

October 15, 2012

Via Email: Debra.Nelson@chartisinsurance.com

Debra Nelson
Environmental Casualty Claim Department
Chartis Insurance
P.O. Box 26067
Shawnee Mission, KS 66225

Re: Insured: City of Benicia
Claimant: Department of Toxic Substance Control
Policy: Landmark Insurance Company Policy No. SMP 800-1547
Policy Term: March 3, 1982 - March 3, 1985
Site: Benicia Arsenal
Location: Benicia, CA
Your Lead Claim Number: 182-026566
Claim-set: 700000257802

Dear Ms. Nelson:

This responds to your letter of September 5, 2012 regarding the City of Benicia's claim under Landmark Insurance Company's Policy Number SMP 800-1547 (the "Policy"). Your letter mistakenly denies coverage for the City's claim.

First, you state "Landmark policy SMP 800-1547 contains a pollution exclusion, which precludes coverage for property damage caused by pollution or contamination, with certain exceptions." That is incorrect. The pollution exclusion in the Policy was deleted by an endorsement entitled "Pollution Coverage Amendment" effective March 3, 1982. The City was expressly assured of pollution coverage under this policy. In a July 19, 1982 letter to Ronald E. Peterson, Michael R. Smith wrote "The second endorsement deletes Exclusion No. 4 on Endorsement No. 3, thereby providing the City with Pollution coverage." The exclusion, endorsement, and July 19, 1982 letter are attached to this letter.

Second, you state that the facts underlying Benicia's claim may not constitute an "occurrence" or "property damage" as defined in the Policy. As you know, these terms are interpreted broadly under California law, and any ambiguities in the Policy will be construed against the insurer. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287; *Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263.)

The Policy defines an occurrence as “an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.” In the context of liability insurance, an accident is defined under California law as “an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause.” (*Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302.) The contamination at issue here was unexpected, unforeseen, and undesigned, and was therefore an “accident” that triggered coverage.

The Policy defines property damage as “(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 from, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.” Here, the Imminent and Substantial Endangerment and Remedial Order alleges that the Benicia Arsenal site has been physically injured through soil and groundwater contamination, risk of unexploded ordnance, and discharge of hazardous materials. The California Supreme Court in *State of California v. Continental Ins. Co.*, 55 Cal.4th 186 (2012) recently described a slow discharge of hazardous waste like that alleged at the Benicia Arsenal site as both “property damage” and an “occurrence.”

As reflected in the “Facts” section of your letter, we have provided you with substantial documentation of the situation. That documentation is more than sufficient to establish that the claim results from “property damage” and an “occurrence.” Thus, the claim gives rise to coverage under the policy.

To trigger the duty to defend, “the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*.” (*Delgado, supra*, citing *Montrose, supra*.) This claim gives rise to a duty to defend because it may fall within policy coverage. In your letter you wrote that Landmark has no present obligation to defend the City because the policy only provides for a defense against “suits,” and DTSC’s administrative action is not a suit. Even if there is not yet a “suit,” Landmark will have a duty to defend the City when DTSC commences a civil action by filing a complaint.

The California Supreme Court has pointed out that “an insured’s early intervention in a dispute outside the civil action context may reduce any indemnity for which the insurer is ultimately held liable.” (*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 883.) For that reason, even if the administrative action is not yet a “suit,” Chartis Insurance has the opportunity now to help direct the outcome and minimize its loss. If the matter here is not otherwise resolved to the satisfaction of DTSC, a civil action is imminent.

Please let us know if Chartis will participate in a resolution short of formal litigation. We look forward to cooperating productively with you in resolving this matter.

Sincerely,
ERS Corp



Mark O'Brien
CEO

Enclosures

cc: Heather McLaughlin, Esq.

Marsh & McLennan

Marsh & McLennan, Incorporated
Three Embarcadero Center
Post Office Box 3880
San Francisco, California 94119-3880
415-393-5000

July 19, 1982

Mr. Ronald E. Peterson
Director of Finance
City of Benicia
250 East "L" Street
Benicia, CA 94512

POLLUTION COVERAGE

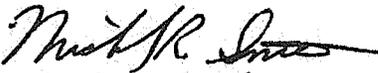
Dear Ron:

Enclosed please find the following items:

1. A photocopy of Endorsement No. 3 to your Multi-Peril Package Policy No. SMP8001547.
2. Two endorsements to the policy mentioned above. One, the change endorsement, simply corrects the policy period. The second endorsement deletes Exclusion No. 4 on Endorsement No. 3, thereby providing the City with Pollution coverage.
3. Item 3 is Endorsement No. 2 to your Excess Liability Policy No. TUL675249 which causes the policy to conform to the conditions and coverages in the underlying liability policy.

Ron, should you have any questions or comments concerning the enclosed documents, please advise.

Sincerely,


Michael R. Smith

MRS328/sdj/5.36
Enclosure

ENDORSEMENT

This endorsement, effective **12:01 A.** M. **MARCH 3, 1982** forms a part of

policy No. **SEP 800 15 47** issued to **CITY OF BENEZIA**
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.

↑
DELETED BY ENDORSEMENT, SEE CR DATED 7/19/1982


Authorized Representative

ENDORSEMENT NO. 3



CHANGE ENDORSEMENT

MP 12 01 (Ed. 02 79)

THIS ENDORSEMENT FORMS A PART OF THE POLICY NUMBERED BELOW:

ENDORSEMENT EFFECTIVE DATE MARCH 3, 1982	POLICY NUMBER SMP 890 15 47	TERM 1 YRS	FROM 3-3-82	TO 3-3-85
COMPANY LANDMARK INSURANCE COMPANY		INSURED'S NAME AND MAILING ADDRESS CITY OF BENICIA 250 EAST "L" STREET BENICIA, CALIFORNIA 94510		
		AUTHORIZED REPRESENTATIVE'S NAME AND MAILING ADDRESS MARSH & McLENNAN, INC. P. O. BOX 3880 SAN FRANCISCO, CALIFORNIA 94119		
		PRODUCER CODE		
POLICY CHANGES				
1. POLICY EXPIRATION DATE IS CORRECTED TO READ: MARCH 3, 1985				
2. PER ATTACHED FORM 1803.				
SPECIFY FORM NOS. AND EDITION DATES AFFECTED BY POLICY CHANGES:				

SECTION I—PROPERTY COVERAGE

Coverage Description	Loc. No.	Bldg. No.	LIMITS OF LIABILITY		RATES		PREMIUMS		<input type="checkbox"/> Add'l <input type="checkbox"/> Return
			Previous	New	Previous	New	Previous	New	
			\$	\$			\$	\$	\$
			\$	\$			\$	\$	\$
			\$	\$			\$	\$	\$
			\$	\$			\$	\$	\$

SECTION II—LIABILITY COVERAGE

COVERAGE	LIMITS OF LIABILITY		PREMIUMS		<input type="checkbox"/> Add'l <input type="checkbox"/> Return
	Previous	New	Previous	New	
SMP Liability Insurance Form: Bodily Injury and Property Damage Liability (Combined Single Limit)	\$ ea. Occurrence \$ Aggregate	\$ ea. Occurrence \$ Aggregate	\$	\$	\$
<input type="checkbox"/> Premises Medical Payments SMP Liability Insurance Form	\$ ea. Person	\$ ea. Person	\$	\$	\$
<input type="checkbox"/> Medical Payments Coverage Part	\$ ea. Accident	\$ ea. Accident	\$	\$	\$
<input type="checkbox"/> Forms other than SMP Liability Insurance Form Specify Coverage Part	BODILY INJURY LIABILITY				
	\$ ea. Occurrence \$ Aggregate	\$ ea. Occurrence \$ Aggregate	\$	\$	\$
	PROPERTY DAMAGE LIABILITY				
	\$ ea. Occurrence \$ Aggregate	\$ ea. Occurrence \$ Aggregate	\$	\$	\$
<input type="checkbox"/> Revised Dual Limits:					

INSTALLMENT PAYMENT PREMIUMS

	Previous Installments	Additional Premium	Return Premium	Revised Installments
Dates of subsequent installments, 2.	\$	\$	\$	\$
if payable in annual installments: 3.	\$	\$	\$	\$
PREMIUM DUE AT EFFECTIVE DATE OF ENDORSEMENT:	\$	\$	\$	\$
Total for remainder of policy term:	\$	\$	\$	\$

MP 12 01 (Ed. 02 79) MARSH & McLENNAN, INC. July 13, 1982 GAT/lac

Agency By

Robert J. Olson

ENDORSEMENT

This endorsement, effective 12:01 A. M. MARCH 3, 1982 forms a part of
policy No. SMP 800 15 47 issued to CITY OF BENICIA
by LANDMARK INSURANCE COMPANY

POLLUTION COVERAGE AMENDMENT

IT IS AGREED THAT EXCLUSION #4 ON ENDORSEMENT #3 IS
HEREBY DELETED.

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN
UNCHANGED.

July 13, 1982 GAT/lae

Authorized Representative

ENDORSEMENT
TRANSPORT INDEMNITY COMPANY
COMPAC INSURANCE COMPANY

END. NO.	POLICY NUMBER	INSURED	END. EFFECTIVE DATE
2	TUL 675249	CITY OF BENICIA	3-3-81 (12:01 A.M.)

(REVISED)

CONTAMINATION OR POLLUTION LIMITATION

IT IS AGREED THAT THIS POLICY DOES NOT APPLY TO ANY LOSS OR LIABILITY ARISING OUT OF CONTAMINATION OR POLLUTION EXCEPT INSOFAR AS COVERAGE IS AVAILABLE TO THE INSURED UNDER THE UNDERLYING INSURANCE SET FORTH IN THE SCHEDULE OF UNDERLYING INSURANCE.

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, or limitations of the policy to which this endorsement is attached other than as above stated.

This endorsement when countersigned by a duly authorized representative of the Company shall be valid and form part of the above mentioned policy.

7/7/82
THP/ib

TRANSPORT INDEMNITY COMPANY
 COMPAC INSURANCE COMPANY