

Facts

According to the information, in 1964 the United States Army closed its arsenal located in Benicia, California and the site was sold to the insured, City of Benicia for \$6 million. Subsequently, a private company, Benicia Industries operated an industrial facility at the site under lease from the City. The site became a Formerly Used Defense Site and the United States Army, through its Army Corps. of Engineers ("USACE") investigated and performed remediation at the site until its funding terminated.

The California Department of Toxic Substance Control ("DTSC") issued an order of Imminent and Substantial Endangerment and Remedial Order to the developer of the property, Granite Management Corp, Pacific Bay Properties, etc..The developers remediated the site after entering into a settlement agreement and consent order in which the USACE agreed to pay \$50 million for the clean-up of the Tourtelot property located at the site.

Subsequently, the DTSC and the Regional Water Quality Control Board ("RWQCB") found that the USACE did not perform adequate clean-up of the residual portions of the site and may have caused releases of hazardous substances to the environment. The additional contamination that was not remediated included, munition and explosives of concern ("MEC") and munitions constituents ("MC").

Also, when the City leased the site to Benicia Industries, it took possession of the storm and sewer drains. It appears that these drains discharged industrial wastes directly into the Carquinez Strait. Based on a review of the site various hazardous substances have been found at the location, including solvents, PCE, TCE, heavy metals, acetone, methyl ethyl ketene (MEK), TNT, acids, oils, fuels, cyanide, silver, lead, and chromium.

A draft remedial action order was submitted to the USACE for investigation activities to be performed at the site.

In September 2010, the City received a letter from the DTSC advising that it must be involved in the investigations and clean-up of the arsenal due to its ownership status. It also indicated that the USACE believes that it is concluded with the investigation and clean-up. Thus, the DTSC is seeking the City's involvement to complete the investigation and clean-up required.

Policy

Landmark policy SMP 800-1505 provides general liability coverage effective March 3, 1981 to March 3, 1982. The policy maintains a \$500,000 limit, with a \$2,500 deductible per claim. Attached, please find excerpts of the policy for your convenience. We ask that you review your copy of the complete policy for all of the policy terms, conditions and exclusions and provisions.

Discussion

Landmark policy SMP 800-1505 contains a Municipality Limitation Endorsement exclusion, which precludes coverage for property damage directly or indirectly caused by pollution or contamination. It additionally bars coverage for the cost of removing, or cleaning up polluting or contaminating substances. It is alleged that the City must investigate and clean-up the arsenal site in Benicia, California. Based on the facts of this matter and the above-referenced exclusion of Landmark policy SMP 800-1505, there is no coverage for this claim.

Furthermore, the insuring agreement and definitions sections of the policy contain language which may further preclude coverage under the policy.

There may have been no "property damage," as defined by the policy. If there was no "property damage" there would be no coverage for the claim. There must be an "occurrence" as defined by the policy that took place during the policy period. To the extent there was no "property damage" as defined, or if the "property damage" was not the result of an "occurrence" that took place during the policy period, there would be no coverage for the claim.

Landmark, under policy SMP 800-1505 reserves the right to deny coverage based on the insuring agreement and definitions.

Additionally, the policy contains exclusion (k), which precludes coverage for property damage to property owned by the insured. In this case, it appears that the insured, City of Benicia owned the site of the alleged contamination. To the extent that any of the alleged property damaged is solely to property owned by the City of Benicia, there is no coverage. Landmark reserves its right to deny coverage based on the above exclusion under policy SMP 800-1505.

If you believe that coverage for all or part of this claim should not have been denied, you may have the matter reviewed by the California Department of Insurance at the following address and telephone numbers:

California Department of Insurance
Consumer Services Division
Claims Service Bureau
300 South Spring Street
Los Angeles, CA 90013

(213) 897 - 8921 (outside California)
(800) 927 - HELP (inside California)
(800) 482 4833 (TDD Only)

Chartis' coverage determination is based on the information presently available to us. This letter is not, and should not be construed as, a waiver of any terms, conditions, exclusions or other provisions of the Landmark policy, or any other policies of insurance issued by Landmark insurers or any of their affiliates. The Landmark insurer expressly reserves all of its rights under the Landmark Policy, including the right to assert additional defenses to any claims for coverage, if subsequent information indicates that such action is warranted.

Should you have any additional information that you feel would either cause us to review our position or would assist us in our investigation or determination, we ask that you advise us as soon as possible. In closing, allow me to reiterate that we value your client as a customer and encourage you to contact us should you have any questions or concerns regarding the contents of this letter. Thank you for your cooperation in this matter.

Yours truly,
Debra Nelson

Debra K. Nelson
Environmental Casualty Claim Department
Chartis

ENDORSEMENT

This endorsement, effective **12.01** A. M. **March 3, 1981** forms a part of
policy No. **SMP 8001505** issued to **City of Benicia**
by **Landmark Insurance Company**

MUNICIPALITY LIMITATION ENDORSEMENT

IN CONSIDERATION OF THE PREMIUM CHARGED, IT IS HEREBY UNDERSTOOD AND AGREED THAT SUCH INSURANCE AS IS AFFORDED BY THIS POLICY DOES NOT APPLY TO:

1. PERSONAL INJURIES OR PROPERTY DAMAGE ARISING OUT OF MOB ACTION, RIOT OR CIVIL COMMOTION, OR OUT OF ANY ACT OR OMISSION IN CONNECTION WITH THE PREVENTION OR SUPPRESSION OF ANY OF THE FOREGOING;
2. ANY LIABILITY ARISING OUT OF INVERSE CONDEMNATION PROCEEDINGS INSTITUTED OR COMPLETED BY THE NAMED INSURED.
3. ANY LIABILITY ARISING OUT OF OR CONTRIBUTED TO BY ANY COMPLETE OR PARTIAL FAILURE TO SUPPLY OR PROVIDE WATER, ELECTRICITY OR GAS.
4. PERSONAL INJURIES OR PROPERTY DAMAGE OR LOSS OF, DAMAGE TO, OR LOSS OF USE OF PROPERTY DIRECTLY OR INDIRECTLY CAUSED BY SEEPAGE, POLLUTION OR CONTAMINATION, NOR THE COST OF REMOVING, NULLIFYING OR CLEANING UP, SEEPING, POLLUTING OR CONTAMINATING SUBSTANCES, NOR ANY RESULTING FINES, PENALTIES, PUNITIVE OR EXEMPLARY DAMAGES.

End't #3

Authorized Representative

Exclusions Con't

[This insurance does not apply:]

Exclusion

(k) to property damage to

(1) property owned or occupied by or rented to the insured,

(2) property used by the insured, or

(3) property in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control; but parts (2) and (3) of this exclusion do not apply with respect to liability under a written sidetrack agreement and part (3) of this exclusion does not apply with respect to property damage (other than elevators) arising out of the use of an elevator at the premises owned by, rented to or controlled by the named insured.

Insuring Agreement

**I. COVERAGE A—BODILY INJURY LIABILITY
COVERAGE B—PROPERTY DAMAGE LIABILITY**

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

- A. bodily injury or
- B. property damage

to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

Definitions

Property Damage – means

1. physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or
2. loss of use of tangible property which has not been physically injured or destroyed providing such loss of use is caused by an occurrence during the policy period.

Occurrence - As respects Coverages A and B under the Insuring Agreement of this policy, "occurrence" means an accident, or event including continuous or repeated exposure to conditions, which results during the policy term in bodily injury or property damage neither expected nor intended from the standpoint of the insured;

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