Insurer’s requests for information regarding the “claim”. The “insured” may at any time, by its signed consent, freely and fully waive its right to select independent counsel.

**C.** The “insured” shall have the right and the duty to retain a qualified environmental consultant or “catastrophe management firm” to: **1)** perform any investigation and/or remediation of any “pollution condition” or “indoor environmental condition” covered pursuant to this Policy; or **2)** perform “catastrophe management services” covered pursuant to this Policy, respectively. The “insured” must receive the consent of the Insurer prior to the selection and retention of such consultant or “catastrophe management firm”, except in the event of a “first-party claim” that results in “emergency response costs”.

**D.** “Legal defense expenses” reduce the Limits of Liability identified in the Declarations to this Policy, and, unless specifically stated otherwise herein, any applicable Limits or Sublimits of Liability identified in any endorsement hereto. “Legal defense expenses” shall also be applied to the “self-insured retention”.

**E.** The Insurer shall present all settlement offers to the “insured”. If the Insurer recommends a settlement which is acceptable to a claimant, exceeds any applicable “self-insured retention”, is within the Limits of Liability, and does not impose any additional unreasonable burdens on the “insured”, and the “insured” refuses to consent to such settlement offer, then the Insurer’s duty to defend shall end. Thereafter, the “insured” shall defend such “claim” independently and at the “insured’s” own expense. The Insurer’s liability shall not exceed the amount for which the “claim” could have been settled if the Insurer’s recommendation had been accepted, exclusive of the “self-insured retention”.



#### IV. COVERAGE TERRITORY

The coverage afforded pursuant to this Policy shall only apply to “pollution conditions” or “indoor environmental conditions” located, and “claims” made, within the United States of America.

#### V. DEFINITIONS

- A. **“Additional insured”** means any person or entity specifically endorsed onto this Policy as an “additional insured”, if any. Such “additional insured” shall maintain only those rights that are specified by endorsement to this Policy.
- B. **“Adverse media coverage”** means national or regional news exposure in television, radio, print or internet media that is reasonably likely to have a negative impact on the “insured” with respect to its income, reputation, community relations, public confidence or good will.
- C. **“Bodily injury”** means physical injury, illness, disease, mental anguish, emotional distress, or shock, sustained by any person, including death resulting therefrom, and any prospective medical monitoring costs that are intended to confirm any such physical injury, illness or disease.
- D. **“Business income”** means:
1. Net profit or loss, before income taxes, including “rental income” from tenants, that would have been realized had there been no “business interruption”;
  2. The “insured’s” continuing operating and payroll expense (excluding payroll expense of officers, executives, department managers and contract employees);
  3. Costs incurred by the “insured” as rent for temporary premises when a portion of a “covered location” becomes untenantable due to a “pollution condition” or “indoor environmental condition” and temporary premises are required to continue the “insured’s” operations. Such rental costs cannot exceed the fair rental value of the untenantable portion of the “covered location” immediately preceding the “pollution condition” or “indoor environmental condition”.
- E. **“Business interruption”** means the necessary partial or complete suspension of the “insured’s” operations at a “covered location” for a period of time, which is directly attributable to a “pollution condition” or “indoor environmental condition” to which Coverage A. of this Policy applies. Such period of time shall extend from the date that the operations are necessarily suspended and end when such “pollution condition” or “indoor environmental condition” has been remediated to the point at which the “insured’s” normal operations could reasonably be restored.
- F. **“Business interruption loss”** means:
1. “Business income”;
  2. “Extra expense”; and
  3. “Delay expense”.
- G. **“Catastrophe management costs”** means reasonable and necessary expenses approved by the Insurer, in writing, except for those expenses incurred during the same seven (7) day period associated with “emergency response costs”, which have been incurred by the “insured” for the following:
1. Responsive consulting services rendered by a “catastrophe management firm”;
  2. Printing, advertising, mailing of materials of public relations materials;
  3. Travel by directors, officers, employees or agents of the “insured”, or the “catastrophe management firm”, incurred at the direction of a “catastrophe management firm”;
  4. To secure the scene of a “pollution condition” or “indoor environmental condition”; or
  5. Sums advanced to third-parties directly harmed by the “pollution condition” or “indoor environmental condition” for their medical costs; funeral costs; psychological counseling; travel expenses costs; temporary living costs or other necessary response costs,

but solely in those instances when, in the good faith opinion of a “key executive”, the associated “pollution condition” or “indoor environmental condition” has resulted in or is reasonably likely to result in: **a)** “loss” (exclusive of “catastrophe management costs”) that will exceed the applicable “self-insured retention”; and **b)** a need for “catastrophe management services” due to “adverse media coverage”.

**“Catastrophe management costs”** do not include any “legal defense expense”.

- H. “Catastrophe management firm”** means any firm that is approved, in writing, except for firms retained for the same seven (7) day period associated with “emergency response costs”, by the Insurer to perform “catastrophe management services” in connection with a “pollution condition” or “indoor environmental condition”.
- I. “Catastrophe management services”** means advising the “insured” with respect to minimizing potential harm to the “insured” from a covered “pollution condition” or “indoor environmental condition” by managing “adverse media coverage” and maintaining and restoring public confidence in the “insured”, and its services or products.
- J. “Claim”** means the written assertion of a legal right received by the “insured” from a third-party, or from another “insured” that is party to an “environmental indemnity obligation”, including, but not limited to, a “government action”, suits or other actions alleging responsibility or liability on the part of the “insured” for “bodily injury”, “property damage” or “remediation costs” arising out of “pollution conditions” or “indoor environmental conditions” to which this insurance applies.
- K. “Covered location”** means:
1. Any location specifically identified in Item 9. of the Declarations to this Policy;
  2. Any location that is specifically identified on a Schedule of Covered Locations attached to this Policy; and
  3. Any location that meets the prerequisites to coverage identified in the Automatic Acquisition and Due Diligence Endorsement attached to this Policy, if any.
- L. “Delay expense”** means, for a “covered location” under development where a “pollution condition” or “indoor environmental condition” causes a delay in the completion or development during the “business interruption”, any of the following expenses:
1. Additional interest on money the “insured” has borrowed to finance the construction, development, or remediation of a project at a “covered location”;
  2. Additional realty taxes and other assessments;
  3. Additional advertising or promotional expense;
  4. Additional expenses incurred resulting from the renegotiation of leases, including associated usual and customary legal representation expense; and
  5. Additional engineering, architectural, and consulting fees.
- M. “Emergency response costs”** means “first-party remediation costs” incurred within seven (7) days following the discovery of a “pollution condition” or “indoor environmental condition” by a “responsible person” in order to abate or respond to an imminent and substantial threat to human health or the environment arising out of:
1. A “pollution condition” or “indoor environmental condition” on, at, under or migrating from a “covered location”; or
  2. A “pollution condition” resulting from “transportation”,
- provided such “emergency response costs” are reported to the Insurer within fourteen (14) days of when that “responsible person” first became aware of such “pollution condition” or “indoor environmental condition”.
- N. “Environmental indemnity obligations”** means an “insured’s” obligations to defend or indemnify a third-party with respect to a “pollution condition” or “indoor environmental condition” to which this insurance otherwise applies, provided that such defense or indemnity obligation is explicitly included within a contract identified or described on the Schedule of Insured Contracts Endorsement attached to this Policy, if any.
- O. “Environmental law”** means any Federal, state, commonwealth, municipal or other local law, statute, ordinance, rule, guidance document, regulation, and all amendments thereto (collectively Laws), including voluntary cleanup or risk-based corrective action guidance, or the direction of an “environmental professional” acting pursuant to the authority provided by any such Laws, along with any governmental, judicial or administrative order or directive, governing the liability or responsibilities of the “insured” with respect to a “pollution condition” or “indoor environmental condition”.
- P. “Environmental professional”** means a licensed professional that is:
1. Mutually agreed upon by the Insurer and the “insured”, except with respect to “emergency response costs”; and

2. Qualified by licensure, knowledge, skill, education and training to perform an assessment, prepare an investigation protocol, interpret the results and prepare a scope of work to remediate a “pollution condition” or “indoor environmental condition”.
- Q. “Extended reporting period”** means the additional period of time in which to report a “claim” first made against the “insured” during or subsequent to the end of the “policy period”.
- R. “Extra damages”** means punitive, exemplary or multiplied damages, and civil fines, penalties and assessments, but solely to the extent that the punitive, exemplary or multiplied damages, and civil fines, penalties and assessments:
1. Are insurable under applicable law; and
  2. Arise out of a “pollution condition” or “indoor environmental condition” that results in “bodily injury”, “property damage”, “remediation costs” or “first-party remediation costs” to which this insurance otherwise applies.
- S. “Extra expense”** means costs incurred by the “insured” due to a “pollution condition” or “indoor environmental condition” that are necessary to avoid or mitigate any “business interruption”. Such costs must be incurred to actually minimize the amount of foregone “business income” that would otherwise be covered pursuant to this Policy.
- T. “First named insured”** means the person or entity as identified in Item 1. of the Declarations to this Policy. The “first named insured” is the party responsible for the payment of any premiums and the payment of, or evidencing payment of, any applicable “self-insured retention” amounts. The “first named insured” shall also serve as the sole agent on behalf of all “insureds” with respect to the provision and receipt of notices, including notice of cancellation or non-renewal, receipt and acceptance of any endorsements or any other changes to this Policy, return of any premium, assignment of any interest pursuant to this Policy, as well as the exercise of any applicable “extended reporting period”, unless any such responsibilities are otherwise designated by endorsement.
- U. “First-party claim”** means the first-party discovery of a “pollution condition” or an “indoor environmental condition” during the “policy period” by an “insured” to which this insurance applies.
- V. “First-party remediation costs”** means reasonable and necessary “remediation costs” incurred by an “insured” resulting from a “first-party claim”. If no applicable laws exist that govern the remediation, investigation, quantification, monitoring, removal, disposal, treatment, neutralization, or immobilization of such “pollution condition” or “indoor environmental condition” in the jurisdiction of the “covered location”, necessary “remediation costs” may be established by securing the written professional recommendations of an “environmental professional”.
- “First-party remediation costs”** also means reasonable and necessary expenses required to restore, repair or replace real or personal property to substantially the same condition it was in prior to being damaged during the course of responding to a “pollution condition” or “indoor environmental condition”. Such expenses shall not include costs associated with betterments or improvements, except to the extent that such betterments or improvements are exclusively associated with the use of building materials which are environmentally superior to those materials which comprised the original damaged property. Any such environmentally superior material must be: **a)** certified as such by an applicable independent certifying institution, where such certification is available; or **b)** in the absence of any such certification, based solely on the judgment of the Insurer and at its sole discretion.
- W. “Fungi”** means any type or form of fungus, including mold or mildew, and any mycotoxins, spores, scents, or byproducts produced or released by “fungi”.
- X. “Government action”** means action taken or liability imposed by any Federal, state, commonwealth, municipal or other local government agency or body acting pursuant to the authority of “environmental law”.
- Y. “Illicit abandonment”** means:
1. Solely with respect to coverage for “covered locations”, the intentional placement or abandonment of any solid, liquid, gaseous or thermal irritant, contaminant, or pollutant, including contaminated soil, contaminated silt, contaminated sedimentation, smoke, soot, vapors, fumes, acids, alkalis, chemicals, hazardous substances, hazardous materials, or waste materials, including “low-level radioactive waste”, “mixed waste” and medical, red bag, infectious and pathological wastes, on, at or into a “covered location”, by a person or entity that:
    - a. Is not an “insured”; and
    - b. Is not affiliated by common ownership with an “insured”, and,
  2. Solely with respect to coverage for “transportation”, the intentional placement or abandonment of any waste, goods, materials or product beyond the boundaries of a “covered location” during “transportation” by a person or entity that:

- a. Is not an “insured”; and
- b. Is not affiliated by common ownership with an “insured”.

“**Illicit abandonment**” does not mean any such placement or abandonment, above, which takes place, in whole or in part, prior to the inception date identified in Item 2. of the Declarations of this Policy.

**Z. “Indoor environmental condition” means:**

- 1. The presence of “fungi” in a building or structure, or the ambient air within such building or structure; or
- 2. The discharge, dispersal, release, escape, migration or seepage of *legionella pneumophila* in a building or structure, or the ambient air within such building or structure,

provided that such “fungi” or *legionella pneumophila* are not naturally occurring in the environment in the amounts and concentrations found within such building or structure.

**AA. “Insured”** means the “first named insured”, any “named insured”, any “additional insured”, and any past or present director or officer of, partner in, employee of, temporary or leased worker of, or, with respect to a limited liability company, a member of, any of the foregoing while acting within the scope of his or her duties as such.

**BB. “Key executive”** means the Chief Executive Officer, Chief Operating Officer, Chief Financial Officer, President, General Counsel, general partner or managing partner (if the “insured” is a partnership), managing member (if the “insured” is a limited liability company) or sole proprietor (if the “insured” is a sole proprietorship) of the “insured”. A “key executive” also means any other person holding a title designated by the “first named insured”, approved by the Insurer, and identified by endorsement to this Policy.

**CC. “Legal defense expense”** means reasonable legal costs, charges, and expenses, including expert charges, incurred by the “insured”:

- 1. In the investigation, adjustment or defense of “claims”; or,
- 2. Solely with respect to those instances where the “insured” has secured the prior consent of the Insurer, except in the event of a “first-party claim” that results in “emergency response costs”, in order to clarify the extent of, minimize, and effect resolution of, any obligation to incur “first-party remediation costs”.

**DD. “Loss” means:**

**Coverage A.**

- 1. A monetary judgment, award or settlement of compensatory damages arising from “bodily injury”, “property damage” or “remediation costs”, including associated “extra damages”;
- 2. “Legal defense expense”;
- 3. “First-party remediation costs”;
- 4. “Emergency response costs”;
- 5. “Business interruption loss”; and
- 6. “Catastrophe management costs”.

**Coverage B.**

- 7. A monetary judgment, award or settlement of compensatory damages arising from “bodily injury”, “property damage” or “remediation costs”, including associated “extra damages”;
- 8. “Legal defense expense”;
- 9. “First-party remediation costs”;
- 10. “Emergency response costs”; and
- 11. “Catastrophe management costs”.

**Coverage C.**

- 12. A monetary judgment, award or settlement of compensatory damages arising from “bodily injury”, “property damage” or “remediation costs”, including associated “extra damages” and “legal defense expense”; and
- 13. “Catastrophe management costs”.

### Supplemental Coverages

Any other liability or first-party exposure insured pursuant to any Supplemental Coverage added by endorsement to this Policy.

- EE. “Low-level radioactive waste”** means waste that is radioactive but not classified as the following: high-level waste (spent nuclear fuel or the highly radioactive waste produced if spent fuel is reprocessed), uranium milling residues, and waste with greater than specified quantities of elements heavier than uranium.
- FF. “Mediation”** means a conciliatory, non-binding attempt to resolve a “claim” using a neutral, third-party facilitator.
- GG. “Mixed waste”** means waste containing both radioactive and hazardous components as defined pursuant to United States law within the Atomic Energy Act and the Resource Conservation and Recovery Act, as either may be amended.
- HH. “Named insured”** means the “first named insured” and any other person or entity specifically endorsed onto this Policy as a “named insured”, if any. “Named insureds” shall maintain the same rights pursuant to this Policy as the “first named insured”, except for those rights specifically: **1)** reserved to the “first named insured” as defined herein; or **2)** limited by endorsement to this Policy.
- II. “Natural resource damage”** means injury to, destruction of, or loss of, including the resulting loss of value of, fish, wildlife, biota, land, air, water, groundwater, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States of America (including the resources of the fishery conservation zone established by the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1801 et. seq.)), any state, commonwealth or local government, or any Native American Tribe, or, if such resources are subject to a trust restriction on alienation, any members of any Native American Tribe, including the reasonable costs of assessing such injury, destruction or loss resulting therefrom.
- JJ. “Non-owned disposal site”** means:
- 1.** Any treatment, storage, transfer, disposal or recycling site or facility located within the United States of America that has not at any time been owned or operated, in whole or in part, by any “insured”, which receives, or has historically received, a “named insured’s” waste for disposal; provided that such treatment, storage, transfer, disposal or recycling site or facility:
    - a.** Was properly permitted and licensed pursuant to “environmental law” to accept the “named insured’s” waste at the time of such disposal by the Federal, state, commonwealth, municipal or other local government agencies or bodies with applicable jurisdiction;
    - b.** Was not owned or operated by any person, corporation or unincorporated association that was in bankruptcy at the time the “named insured’s” waste was received for disposal; and
    - c.** Has not, prior to the time the “named insured’s” waste was received for disposal, been identified on the United States EPA (CERCLA) National Priorities List or pursuant to any functional equivalent of that list made by Federal, state, commonwealth, municipal or other local government agency or body with applicable jurisdiction pursuant to “environmental law”, or
  - 2.** Any treatment, storage, transfer, disposal or recycling site or facility specifically identified on a Schedule of Non-Owned Disposal Sites Endorsement attached to this Policy, if any.
- KK. “Policy period”** means:
- 1.** The period of time specifically identified in Item **2.** of the Declarations to this Policy; or,
  - 2.** Solely with respect to “covered locations” added to this Policy during the period of time specifically identified in Item **2.** of the Declarations to the Policy, if any, the period of time following the effective date of such addition through the expiration date of the Policy identified in Item **2.** of the Declarations to this Policy; or
  - 3.** Any shorter period of time resulting from the cancellation of this Policy.
- LL. “Pollution condition”** means:
- 1.** “Illicit abandonment”; or
  - 2.** The discharge, dispersal, release, escape, migration, or seepage of any solid, liquid, gaseous or thermal irritant, contaminant, or pollutant, including soil, silt, sedimentation, smoke, soot, vapors, fumes, acids, alkalis, chemicals, electromagnetic fields (EMFs), hazardous substances, hazardous materials, waste materials, “low-level

radioactive waste”, “mixed waste” and medical, red bag, infectious or pathological wastes, on, in, into, or upon land and structures thereupon, the atmosphere, surface water, or groundwater.

**MM. “Property damage”** means:

1. Physical injury to, or destruction of, tangible property of a third-party, including all resulting loss of use of that property;
2. Loss of use of tangible property of a third-party, that is not physically injured or destroyed;
3. Diminished value of tangible property owned by a third-party; or
4. “Natural resource damages”.

“Property damage” does not mean “remediation costs”.

**NN. “Remediation costs”** means expenses incurred to investigate, quantify, monitor, remove, dispose, treat, neutralize, or immobilize “pollution conditions” or “indoor environmental conditions” to the extent required by “environmental law” in the jurisdiction of such “pollution conditions” or “indoor environmental conditions”.

**OO. “Rental income”** means the actual rental fees lost as a result of a “suspension” of a rented “covered location”.

**PP. “Responsible person”** means any employee of an “insured” responsible for environmental affairs, control, or compliance at a “covered location”, or any “key executive” of, officer or director of, or partner in, an “insured”.

**QQ. “Self-insured retention”** means the largest applicable dollar amount among triggered coverage parts identified in Item 4. of the Declarations to this Policy, or as otherwise designated by endorsement to this Policy, if any.

**RR. “Suspension”** means that part of, or all of, a rented “covered location” is rendered untenable for the purposes identified to the Insurer prior to the inception date of this Policy due to a “pollution condition” or “indoor environmental condition”.

**SS. “Terrorism”** means activities against persons, organizations or property of any nature:

1. That involve the following or preparation for the following:
  - a. Use or threat of force or violence; or
  - b. Commission or threat of a dangerous act; or
  - c. Commission or threat of an act that interferes with or disrupts an electronic, communication, information, or mechanical system; and
2. When one or both of the following applies:
  - a. The effect is to intimidate or coerce a government or the civilian population or any segment thereof, or to disrupt any segment of the economy; or
  - b. It appears that the intent is to intimidate or coerce a government, or to further political, ideological, religious, social or economic objectives or to express (or express opposition to) a philosophy or ideology.

**TT. “Transportation”** means the movement of an “insured’s” waste, materials, goods or products to or from a “covered location” by automobile, aircraft, watercraft, railcar or other conveyance, including any associated loading or unloading thereof, by an “insured”, or any third-party vendor engaged by an “insured” in the business of transporting property for hire, provided that any such movement, and associated loading and unloading activities, are performed beyond the boundaries of a “covered location”.

**UU. “Underground storage tank”** means any tank and associated piping and appurtenances connected thereto which tank has more than ten percent (10%) of its volume below ground.

“Underground storage tank” does not mean:

1. Any flow-through process tank, including, but not limited to, a septic tank, oil/water separator, sump, or any stormwater or wastewater collection/treatment vessel or system; or
2. Any tank that is located below ground, provided that such tank is located on or above the floor of a basement of a building or on or above the floor of any shaft or tunnel.

**VV. “War”** means war, whether or not declared, civil war, martial law, insurrection, revolution, invasion, bombardment or any use of military force, usurped power or confiscation, nationalization or damage of property by any government, military or other authority.

## VI. EXCLUSIONS

This insurance shall not apply to:

### A. Asbestos

“Loss” arising out of or related to asbestos or asbestos-containing materials.

This exclusion shall not apply to:

1. Monetary judgments, awards or settlements of compensatory damages resulting from “bodily injury” or “property damage”, or any associated “extra damages” or “legal defense expenses”;
2. Monetary judgments, awards or settlements of compensatory damages resulting from “remediation costs”, or any associated “extra damages” or “legal defense expense”, arising out of asbestos or asbestos-containing materials discovered in soil or groundwater; and
3. “First-party remediation costs”, “emergency response costs”, “catastrophe management costs” or “business interruption loss”, or any associated “legal defense expense”, resulting from “first-party claims” arising out of asbestos or asbestos-containing materials discovered in soil or groundwater.

### B. Contractual Liability

“Loss” arising out of or related to liability of others assumed by any “insured” through contract or agreement, except if the liability would have attached to the “insured” in the absence of such contract or agreement.

This exclusion shall not apply to “environmental indemnity obligations”.

### C. Criminal Fines and Criminal Penalties

“Loss” arising out of or related to criminal fines, criminal penalties or criminal assessments.

### D. Divested Property

“Loss” arising out of or related to a “pollution condition” on, at, under or migrating from, or “indoor environmental condition” at, any “covered location”:

1. That had been sold, abandoned, or given away by any “insured”, or was condemned (collectively hereinafter Divested), prior to the “policy period”; or
2. When such “pollution condition” or “indoor environmental condition” first commenced after the “covered location” had been Divested.

This exclusion shall not apply to any “pollution conditions” or “indoor environmental conditions” that first commenced, in whole or in part, prior to the effective date that any such “covered location” was Divested as identified on the Divested Properties Coverage Endorsement attached to this Policy, if any.

### E. Employers Liability

“Claims” arising out of or related to “bodily injury” to:

1. Any “insured” or any employee of its parent corporation, subsidiary or affiliate:
  - a. Arising out of, or in the course of, employment by any “insured”, its parent corporation, subsidiary or affiliate; or
  - b. Performing duties related to the conduct of the business of any “insured”, its parent corporation, subsidiary or affiliate.
2. The spouse, child, parent, brother or sister of any “insured” or employee of its parent corporation, subsidiary or affiliate as a consequence of Paragraph 1., above.

This exclusion applies:

1. Whether any “insured” may be liable as an employer or in any other capacity; and
2. To any obligation to share damages with or repay someone else who must pay damages because of such “bodily injury”.

## **F. First-Party Property Damage**

“Loss” arising out of or related to damage to real or personal property owned by, leased to, loaned to, or rented by any “insured”, or otherwise in the care, custody, or control of any “insured”.

This exclusion shall not apply to “first-party remediation costs”, “emergency response costs”, “business interruption loss” and “catastrophe management costs”.

## **G. Fraud or Misrepresentation**

“Loss” arising out of or related to:

1. Fraudulent acts or material misrepresentations on the part of the “first named insured” made:
  - a. Within an Application to this Policy; or
  - b. During the Application or underwriting process prior to the inception date of this Policy, which would have affected the Insurer’s decision to either issue this Policy, or issue this Policy and its endorsements pursuant to the financial terms identified in the Declarations to this Policy; or
2. Fraudulent acts or material misrepresentations on the part of any “responsible person” during the “policy period”.

## **H. Insured’s Internal Expenses**

“Loss” arising out of or related to expenses incurred by any “insured” for services performed by its salaried staff and any employees.

This exclusion shall not apply to:

1. “Emergency response costs”, along with any associated “catastrophe management costs” incurred during that same seven (7) day period; or
2. Any other costs, charges or expenses incurred with the prior approval of the Insurer at its sole discretion.

## **I. Insured vs. Insured**

“Claims” made by any “insured” against any other “insured”.

This exclusion shall not apply to:

1. “Claims” initiated by third-parties, including cross claims, counterclaims or claims for contribution by such parties against any “insured”; or
2. “Claims” that arise out of an indemnification provided by one “insured” to another “insured” in an “environmental indemnity obligation”.

## **J. Intentional Non-Compliance**

“Loss” arising out of or related to the intentional disregard of, or knowing, willful, or deliberate non-compliance with, any law, statute, regulation, administrative complaint, notice of violation, notice letter, instruction of any governmental agency or body, or any executive, judicial or administrative order, by, or at the direction of, any “responsible person”.

## **K. Known Conditions**

“Loss” arising out of or related to “pollution conditions” or “indoor environmental conditions” in existence and reported to a “responsible person”:

1. Prior to the “policy period”; or,
2. Solely with respect to “covered locations” added to this Policy during the period of time specifically identified in Item 2. of the Declarations to the Policy, if any, prior to the effective date of coverage for such “covered location”, and not affirmatively disclosed to the Insurer in an Application or supplemental underwriting materials provided to the Insurer to secure coverage for such “covered location” pursuant to this Policy.

## **L. Lead-Based Paint**

“Loss” arising out of or related to lead-based paint.

This exclusion shall not apply to:



1. Monetary judgments, awards or settlements of compensatory damages resulting from “bodily injury” or “property damage”, or any associated “extra damages” or “legal defense expenses”;
2. Monetary judgments, awards or settlements of compensatory damages resulting from “remediation costs”, or any associated “extra damages” or “legal defense expenses”, arising out of lead-based paint discovered in soil or groundwater; and
3. “First-party remediation costs”, “emergency response costs”, “catastrophe management costs” or “business interruption loss”, or any associated “legal defense expense”, resulting from “first-party claims” arising out of lead-based paint discovered in soil or groundwater.

#### **M. Material Change in Risk**

“Loss” arising out of or related to a change in the use or operations at a “covered location” that materially increases the likelihood or severity of a “pollution condition”, “indoor environmental condition”, “claim” or “first-party claim” from the intended uses or operations identified:

1. By the “first named insured” for the Insurer in an Application or supplemental underwriting materials provided prior to the effective date of coverage for such “covered location”, if any; or
2. Solely with respect to “covered locations” added to the Policy pursuant to an Automatic Acquisition and Due Diligence Endorsement attached to this Policy, if any, as part of the due diligence materials and supplemental underwriting materials provided to the Insurer as part of the notice required pursuant to that endorsement, if any.

This exclusion shall only apply to the “covered location” associated with the change in use or operations and shall not limit coverage for other “covered locations” to which this insurance applies.

#### **N. Non-Owned Disposal Sites**

“Loss” arising out of or related to “pollution conditions” on, at, under or migrating from any treatment, storage, disposal, transfer or recycling site or facility that is not a “non-owned disposal site”.

#### **O. Underground Storage Tanks**

“Loss” arising out of or related to “pollution conditions” emanating from an “underground storage tank” located at a “covered location”, when the existence of such “underground storage tank” was known to a “responsible person”:

1. Prior to the “policy period”; or,
2. Solely with respect to “underground storage tanks” situated at “covered locations” added to this Policy during the “policy period”, prior to the effective date of coverage for such “covered location”.

This exclusion shall not apply to any “underground storage tank” that:

1. Is identified on the Schedule of Underground Storage Tanks Endorsement or Schedule of Covered Storage Tanks (Financial Responsibility) Endorsement attached to this Policy, if any; or
2. Has been removed or closed-in-place prior to the inception date of this Policy and such removal or closure was conducted in accordance with “environmental law”.

#### **P. Vehicle Damage**

“Claims” or associated “legal defense expense” for “property damage” to any automobile, aircraft, watercraft, railcar or other conveyance utilized for “transportation”.

#### **Q. War or Terrorism**

“Loss” arising out of or related to “pollution conditions” or “indoor environmental conditions” attributable, whether directly or indirectly, to any acts that involve, or that involve preparation for, “war” or “terrorism” regardless of any other cause or event that contributes concurrently or in any sequence to the injury or damage.

#### **R. Workers’ Compensation**

“Loss” arising out of or related to any obligation of any “insured” pursuant to the Jones Act or any workers’ compensation, unemployment compensation, or disability benefits law or related laws.

## VII. REPORTING AND COOPERATION

A. Without limiting the specific requirements contained in any Insuring Agreement or any other exposure-specific reporting requirements contained within this Policy, the “insured” shall also see to it that the Insurer receives notice of any “claim” or “first-party claim”, as soon as practicable, by one or more of the following:

1. Provide written notice to the address, fax number, or email address identified in Item **8.a.** of the Declarations to this Policy; or
2. Provide verbal or electronic notice utilizing the **Environmental Incident Alert 24-hour Emergency Response and Incident Reporting System** by calling the telephone number identified in Item **8.** of the Declarations to this Policy or by using the associated telephone web application, respectively.

Such notice should include reasonably detailed information as to:

1. The identity of the “insured”, including contact information for an appropriate person to contact regarding the handling of the “claim” or “first-party claim”;
2. The identity of the “covered location”;
3. The nature of the “claim” or “first-party claim”; and
4. Any steps undertaken by the “insured” to respond to the “claim” or “first-party claim”.

B. The “insured” must:

1. As soon as practicable, send the Insurer copies of any demands, notices, summonses or legal papers received in connection with any “claim”;
  2. Authorize the Insurer to obtain records and other information;
  3. Cooperate with the Insurer in the investigation, settlement or defense of the “claim”;
  4. Assist the Insurer, upon the Insurer’s request, in the enforcement of any right against any person or organization which may be liable to the “insured” because of “loss” to which this Policy may apply; and
  5. Provide the Insurer with such information and cooperation as it may reasonably require.
- C. No “insured” shall make or authorize an admission of liability or attempt to settle or otherwise dispose of any “claim”, without the written consent of the Insurer. Nor shall any “insured” retain any consultants or “catastrophe management firms”, or incur any “first-party remediation costs” or “catastrophe management costs” with respect to a “first-party claim”, without the prior consent of the Insurer, except for “emergency response costs”.
- D. Upon the discovery of a “pollution condition” or “indoor environmental condition”, the “insured” shall make every attempt to mitigate any loss and comply with applicable “environmental law”. The Insurer shall have the right, but not the duty, to mitigate such “pollution conditions” or “indoor environmental condition” if, in the sole judgment of the Insurer, the “insured” fails to take reasonable steps to do so. In that event, any “remediation costs” or “catastrophe management costs” incurred by the Insurer shall be deemed incurred by the “insured”, and shall be subject to the “self-insured retention” and Limits of Liability identified in the Declarations to this Policy.

For the purposes of fulfilling the notice requirements contained in the Insuring Agreements to this Policy, notice supplied pursuant to one or more of the verbal or electronic notice mechanisms specifically contemplated in Subsection A., above, or on the Declarations, shall constitute written notice to the Insurer.

## VIII. EXTENDED REPORTING PERIOD

- A. Provided the “first named insured” has not purchased any other insurance to replace this Policy, the “first named insured” shall be entitled to a basic “extended reporting period”, and may purchase an optional supplemental “extended reporting period”, following Cancellation, as described in Subsection A., Paragraph 1. of Section IX., **GENERAL CONDITIONS**, or nonrenewal of this Policy, in accordance with the terms and conditions described in Subsections B. through D., below.
- B. “Extended reporting periods” shall not reinstate or increase any of the Limits of Liability. “Extended reporting periods” shall not extend the “policy period” or change the scope of coverage provided. A “claim” first made against an “insured” and reported to the Insurer within the basic “extended reporting period” or supplemental “extended reporting period”, whichever is applicable, shall be deemed to have been made and reported on the last day of the “policy period”. In addition, if an “insured” first discovers a “pollution condition” or “indoor environmental condition” during the “policy period” and reports such “first-party claim” to the Insurer within the

basic “extended reporting period” or supplemental “extended reporting period”, whichever is applicable, then such “first-party claim” shall also be deemed to have been first discovered and reported on the last day of the “policy period”.

- C. The “first named insured” shall have a ninety (90) day basic “extended reporting period” without additional charge.
- D. The “first named insured” shall also be entitled to purchase a supplemental “extended reporting period” of up to thirty-three (33) months for not more than two hundred percent (200%) of the full premium identified in Item 6. of the Declarations to this Policy, and any additional premiums resulting from coverage added during the “policy period”. Such supplemental “extended reporting period” starts when the basic “extended reporting period” ends. The Insurer shall issue an endorsement providing a supplemental “extended reporting period” provided that the “first named insured”:
  - 1. Makes a written request, to the address identified in Item 8.b. of the Declarations to this Policy, for such endorsement which the Insurer receives prior to the expiration of the “policy period”; and
  - 2. Pays the additional premium when due. If that additional premium is paid when due, the supplemental “extended reporting period” may not be cancelled, provided that all other terms and conditions of the Policy are met.

## IX. GENERAL CONDITIONS

### A. Cancellation

- 1. This Policy may be cancelled only by the “first named insured”, or through the “first named insured’s” agent, by mailing to the Insurer at the address identified in Item 8.b. of the Declarations to this Policy, written notice stating when such cancellation shall be effective.
- 2. This Policy may be cancelled by the Insurer for the following reasons:
  - a. Non-payment of premium; or
  - b. Fraud or material misrepresentation on the part of any “insured”,  
by mailing to the “first named insured” at the “first named insured’s” last known address, written notice stating when, not less than sixty (60) days thereafter, fifteen (15) days if cancellation is for non-payment of any unpaid portion of the premium, such cancellation shall be effective. The mailing of notice shall be sufficient proof of notice. The effective date and hour of cancellation stated in the notice shall be the end of the “policy period”.  
Subparagraph 2.b., herein, shall apply only to that “insured” that engages in the fraud or misrepresentation. This exception shall not apply to any “insured” that is a parent corporation, subsidiary, employer of, or otherwise affiliated by ownership with, such “insured”.
- 3. In the event of cancellation, the premium percentage identified in Item 6. of the Declarations to this Policy shall be the minimum-earned premium upon the inception date of this Policy. Thereafter, the remaining unearned premium, if any, shall be deemed earned by the Insurer on a *pro rata* basis over the remainder of the “policy period”. Any unearned premium amounts due the “first named insured” upon cancellation of this Policy shall be calculated on a *pro rata* basis and refunded within thirty (30) days of the effective date of cancellation.

### B. Inspection and Audit

To the extent of the “insured’s” ability to provide such access, and with reasonable notice to the “insured”, the Insurer shall be permitted, but not obligated, to inspect and sample the “covered locations”. The “insured” shall have the concurrent right to collect split samples. Neither the Insurer’s right to make inspections, the making of said inspections, nor any report thereon shall constitute an undertaking, on behalf of or for the benefit of the “insured” or others, to determine or warrant that such property or operations are safe or in compliance with “environmental law”, or any other law.

The Insurer may examine and audit the “insured’s” books and records during this “policy period” and extensions thereof and within three (3) years after the final termination of this Policy.

### C. Legal Action Against the Insurer

No person or organization other than an “insured” has a right pursuant to this Policy:

- 1. To join the Insurer as a party or otherwise bring the Insurer into a suit against any “insured”; or

2. To sue the Insurer in connection with this insurance unless all of the Policy terms have been fully complied with.

A person or organization may sue the Insurer to recover after an agreed settlement or on a final judgment against an “insured”. However, the Insurer shall not be liable for amounts that are not payable pursuant to the terms of this Policy or that are in excess of the applicable Limit of Liability. An agreed settlement means a settlement and release of liability signed by the Insurer, the “insured”, and the claimant or the claimant’s legal representative.

#### **D. Bankruptcy**

The insolvency or bankruptcy of any “insured”, or any “insured’s” estate, shall not relieve the Insurer of its obligations pursuant to this Policy. However, any such insolvency or bankruptcy of the “insured”, or the “insured’s” estate, shall not relieve the “insured” of its “self-insured retention” or deductible period obligations pursuant to this Policy. This insurance shall not replace any other insurance to which this Policy is excess, nor shall this Policy drop down to be primary, in the event of the insolvency or bankruptcy of any underlying insurer.

#### **E. Subrogation**

In the event of any payment pursuant to this Policy by the Insurer, the Insurer shall be subrogated to all of the rights of recovery against any person or organization, and the “insured” shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. All “insureds” shall do nothing to prejudice such rights. Any recovery as a result of subrogation proceedings arising pursuant to this Policy shall accrue first to the “insureds” to the extent of any payments in excess of the limit of coverage; then to the Insurer to the extent of its payment pursuant to the Policy; and then to the “insured” to the extent of the “self-insured retention”. Expenses incurred in such subrogation proceedings shall be apportioned among the interested parties in the recovery in the proportion that each interested party’s share in the recovery bears to the total recovery.

#### **F. Representations**

By accepting this Policy, the “first named insured” agrees that:

1. The statements in the Declarations, schedules and endorsements to, and Application for, this Policy are accurate and complete;
2. Those statements and representations constitute warranties that the “first named insured” made to the Insurer; and
3. This Policy has been issued in reliance upon the “first named insured’s” warranties.

#### **G. Separation of Insureds**

Except with respect to the Limits of Liability, Cancellation condition **2.a.**, and any applicable exclusions, this Policy applies:

1. As if each “named insured” were the only “insured”; and
2. Separately to each “named insured” against whom a “claim” is made,

and any fraud, misrepresentation, breach of a condition or violation of any duty (hereinafter Breach) by an “insured” shall not prejudice coverage for any “named insured” pursuant to this Policy, provided that: **1)** such “named insured” did not participate in, know of or assist in such Breach; and **2)** such “named insured” is not a parent, subsidiary, partner, member, director, officer of, employer of or otherwise affiliated with, the “insured” that committed such Breach.

#### **H. Other Insurance**

If other valid and collectible insurance is available to any “insured” covering “loss” also covered by this Policy, other than a policy that is specifically written to apply in excess of this Policy, the insurance afforded by this Policy shall apply in excess of and shall not contribute with such other insurance.

#### **I. Changes and Assignment**

Notice to or knowledge possessed by any person shall not effect waiver or change in any part of this Policy or estop the Insurer from asserting any right pursuant to the terms of this Policy. The terms, definitions, conditions, exclusions and limitations of this Policy shall not be waived or changed, and no assignment of any interest in this Policy shall bind the Insurer, except as provided by endorsement and attached to this Policy.

#### **J. Headings**

The descriptions in the headings and sub-headings of this Policy are inserted solely for convenience and do not constitute any part of the terms or conditions hereof.

**K. Consent**

Where the consent of the Insurer, or an “insured”, is required pursuant to this Policy, such consent shall not be unreasonably withheld, delayed, conditioned, or denied.

<Select One>

## POLLUTION AND REMEDIATION LEGAL LIABILITY POLICY

This is a "claims-made and reported" Policy. For coverage to apply, a **Claim** must be first made against you during the **Policy Period** and reported to us, in writing, during the **Policy Period**, or, where applicable, the Extended Reporting Period. However, this does not apply to coverages provided under A.2., B.1., B.2., and C.2. stated in SECTION I – INSURING AGREEMENT. Please read this Policy carefully, including the Declarations and all Endorsements.

This Policy contains provisions that limit the amount of **Legal Expense** we are responsible to pay.

Throughout this Policy, the words "we", "us", and "our" mean the Company stated in the Declarations. The words "you" and "your" mean the **Insured**.

Words that are **bolded**, except for caption headings, have the meaning set forth in SECTION III – DEFINITIONS, whether expressed in singular or plural throughout this Policy.

In consideration of the payment of premium, in reliance upon the Application and subject to the Declarations and the terms and conditions of this Policy, we agree with you as follows:

### SECTION I - INSURING AGREEMENTS

#### A. Your Location Coverage

We will pay on your behalf for **Pollution Loss**, as a result of a **Pollution Condition** on, at, under or migrating from **Your Location** that first commenced on or after the **Retroactive Date**, if applicable, and first commenced prior to the **Reverse Retroactive Date**, if applicable, provided that:

1. (i) the **Pollution Condition** results in a **Claim** against you; (ii) the **Claim** is for **Pollution Loss** that you become legally obligated to pay; and (iii) the **Claim** is first made against you during the **Policy Period** and reported to us, in writing, during the **Policy Period**, or, where applicable, the Extended Reporting Period; or
2. the **Pollution Condition** is first discovered by you during the **Policy Period** and reported to us, in writing, during the **Policy Period**, or, where applicable, the Extended Reporting Period.

#### B. Emergency Remediation Expense Coverage

We will indemnify you for **Emergency Remediation Expense** incurred by you, as a result of a **Pollution Condition** on, at, under or migrating from **Your Location**, provided that:

1. the **Emergency Remediation Expense** is incurred within seventy-two (72) hours of the commencement of the **Pollution Condition**; and
2. the **Pollution Condition** and notice of the **Emergency Remediation Expense** are reported to us, in writing, during the **Policy Period**, but in no event later than fourteen (14) days from the discovery of the **Pollution Condition**, or the end of the **Policy Period**, whichever occurs first.

#### C. Contingent Transportation Coverage

We will pay on your behalf for **Pollution Loss**, as a result of a **Pollution Condition** that first commences and finally ends during the course of **Transportation** by a **Carrier**, provided that:

1. the **Transportation** takes place during the **Policy Period**, and

2. the **Pollution Condition** is first discovered during the **Policy Period** and reported to us, in writing, during the **Policy Period**, or, where applicable, the Extended Reporting Period; or
3. (i) the **Pollution Condition** results in a **Claim** against you; (ii) the **Claim** is for **Pollution Loss** that you become legally obligated to pay; and (iii) the **Claim** is first made against you during the **Policy Period** and reported to us, in writing, during the **Policy Period**, or, where applicable, the Optional Extended Reporting Period.

**D. Non-Owned Disposal Site Coverage**

We will pay on your behalf for **Pollution Loss**, as a result of a **Pollution Condition** on, at, under or migrating from a **Non-Owned Disposal Site** that first commenced on or after the **Retroactive Date**, if applicable, and first commenced prior to the **Reverse Retroactive Date**, if applicable, provided that:

1. the **Pollution Condition** arises from **Pollutants** generated by you that originate from **Your Location**;
2. the **Pollution Condition** results in a **Claim** against you; and
3. the **Claim** is first made against you during the **Policy Period** and reported to us, in writing, during the **Policy Period**, or, where applicable, the Extended Reporting Period.

This coverage also applies to any **Non-Owned Disposal Site** that is identified in the Non-Owned Disposal Site Schedule, if endorsed onto this Policy.

**SECTION II - SUPPLEMENTAL COVERAGES**

The following Supplemental Coverages are afforded under this Policy. Any amounts paid under these coverages do not qualify as **Pollution Loss** or **Emergency Remediation Expense**. In no event will we pay more than the Limits of Liability specified below. The Limits of Liability for each of the following Supplemental Coverages are separate from and in addition to the Limits of Liability for the coverages in SECTION I - INSURING AGREEMENTS of this Policy, and payments made under these Supplemental Coverages do not erode the Aggregate Limits of Liability of this Policy. No Self-Insured Retention Amount applies to these Supplemental Coverages.

**A. Disaster Response Expense Coverage**

We will pay on your behalf up to an aggregate limit of liability of \$250,000 for any reasonable and necessary expenses incurred by you, with our prior written consent, for a public relations or crisis management firm hired by you, and approved by us, to minimize potential harm to your reputation by maintaining or restoring public confidence in you resulting from a **Pollution Condition** on, at, under or migrating from **Your Location**, that has or is likely to result in a **Media Event**. This limit of liability is the most we will pay regardless of the number of **Pollution Condition(s)**.

**B. Green Building Materials Expense Coverage**

We will pay on your behalf up to an aggregate limit of liability of \$250,000 for any reasonable and necessary expenses incurred by you in the use of **Green Building Materials**, even when the use of such materials is not necessary, as part of **Restoration Costs** when otherwise covered under this Policy. This limit of liability is the most we will pay regardless of the number of **Pollution Condition(s)**.

**C. Litigation Expense Coverage**

We will indemnify you up to an aggregate limit of liability of \$25,000 for the actual loss of earnings and reasonable and necessary expenses incurred by you for attendance at depositions, hearings, arbitrations, **Mediation** or trials, at our written request, for **Claim(s)** covered under this Policy. This limit of liability is the most we will pay regardless of the number of **Claim(s)**, events or persons attending.

**D. Subpoena Expense Coverage**

We will pay on your behalf up to an aggregate limit of liability of \$25,000 for reasonable and necessary fees and costs of counsel retained by us to advise you regarding the production of subpoenaed documents or to represent you while preparing for or giving testimony in response to a subpoena that is both served on you during the **Policy Period** and reported by you to us, in writing, during the **Policy Period**, or, where applicable, the Extended Reporting Period, and arises from a **Pollution Condition** on, at, under or migrating from **Your Location**. This limit of liability is the most we will pay regardless of the number of subpoenas served.

**SECTION III - DEFINITIONS**

**A. Additional Insured means:**

1. any person or entity endorsed onto this Policy as an **Additional Insured**;
2. all of your first mortgagees for loans on **Your Location**; or
3. any person or entity, as required by a written contract or agreement signed by the **First Named Insured**, provided that such written contract or agreement is signed by the **First Named Insured** prior to the commencement of the **Pollution Condition**.

Coverage for such **Additional Insured** only applies for:

- a. a **Pollution Condition** on, at, under or migrating from **Your Location**;
- b. the person's, entity's or mortgagee's liability, to the extent permitted by law, arising out of the **First Named Insured's** ownership, occupation, development, operation, maintenance, financing or use of **Your Location**; and
- c. only if the person, entity or mortgagee is named in a suit as a co-defendant with the **First Named Insured**, alleging that the person or entity is liable on the basis described in Subsection A.3.b. immediately above,

If coverage is required by a written contract or agreement, under Subsection A.3. referenced above, the most we will pay on behalf of the **Additional Insured** is the lesser of: (i) the amount of insurance required by the written contract or agreement; or (ii) the amount of insurance available under the applicable Limit of Liability set forth in Item (4) of the Declarations. Coverage shall not increase the applicable Limit of Liability set forth in Item (4) of the Declarations.

**B. Additional Named Insured means any person or entity endorsed onto this Policy as an **Additional Named Insured**, but solely with respect to the liability of such person or entity as a result of their ownership, occupation, development, operation, maintenance, financing or use of **Your Location**.**

**C. Bodily Injury means each of the following caused by a **Pollution Condition**:**

1. physical injury, sickness, disease or building related illness sustained by any person, including death resulting therefrom, and any accompanying medical or environmental monitoring; or
2. mental anguish, emotional distress, or shock, sustained by any person.



**D. Business Personal Property of Others** means property of others located on or at **Your Location**, consisting of the following:

1. furniture and fixtures;
2. machinery and equipment;
3. all other personal property not owned by you but used in your business; or
4. leased **Business Personal Property of Others** for which you have a contractual responsibility to insure.

**Business Personal Property of Others** does not include your interest as tenant in improvements and betterments. For use of this definition, improvements and betterments means fixtures, alterations, installations or additions:

- a. made a part of the building or structure you do not own; or
- b. acquired or made at your expense and which cannot legally be removed.

**E. Carrier** means any person or entity, other than you or any of your subsidiaries or affiliate companies, engaged by you or on your behalf, licensed and in the business of transporting property for hire by land motor vehicle, trailer, semi-trailer, mobile equipment or watercraft.

**F. Claim** means any written demand, notice, or assertion of a legal right, alleging liability or responsibility on your part, and includes, but is not limited to, a lawsuit, petition, order or government or regulatory action commenced against you.

**G. Emergency Remediation Expense** means **Remediation Expense** incurred by you on an emergency basis that we determine was reasonable and necessary to mitigate the immediate effects of the **Pollution Condition** on, at, under or migrating from **Your Location** where any delay on your part would cause immediate injury to any person or immediate damage to any property.

**H. First Named Insured** means the person or entity stated in Item (1) of the Declarations.

**I. Green Building Materials** means building products or materials that are recognized by The Leadership in Energy and Environmental Design (LEED®), Green Globes Assessment and Rating System, International Green Construction Code or Energy Star as:

1. being environmentally preferable or sustainable; or
2. providing enhanced energy efficiency.

**J. Insured** means:

1. the **First Named Insured** and its parent company;
2. any **Additional Insured**;
3. any **Additional Named Insured** endorsed onto this Policy;
4. the **First Named Insured's** or any **Additional Named Insured's** current and former directors, partners, principals, members, officers, stockholders, or trustees, but solely while acting within the course and scope of their duties as such;
5. the **First Named Insured's** or any **Additional Named Insured's** current and former employees,

including a **Leased Worker**, but solely while acting within the course and scope of their employment or leased worker agreement;

6. the **First Named Insured's** heirs, executors, administrators, assigns or legal representatives in the event of death, incapacity or bankruptcy, but only with respect to the liability of the **First Named Insured** otherwise insured herein;
  7. any entity of the **First Named Insured** in which the **First Named Insured** or entity thereof did or does have at least a fifty percent (50%) or more ownership interest, or management control over, by written agreement;
  8. any entity for which the **First Named Insured** or any entity that falls under Subsection J.7. referenced immediately above has the responsibility, by written contract or agreement, of placing insurance, but only to the extent of the tort liability of the **First Named Insured** or any entity that falls under Subsection J.7. referenced immediately above;
  9. any present or former member, director, officer, shareholder, partner, trustee, employee, spouse, **Leased Worker** of Subsections J.7. and J.8. referenced immediately above, while any of the foregoing are acting within the course and scope of their duties as such; and
  10. the **First Named Insured** to the extent of its participation in a legal entity, including a limited liability company or joint venture, but only to the extent of the **First Named Insured's** legal liability under the respective legal entity.
- K. Insured Contract** means that part of any written contract or agreement, listed in the Insured Contract Schedule endorsed onto this Policy, under which you assume the tort liability of another party to pay compensatory damages for **Bodily Injury, Property Damage or Remediation Expense** to a third-person or entity, provided that such written contract or agreement is signed by you prior to the **Bodily Injury, Property Damage or Remediation Expense**. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.
- L. Leased Worker** means a person leased to you by a labor leasing firm, under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business.
- M. Legal Expense** means legal costs, charges and expenses incurred by you or on your behalf in the investigation or defense of a **Claim for Pollution Loss**, or in connection with **Remediation Expense**, and includes any necessary expert fees paid to experts retained by defense counsel.

**Legal Expense** does not include any of the following:

1. time and expense incurred by you assisting us in the investigation or resolution of a **Claim** or in connection with **Remediation Expense**, including but not limited to, the costs of your in-house counsel, salary charges of your regular employees or officials, and fees and expenses of counsel retained by you;
  2. salary charges of our employees; or
  3. legal cost, charges and expenses incurred in connection with **Emergency Remediation Expense**.
- N. Low-Level Radioactive Waste and Material** means waste or material that when disposed is acceptable for disposal in a near-surface disposal facility or a land disposal facility as defined in 10 CFR 61.2.
- O. Media Event** means a spontaneous event that results in coverage by any television news or newspapers, in either print or internet editions.

Coverage in e-mails, blogs, vlogs or other private or not for profit media does not constitute a **Media Event**.

- P. Mediation** means an informal and non-binding dispute settlement process overseen by a neutral third-party approved by us.
- Q. Mold Matter** means mold, mildew or any type or form of fungus, including any mycotoxins, spores, or byproducts produced or released by fungi.
- R. Mold Matter Remediation Standards** means those standards that govern the required investigation and abatement of **Mold Matter**, as imposed by a Federal, State, Local or Provincial governmental authority pursuant to law or regulation. If no standards have been imposed by such authority, then the standards for investigation and abatement will be those necessary to protect human health at **Your Location**, as determined in consultation with a **Mold Matter Professional**, and will be no less than those remediation activities recommended by the New York City Department of Health & Mental Hygiene Guidelines on Assessment and Remediation of Fungi in Indoor Environments ("NYC Guidelines"), or any subsequent amendments thereof.
- S. Mold Matter Professional** means a Certified Industrial Hygienist, or similarly qualified health and safety professional experienced in performing mold investigation and remediation, retained by you with our prior written consent.
- T. Natural Resource Damage** means physical injury to, or destruction of, as well as the assessment of such injury or destruction, including the resulting loss of use of the land or resources to the general public, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources belonging to, or managed by, held in trust by, appertaining to, or otherwise controlled by the United States including the resources of the fishery conservation zone established by the Magnuson-Stevens Fishery Conservation and Management Act 16 U.S.C. 1801 et. seq.), any State, Local or Provincial government, any foreign government, any Native American tribe or, if such resources are subject to a trust restriction on alienation, any member of a Native American tribe. The terms Natural Resource Damage and Natural Resource Damage Assessments are as further defined by statute [CERCLA §§101(6); 107(a)(4)(C); OPA §§1001(5); 1002(b)(2)] and regulation [43 CFR Part 11; 15 CFR Part 990].
- U. Non-Owned Disposal Site** means a location used by you for the treatment, storage or disposal of **Pollutants**, provided that:
1. the **Non-Owned Disposal Site** is not managed, operated, owned or leased by you or your affiliate;
  2. the **Non-Owned Disposal Site** is permitted or licensed by the applicable Federal, State, Local or Provincial authorities to accept such **Pollutants** as of the date the waste or material is treated, stored or disposed at the **Non-Owned Disposal Site**; and
  3. the **Non-Owned Disposal Site** is not listed on a proposed or final Federal National Priorities List or any State or Provincial equivalent National Priority List, Superfund or Hazardous Waste List prior to the treatment, storage or disposal of the **Pollutants** at the **Non-Owned Disposal Site**.
- V. Policy Period** means the period stated in Item (2) of the Declarations or any shorter period resulting from cancellation.
- W. Pollutants** mean any solid, liquid, gaseous or thermal irritant, contaminant or hazardous substance, including, but not limited to, acids, alkalis, electromagnetic fields, fumes, bacteria, **Low-Level Radioactive Waste and Material**, **Mold Matter**, odors, smoke, soot, toxic chemicals, vapors and waste materials, including medical, infectious and pathological wastes.
- X. Pollution Condition** means:
1. the discharge, dispersal, release, seepage, migration, or escape of **Pollutants** into or upon land, or structures thereupon, the atmosphere, or any watercourse or body of water including groundwater; the continued discharge, dispersal, release, seepage, migration or escape of such **Pollutants** comprises a single **Pollution Condition**;

2. the presence of any uncontrolled or uncontained **Pollutants** in land, the atmosphere, or any watercourse or body of water including groundwater;
3. the illicit abandonment of **Pollutants**, or any drums, tanks or similar containers holding such **Pollutants**, in, on or under the soil or any watercourse or body of water including groundwater, or inside a building leased by you to a tenant, on, at or under **Your Location**, by anyone other than you, provided that you are without knowledge of the use and/or presence of such **Pollutants** or any drums, tanks or similar containers holding such **Pollutants**; and
4. the presence of **Mold Matter** in or on buildings or structures.

Except as to Subsection X.3. referenced above, a **Pollution Condition** shall not include the presence of **Pollutants** in any container or structure that holds or contains **Pollutants**.

**Y. Pollution Loss** means each of the following that results from a **Pollution Condition** that first commenced on or after the **Retroactive Date** stated in Item (4) of the Declarations, if applicable, or first commenced prior to the **Reverse Retroactive Date** stated in Item (4) of the Declarations, if applicable:

1. monetary judgment, or settlement that is entered into with our prior written consent (which consent shall not be unreasonably withheld), of compensatory damages for:
  - a. **Bodily Injury or Property Damage**; or
  - b. **Remediation Expense**;
2. with regard to SECTION I – INSURING AGREEMENTS, A. Your Location Coverage and C. Contingent Transportation Coverage, **Remediation Expense** that is incurred with our prior written consent (which consent shall not be unreasonably withheld);
3. civil fines and penalties assessed against you, but only where insurance coverage for such fines and penalties is allowable by law;
4. punitive, exemplary or multiplied damages that you are legally liable for, but only where insurance coverage for such damages is allowable by law;
5. **Legal Expense** associated with Subsections Y.1. through Y.4. referenced immediately above, that is incurred with our prior written consent (which consent shall not be unreasonably withheld);

**Pollution Loss** does not include:

- a. injunctive or equitable relief;
- b. the return of fees or charges, or services rendered;
- c. salaries of your employees or any **Leased Worker**; or
- d. your profit, overhead or mark-up.

**Z. Property Damage** means each of the following caused by a **Pollution Condition**:

1. physical injury to or destruction of third-party tangible property, including the resulting loss of use thereof;
2. loss of use of third-party tangible property that has not been physically injured or destroyed;
3. diminished third-party property value, but only where there is physical injury to or the destruction of

such tangible property; or

**4. Natural Resource Damage.**

**Property Damage** does not include **Remediation Expense**.

**AA. Remediation Expense** means reasonable and necessary expenses caused by a **Pollution Condition** and incurred to investigate, assess, remove, dispose of, treat, contain or neutralize a **Pollution Condition**, including any associated monitoring and testing costs, to the extent required by:

1. Federal, State, Local or Provincial Laws, Regulations or Statutes, or any subsequent amendments thereof, or **Mold Matter Remediation Standards**, enacted to address a **Pollution Condition**, including any individual or entity acting under the authority thereof; or
2. a legally executed State voluntary program governing the clean-up of a **Pollution Condition**.

**Remediation Expense** shall also include **Legal Expense** associated with Subsections AA.1. and AA.2. referenced immediately above and **Restoration Costs**.

**Remediation Expense** does not include any capital improvements.

**BB. Responsible Insured** means any of your officers, directors, partners, members, managers, supervisors or foremen, or any of your employees or agents that have responsibility, in whole or in part, for risk control, risk management, health and safety or environmental affairs, control or compliance, and any manager of **Your Location**.

**CC. Restoration Costs** means reasonable and necessary costs incurred by you to restore, repair or replace real or personal property to substantially the same condition it was in prior to being damaged during work performed in the course of incurring **Remediation Expense**.

However, these costs shall not exceed the Actual Cash Value of such real or personal property immediately prior to incurring the **Remediation Expense** or include costs associated with improvements or betterments. Actual Cash Value is defined as the cost to replace such real or personal property, immediately prior to incurring the **Remediation Expense**, minus the accumulated depreciation of the real or personal property.

**DD. Retroactive Date** means the date stated in Item (4) of the Declarations for each applicable coverage that is specified, if any, or any **Retroactive Date** listed on an endorsement to this Policy.

**EE. Reverse Retroactive Date** means the date stated in Item (4) of the Declarations for each applicable coverage that is specified, if any, or any **Reverse Retroactive Date** listed on an endorsement to this Policy.

**FF. Transportation** means:

1. the movement by a **Carrier** of your waste or material generated by you, after the **Carrier** crosses the legal boundary of **Your Location** until the waste or material has arrived and is unloaded at its final destination, provided that the **Pollution Condition** occurs at a location other than **Your Location**; or
2. the loading and movement by a **Carrier** of waste or material, from a location other than **Your Location**, until the **Carrier** crosses the legal boundary of **Your Location**.

**GG. Underground Storage Tank** means any stationary container or vessel, which is ten percent (10%) or more beneath the surface of the ground at **Your Location**, and includes the associated underground piping, underground ancillary equipment and containment system(s) connected thereto, and is:

1. constructed primarily of non-earthen materials; and

2. designed to contain any substance.

For purposes of this definition, associated underground piping means piping leading to and away from the **Underground Storage Tank** until such piping is above ground or terminates in another **Underground Storage Tank**, receptacle, dispenser, or crosses the legal boundaries of **Your Location**.

**HH. Your Location** means any location listed in the Your Location(s) Schedule endorsed onto this Policy.

#### SECTION IV - EXCLUSIONS

This Policy does not apply to any **Claim, Pollution Loss, Emergency Remediation Expense**, or any other coverage afforded under this Policy, including SECTION II – SUPPLEMENTAL COVERAGES, directly or indirectly based upon or arising out of:

**A. Asbestos and Lead-Based Paint**

the existence of, or required removal or abatement of, lead-based paint or asbestos, in any form, in or on any building or structure on or at **Your Location**, including but not limited to products containing asbestos, asbestos fibers, asbestos dust, and asbestos containing materials.

This exclusion does not apply to the existence of, or required removal or abatement of, lead-based paint or asbestos, in any form, in or upon land, the atmosphere (outside of any building or structure), or any watercourse or body of water including groundwater.

**B. Communicable Diseases**

the exposure to infected humans or animals, or contact with bodily fluids of infected humans or animals.

**C. Contractual Liability**

your:

1. assumption of liability in a contract or agreement; or
2. breach of contract or agreement.

This exclusion does not apply to:

- a. liability that you would have in the absence of a contract or agreement; or
- b. liability assumed by you in an **Insured Contract**.

**D. Divested Location**

any **Pollution Condition** on, at, under or migrating from **Your Location**, where the actual discharge, dispersal, release, seepage, migration or escape of **Pollutants** commenced subsequent to the time **Your Location** was sold, given away, no longer used or leased by you, abandoned by you, or condemned.

**E. Employer's Liability**

any injury to:

1. any of your employees, including any **Leased Workers** under your supervision, directors, partners, principals, members, officers, stockholders or trustees, but solely within the course and scope of their employment or lease agreement and only if such injury arises in the course of:
  - a. employment by you; or
  - b. performing duties related to the conduct of your business.
2. the spouse, domestic partner, child, parent, brother or sister of anyone set forth in Subsection E.1.

immediately above, as a consequence of any injury to any of the persons described in Subsection E.1. immediately above.

This exclusion applies whether you may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability you assumed under an **Insured Contract**.

**F. Hostile Acts**

any consequence, whether direct or indirect, of war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power, strike, riot, or civil commotion.

**G. Insured versus Insured**

any **Claim** made by an **Insured** against any other **Insured**.

**H. Intentional and Dishonest Acts**

1. intentional disregard of, or non-compliance with, any statute, regulation, ordinance, law or order, by you or at your direction or at your agent's direction; or
2. actual or alleged fraudulent, dishonest, malicious or intentionally or inherently harmful conduct by you.

This exclusion does not apply to any **Insured** that did not allegedly commit or allegedly participate in committing any of the forgoing described above.

**I. Known Circumstances or Conditions**

1. a **Claim** for **Pollution Loss** or **Remediation Expense** reported to or known by a **Responsible Insured** prior to the inception of the **Policy Period**; or
2. any **Pollution Condition**, known by a **Responsible Insured** prior to the inception of the **Policy Period**, which was not identified by you in the statements, declarations and information contained in the Application for this Policy including any other supplemental materials submitted to us as part of the Application process prior to the inception of the **Policy Period** or prior to **Your Location** being endorsed onto this Policy; or
3. a circumstance or condition known by a **Responsible Insured** prior to the inception of the **Policy Period**, which was not identified by you in the statements, declarations and information contained in the Application for this Policy including any other supplemental materials submitted to us as part of the Application process prior to the inception of the **Policy Period** or prior to **Your Location** being endorsed onto this Policy, where the **Responsible Insured** should have reasonably foreseen that a **Pollution Condition** or a **Claim** for **Pollution Loss** would result, or **Remediation Expense** would be incurred.

Any **Pollution Condition** disclosed in writing to us prior to the inception of the **Policy Period** or prior to **Your Location** being endorsed onto this Policy and not otherwise excluded under this Policy is deemed to be first discovered on the date **Your Location** is endorsed onto this Policy.

**J. Material Change in Use or Operations**

any material change in the use of, or operations at, **Your Location** from the use or operations identified by you in the statements, declarations and information contained in the Application for this Policy including any other supplemental materials submitted to us as part of the Application process prior to the inception of the **Policy Period** or prior to **Your Location** being endorsed onto this Policy.

**K. Products Liability**

any goods, materials or products designed, manufactured, sold, handled, distributed, altered, repaired or supplied by you or by others under license or trade name from you, including any container thereof, any

failure to warn, or any reliance upon a representation or warranty made at any time with respect thereto, but only if the **Pollution Condition** took place away from **Your Location** and after physical possession of such goods or products has been relinquished to others.

This exclusion does not apply to C. Contingent Transportation Coverage as set forth in SECTION I - INSURING AGREEMENTS of this Policy.

**L. Property**

Damage to any real or personal property owned, leased or operated by you, or in your care, custody or control, even if such damage is incurred to avoid or mitigate **Pollution Loss** which may be covered under this Policy.

This exclusion does not apply to **Restoration Costs** or **Natural Resource Damage**.

Additionally, this exclusion does not apply to a **Claim** first made against you for damage to **Business Personal Property of Others** as a result of a **Pollution Condition**.

**M. Radioactive / Nuclear Material**

1. material or waste that if disposed must be placed in a geologic repository as defined in 10 CFR 60 or 10 CFR 63 or any other existing or planned disposal facility for waste that would not otherwise qualify as **Low-Level Radioactive Waste and Material**;
2. radioactive waste or material for which you have coverage under any nuclear insurance policy or have received indemnity from any United States or international government authority or statute, including but not limited to the United States Price Anderson Act (Public Law 100-408) or the United States National Defense Contracts Act (Public Law 85-804);
3. tailings, milling wastes, or products produced by the extraction of uranium or thorium from any ore processed for its source material;
4. any nuclear weapon, engineered assembly, or component thereof designed to cause the release of radiological material or any hazardous substance onto a chosen target or to generate a nuclear detonation; and
5. the existence, required removal or abatement of naturally occurring radioactive materials or technologically enhanced naturally occurring radioactive materials, including but not limited to radon,

including, but not limited to the actual, alleged or threatened exposure of any person(s) or property to any such matter.

**N. Underground Storage Tank**

the existence of any **Underground Storage Tank** on, at or under **Your Location**.

This exclusion does not apply to:

1. an **Underground Storage Tank** that is closed, abandoned-in-place or removed prior to the inception of the **Policy Period**, where performed in accordance with enacted Federal, State, Local or Provincial regulations;
2. an **Underground Storage Tank** that is identified in the Underground Storage Tank Schedule endorsed onto this Policy;
3. an **Underground Storage Tank**, the existence of which is unknown by a **Responsible Insured** prior to the inception of the **Policy Period**;
4. any flow-through process tank, including oil/water separator; or



5. any storage tank situated in a man-made underground area (such as a basement, cellar, mine shaft or tunnel) if the storage tank is situated upon or above the surface of the floor.

**O. Workers' Compensation and Similar Laws**

your obligation under a workers' compensation, unemployment compensation, or disability benefits law or any similar law.

**SECTION V - LIMITS OF LIABILITY AND SELF-INSURED RETENTION AMOUNT**

**A. Policy Aggregate Limit of Liability**

The Policy Aggregate Limit of Liability set forth in Item (3)a. of the Declarations is the most we shall pay for the sum of all **Pollution Loss, Emergency Remediation Expense** and any other amounts for which insurance is afforded under SECTION I - INSURING AGREEMENTS of this Policy, regardless of the number of **Pollution Condition(s)** or **Claim(s)**.

**B. Legal Expense in Addition to the Limits of Liability**

Once the applicable Self-Insured Retention Amount has been satisfied, **Legal Expense** shall not begin to reduce the Policy Aggregate Limit of Liability set forth in Item (3)a. of the Declarations until we have incurred, on behalf of one or more **Insureds**, **Legal Expense** in the aggregate of that amount, if any, set forth in Item (3)b. **Legal Expense** Aggregate Limit of Liability of the Declarations. Once we have incurred the **Legal Expense** Aggregate Limit of Liability, if any, **Legal Expense** applies to and reduces each applicable Limit of Liability set forth in Item (4) of the Declarations and the Policy Aggregate Limit of Liability set forth in Item (3)a. of the Declarations.

**C. Limit of Liability**

Subject to the Policy Aggregate Limit of Liability, set forth in Item (3)a. of the Declarations, the Limit of Liability for each **Pollution Condition** for each coverage set forth in Item (4) of the Declarations is the most we shall pay for all **Pollution Loss** and **Emergency Remediation Expense**, based upon or arising out of the same, related, repeated or continuous **Pollution Condition** for which insurance is afforded under SECTION I - INSURING AGREEMENTS of this Policy.

**D. Self-Insured Retention Amount**

The Self-Insured Retention Amount set forth in Item (4) of the Declarations must first be satisfied by payments by you that have been made with our prior written consent (which consent shall not be unreasonably withheld), or by covered **Emergency Remediation Expense**, before we have any obligation to pay any amounts under the Policy. The Self-Insured Retention Amount must be paid by you and be uninsured and cannot be satisfied by payments made under another insurance policy. In the event that you or the person or entity designated by the **First Named Insured** does not satisfy the Self-Insured Retention Amount, the **First Named Insured** is responsible for the Self-Insured Retention Amount obligation.

Subject to the Limits of Liability set forth in Item (4) of the Declarations, we are liable only for that portion of **Pollution Loss** and **Emergency Remediation Expense** under SECTION I - INSURING AGREEMENTS of this Policy in excess of the Self-Insured Retention Amount for each **Pollution Condition**, if any, set forth in Item (4) of the Declarations for each such coverage.

**Legal Expense** applies to and reduces each applicable Self-Insured Retention Amount set forth in Item (4) of the Declarations and the **Legal Expense** Aggregate Limit of Liability set forth in Item (3)b. of the Declarations.

If you mutually agree with us to use **Mediation** to resolve a **Claim** and the **Claim** is subsequently resolved as a direct consequence of **Mediation**, the Self-Insured Retention Amount applicable to said **Claim** shall be reduced by fifty percent (50%), subject to a maximum reduction of no more than \$25,000. In the event you

owe any portion of the Self-Insured Retention Amount, it shall be paid to us within thirty (30) days following receipt of the executed, full and final release of the **Claim**.

**E. Multiple Insured(s) and Multiple Related Claim(s)**

1. The number of **Insureds** covered by this Policy shall not operate to increase any Limits of Liability or **Legal Expense** set forth in Item (4) and Item (3)b. of the Declarations, or as set forth in SECTION II - SUPPLEMENTAL COVERAGES, notwithstanding any other provision of this Policy.
2. All **Pollution Loss, Emergency Remediation Expense**, and any other coverage afforded under this Policy, including SECTION II – SUPPLEMENTAL COVERAGES, incurred over one or more **Policy Period(s)** and arising out of the same, related, repeated or continuous **Pollution Condition** shall be treated as having resulted from a single **Pollution Condition**, subject to:
  - a. a single Limit of Liability;
  - b. a single Self-Insured Retention Amount; and
  - c. shall not operate to increase any Limits of Liability or **Legal Expense** set forth in Item (4) or Item (3)b. of the Declarations.

The **Pollution Loss, Emergency Remediation Expense** and any other coverage afforded under this Policy, including SECTION II – SUPPLEMENTAL COVERAGES, will be subject to the same Limits of Liability and Self-Insured Retention Amount in effect at the time the **Pollution Condition** was first reported to us, in writing, by you, during the **Policy Period**, or, where applicable, the Extended Reporting Period.

3. Multiple **Claim(s)** against one or more **Insureds** arising out of the same, related, repeated, or continuous **Pollution Condition** shall be treated as a single **Claim**. All such **Claim(s)** whenever made, shall be considered first made on the date the earliest such **Claim(s)** was first made and only the policy providing coverage for the earliest **Claim(s)** shall afford coverage.
4. If more than one coverage applies to the whole or a part of a **Pollution Loss** treated as having resulted from a single **Pollution Condition** pursuant to this section, then only the highest **Pollution Condition** Limit of Liability of the applicable limits set forth in Item (4) of the Declarations applies.
5. If more than one coverage applies to the whole or a part of a **Pollution Loss** treated as having resulted from a single **Pollution Condition** pursuant to this section, then only the highest **Pollution Condition** Self-Insured Retention Amount of the applicable Self-Insured Retention Amounts set forth in Item (4) of the Declarations applies.

**F. Exhaustion of Applicable Limit of Liability**

Once any applicable Limit of Liability set forth in Item (3) or Item (4) of the Declarations, or set forth in SECTION II - SUPPLEMENTAL COVERAGES, has been exhausted, we have no obligation to:

1. defend or continue to defend any **Claim** by paying **Legal Expense** under that applicable Limit of Liability; or
2. pay any **Pollution Loss** or **Emergency Remediation Expense**, SECTION II - SUPPLEMENTAL COVERAGES, or any other amounts under that applicable Limit of Liability.

**SECTION VI – EXTENDED REPORTING PERIOD**

**A. Automatic Extended Reporting Period**

The Automatic Extended Reporting Period only applies to insurance afforded by this Policy under SECTION I – INSURING AGREEMENTS, A. Your Location Coverage, C. Contingent Transportation Coverage, and D. Non-Owned Disposal Site Coverage.

In the event of non-renewal or cancellation of this Policy by the **First Named Insured**, you shall be entitled to a ninety (90) day Automatic Extended Reporting Period for no additional premium, commencing on the last day of the **Policy Period**, subject to the following terms and conditions:

1. The Automatic Extended Reporting Period shall apply to a **Claim** first made against you during the **Policy Period** and reported to us, in writing, by you during the Automatic Extended Reporting Period and otherwise covered by this Policy.
2. The Automatic Extended Reporting Period shall also apply to a **Claim** first made against you during the Automatic Extended Reporting Period, resulting from a **Pollution Condition** first discovered by you and reported to us, in writing, by you during the **Policy Period** and otherwise covered by this Policy. In this case, the **Claim** shall be deemed to have been made against you on the last day of the **Policy Period**.
3. The Automatic Extended Reporting Period shall also apply to a **Pollution Condition** first discovered by you during the **Policy Period** and reported to us, in writing, by you within the Automatic Extended Reporting Period and otherwise covered under this Policy.
4. The ninety (90) day Automatic Extended Reporting Period does not apply where:
  - a. this Policy is terminated for fraud, misrepresentation or non-payment of premium as described in SECTION VIII. CONDITIONS, D. Cancellation, Subsections 2.a., 2.b. and 2.c.;
  - b. you have purchased other insurance to replace this Policy, which provides coverage for a **Claim** and/or **Pollution Condition**; or
  - c. the **Pollution Condition** was first discovered by you during the Automatic Extended Reporting Period.

#### **B. Optional Extended Reporting Period**

The Optional Extended Reporting Period only applies to insurance afforded by this Policy under SECTION I – INSURING AGREEMENTS, A. Your Location Coverage, C. Contingent Transportation Coverage, and D. Non-Owned Disposal Site Coverage.

In the event of non-renewal or cancellation of this Policy by the **First Named Insured**, the **First Named Insured** may purchase an Optional Extended Reporting Period, subject to the following terms and conditions:

1. The Optional Extended Reporting Period becomes effective upon payment of an additional premium. Regardless of the period purchased for the Optional Extended Reporting Period, the additional premium will be not more than one hundred percent (100%) of the total premium of this Policy. The Optional Extended Reporting Period commences on the last day of the **Policy Period** and becomes effective for up to three (3) consecutive three-hundred and sixty-five (365) day periods. The ninety (90) day Additional Reporting Period, if applicable, will be merged into the Optional Extended Reporting Period and is not in addition to the Optional Extended Reporting Period.
2. The **First Named Insured** must request the purchase of the Optional Extended Reporting Period in writing to us within thirty (30) days following the termination of this Policy and pay the premium to us promptly when due.
3. If purchased, the Optional Extended Reporting Period applies to:
  - a. a **Claim** first made against you or by you, as applicable, during the **Policy Period** and

reported by you to us, in writing, during the Optional Extended Reporting Period, and that is otherwise covered by this Policy; or

- b. a **Claim** first made against you during the Optional Extended Reporting Period, resulting from a **Pollution Condition** first discovered by you and reported to us, in writing, by you during the **Policy Period** and otherwise covered by this Policy. In this case, the **Claim** shall be deemed to have been made against you on the last day of the **Policy Period**.
4. Notwithstanding anything to the contrary above, the Optional Extended Reporting Period does not apply where:
- a. this Policy is terminated for fraud, misrepresentation or non-payment of premium or cancelled on any ground set forth in Subsections 2.a., 2.b. 2.c., of SECTION VIII - CONDITIONS, D. Cancellation; or
  - b. you have obtained other insurance from any entity other than us or our affiliate, effective after the end of the **Policy Period**, where such other insurance affords coverage, in whole or in part, for a **Claim** and/or **Pollution Loss**; or
  - c. the **Pollution Condition** was first discovered by you during the Automatic Extended Reporting Period.
5. The Optional Extended Reporting Period shall be non-cancellable. At the commencement of the Optional Extended Reporting Period, the entire premium shall be considered one hundred percent (100%) fully earned.
6. The Limits of Liability applicable to the Optional Extended Reporting Period shall be the Limits of Liability remaining under the terminated policy.
7. The quotation of different terms and conditions by us and the **First Named Insured's** choice not to accept those quoted terms and conditions shall not be construed as non-renewal of this Policy.

## SECTION VII - REPORTING, DEFENSE, SETTLEMENT AND COOPERATION

### A. Admission of Liability and Recommended Settlement

As a condition precedent to the coverage hereunder:

You shall not admit liability with respect to any **Claim** without our prior written consent.

If we recommend a settlement of a **Claim**:

- 1. for an amount within the Self-Insured Retention Amount, and you refuse to settle for such recommended amount, we shall not be liable for any **Pollution Loss**, and any other coverage afforded by endorsement; or
- 2. for a total amount in excess of the Self-Insured Retention Amount, and you refuse to settle for such recommended amount, our liability for **Pollution Loss**, and any other coverage afforded by endorsement, shall be limited to that portion of such recommended amount, plus the **Legal Expense** incurred as of the date we recommended such settlement amount, which exceeds the Self-Insured Retention Amount, but falls at or within the Limits of Liability.

### B. Defense

We have the right and duty to defend any **Claim** against you seeking **Pollution Loss** to which this insurance applies, subject to satisfaction of the Self-Insured Retention Amount, even if any of the allegations against

you are groundless, false or fraudulent. We shall have the right, but not the duty, to defend you against any **Claim** for **Pollution Loss** where the Self-Insured Retention Amount has not yet been satisfied. We shall also have the right to select counsel to defend you in connection with any **Pollution Condition** covered under this Policy. If we exercise such rights set forth above, you must promptly reimburse us for any payments made by us within the Self-Insured Retention Amount, if any. However, we have no duty to defend any **Claim** against you to which this insurance does not apply.

### C. Duties

As a condition precedent to the coverage hereunder:

1. You shall notify us of each of the following, as soon as practicable:
  - a. a **Claim**;
  - b. **Bodily Injury** or **Property Damage** which may result in a **Claim**;
  - c. a **Pollution Condition**; and
  - d. **Remediation Expense**.
2. You shall forward to us, or to any of our authorized agents, all demands, notices, summons, legal papers or orders received by you or your representative as soon as practicable.
3. You shall provide to us, whether orally or in writing, notice of the particulars including the time, place and circumstances of the **Claim**, **Pollution Condition**, **Bodily Injury**, **Property Damage** or **Remediation Expense**, along with the names and addresses of any injured persons or witnesses. In the event of oral notice, you shall furnish to us a written notice of such particulars as soon as practicable.
4. You shall cooperate with us with respect to any coverage sought under this Policy. Upon our request, you shall submit to examination under oath by a representative of us.
5. You shall attend hearings, depositions and trials and assist in effecting settlement, securing and giving evidence, obtaining the attendance of witnesses and otherwise cooperate in the investigation or defense of a **Claim**. You shall further cooperate with us and do whatever is necessary to secure and effect any rights of indemnity, contribution apportionment or subrogation which you or we may have.

## SECTION VIII – CONDITIONS

### A. Action Against Us

No action by a third-party to this Policy shall lie against us unless, as a condition precedent thereto:

1. you have fully complied with all of the terms of this Policy; and
2. the amount you are obligated to pay has been finally determined either by judgment against you after actual trial or by written agreement of you, the claimant and us.

Any person or entity that has secured such judgment or entered into such written contract or agreement shall thereafter be entitled to recover under this Policy to the extent of the insurance afforded by this Policy. No person or entity shall have any right under this Policy to join us as a party to any action against you to determine your liability, nor shall we be brought into such action by you or your legal representative.

### B. Assignment

This Policy cannot be assigned without our prior written consent. Such consent shall not be unreasonably withheld or delayed.

**C. Bankruptcy or Insolvency**

Your bankruptcy or insolvency, or that of your estate, shall not relieve us of any of our obligations under this Policy.

**D. Cancellation**

The following apply to this Policy:

**1. Cancellation by the First Named Insured:**

This Policy may be canceled by the **First Named Insured** by mailing to us written notice stating when thereafter the cancellation shall be effective. The mailing of such notice must be sent certified mail, return receipt requested, or by electronic mail. The effective date and time of cancellation stated in the written notice shall become the end of the **Policy Period**.

The Minimum Earned Premium for this Policy shall be the percentage stated in Item (6) of the Declarations of the total premium for this Policy. This means that such percentage of the total premium for this Policy is fully earned by us on the inception of the **Policy Period**. The **First Named Insured** is not entitled to any return of the Minimum Earned Premium upon cancellation.

If the Minimum Earned Premium is less than one hundred percent (100%) of the total premium for this Policy, and the **First Named Insured** cancels this Policy, then the amount of premium returnable after the minimum premium earned is retained by us shall be computed in accordance with the customary short rate table and procedure.

**2. Cancellation by Us:**

This Policy may be canceled by us by mailing to the **First Named Insured**, at the address shown in Item (1) of the Declarations, written notice stating when not less than ninety (90) days thereafter [or fifteen (15) days for non-payment of premium] such cancellation shall be effective. The mailing of such notice shall be sufficient proof of notice of cancellation. The effective date and time of cancellation stated in the written notice shall become the end of the **Policy Period**.

We may cancel this Policy at any time, but only for the following reasons:

- a. you made a material misrepresentation which affects our assessment of the risks insured by this Policy;
- b. you breached or failed to comply with Policy terms, conditions, contractual duties, or any of your obligations under this Policy or at law; or
- c. you failed to pay the premium, the Self-Insured Retention Amount or any Deductible.

If we cancel this Policy for reasons set forth in Subsections D.2.a. or D.2.b. referenced immediately above, then the amount of premium returnable to the **First Named Insured** is computed on a pro-rata basis. If we cancel this Policy for reasons set forth in Subsection D.2.c. above, there shall be no return premium.

In the event of cancellation by us for any ground referred to in Subsection D.2.b. referenced immediately above, you shall have ninety (90) days from the date of notice of cancellation to remedy each breach and each failure that is a ground for cancellation, but only as to each and every breach and failure that are capable of being remedied. If your remedial efforts are completed within such

ninety (90) day period and are satisfactory to us, we shall rescind the Notice of Cancellation with a written confirmation to the **First Named Insured**.

3. The following provisions also apply to Subsections D.1. and D.2. above:

- a. The premium adjustment shall occur as soon as practicable after cancellation becomes effective; however, payment of unearned premium is not a condition of cancellation by us.
- b. If a **Claim** for **Pollution Loss** is made against you, a **Pollution Condition** is discovered or coverage is otherwise requested from us by you, during the **Policy Period**, or, where applicable, the Extended Reporting Period, then the premium shall be considered one hundred percent (100%) earned, and the **First Named Insured** is not entitled to any return of premium upon cancellation.

#### **E. Changes**

Notice to any agent or knowledge possessed by any agent or by any other person shall not constitute a waiver or a change in any part of this Policy or estop us from asserting any right under the terms of this Policy. The terms and conditions of this Policy cannot be waived or changed, except by endorsement issued by us to form a part of this Policy.

#### **F. Choice of Law and Jurisdiction and Venue**

All matters arising from or related to this Policy, including, without limitation, questions related to the validity, interpretation, performance, and enforcement of this Policy, and all forms of contractual, tort and statutory claims, shall be determined in accordance with the law and practice of the State of New York (notwithstanding New York's conflicts of law rules).

It is agreed that, in the event of any dispute arising from or related to this Policy, including, without limitation, questions related to the validity, interpretation, performance, and enforcement of this Policy, and all forms of contractual, tort and statutory claims, we and the **Insured** will submit to the jurisdiction of any court (state or federal) in New York and will comply with all the requirements necessary to give such court jurisdiction. Nothing in this clause constitutes or should be understood to constitute a waiver of the right of us or the **Insured** to remove an action to a United States District Court, regardless of the jurisdiction in which an action is commenced.

#### **G. Declarations and Representations**

By acceptance of this Policy, you agree that:

1. the statements, declarations and information contained in the Application for this Policy, including any other supplemental materials submitted to us as part of the Application process, are true, correct and complete;
2. all such statements, declarations, supplemental materials and information are material to our underwriting of this Policy;
3. this Policy has been issued by us in reliance upon the truth, correctness and completeness of such statements, declarations, supplemental materials and information, and
4. the Application for this Policy, including all statements, declarations, information and other supplemental materials submitted to us as part of the Application process, are incorporated in and made part of this Policy.

#### **H. Headings**

The descriptions in the headings of this Policy are solely for convenience and form no part of the terms and

conditions of this Policy.

**I. Inspection and Audit**

We shall be permitted, but not obligated, to examine, audit, monitor and inspect on a continuing basis any of your books, records, services, and your operations at **Your Location**, at any time, as far as they relate to the subject matter of this Policy.

Our right to examine, audit, monitor and make inspections, or the actual undertaking thereof, or any report thereon, does not constitute an undertaking to determine or warrant that property or operations are safe, healthful or conform to acceptable engineering practice, or are in compliance with any law, rule or regulation. Any inspections shall be coordinated through the broker or agent of the **First Named Insured**.

**J. Other Insurance**

Unless expressly stated to the contrary, this Policy is excess over the Self-Insured Retention Amount and any other valid and collectible insurance whether such other insurance is stated to be primary, contributory, excess, contingent or otherwise, unless such other insurance is written specifically excess of this Policy by reference in such other policy to the Policy Number in this Policy's Declarations. When any other insurance has a duty to defend a **Claim**, we shall have no duty to defend the **Claim**; if the other insurance does not defend the **Claim**, we shall have the right, but not the duty to defend the **Claim**.

**K. Severability**

Except with respect to the Limits of Liability, the Self-Insured Retention Amount and any rights or duties specifically assigned in this Policy to the **First Named Insured**, this insurance applies:

1. as if each **Insured** were the only **Insured**; and
2. separately to each **Insured** against whom a **Claim** is made.

Any misrepresentation, act or omission that is in violation of a term, duty or condition under this Policy by one **Insured** shall not by itself affect coverage for another **Insured** under this Policy. However, this exception shall not apply to the **Insured** who is a parent, subsidiary or affiliate of the **Insured** which committed the misrepresentation, act or omission referenced above.

**L. Sole Agent**

The **First Named Insured** shall act on behalf of all **Insureds** for the payment or return of premium, receipt and acceptance of any endorsement issued to form a part of this Policy, giving and receiving notice of cancellation or non-renewal, any policy buy back and the exercise of the rights provided in SECTION VI – EXTENDED REPORTING PERIOD.

**M. Subrogation and Recoupment**

In the event of any payment under this Policy, we shall have the right to seek recoupment against you in the event we determine no coverage exists and/or be subrogated to all your rights of recovery against any person or entity, and you shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights.

Any recovery as a result of subrogation proceedings under this Policy shall accrue first to you to the extent of your payments in excess of the Limits of Liability of this Policy; then to us to the extent of our payment under this Policy; and then to you to the extent of your payment of the Self-Insured Retention Amount. Expenses incurred in such subrogation proceedings shall be apportioned among the interested parties in the recovery in the proportion that each interested party's share in the recovery bears to the total recovery amount.



However, we waive our right of recovery against any person or entity if and to the extent you agree to waive your right of recovery against such person or entity in a written contract or agreement signed by you prior to:

1. a **Claim** or **Pollution Loss**; or
2. the first commencement of a **Pollution Condition** out of which the **Claim** or request for **Pollution Loss** or **Emergency Remediation Expense** arises under SECTION I - INSURING AGREEMENTS.

**N. Territory**

This Policy only applies to a **Claim** that is first brought, and at all times maintained, within the United States, its territories and possessions, or in Canada.

This Policy does not apply to any **Claim** for which payment would be in violation of the laws of the United States including, but not limited to, United States economic or trade sanction laws or export control laws administered by the United States Treasury, State, and Commerce Departments, such as the economic and trade sanctions administered by the United States Treasury Office of Foreign Assets Control.