

# 2019 K-12 & CCC CONSTRUCTION RISK SUMMIT

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*THE STRUGGLE OF RISK IS REAL*

CASE STUDIES OF CONSTRUCTION DEFECT CLAIMS





# “So What Could Happen?”



# Case Study 1

- **Project**
- New two-story wood frame construction with framing near completion. Roof is partially sheeted but not covered or otherwise protected.



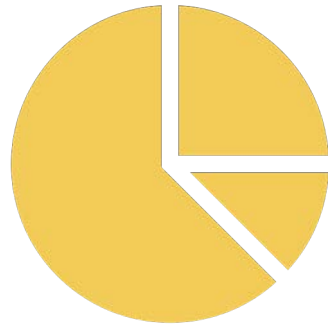
# Facts

- Contractor leaves structural OSB sheathing and structural lumber stacked on site without cribbing underneath to set it up off of the ground
- Severe storm activity due to Atmospheric River caused water to intrude into constructed attic vault saturating insulation installed prior to completion of roof sheathing. Flooding of grounds oversaturated the stacked lumber, OSB sheathing with water and mud as it was not covered or otherwise protected
- Roof design called for only 2 feet of space between insulation and bottom of roof ridge, not allowing for sufficient air to vent ceiling vault should water enter the vault creating risk of excessive condensate accumulation and development of mold



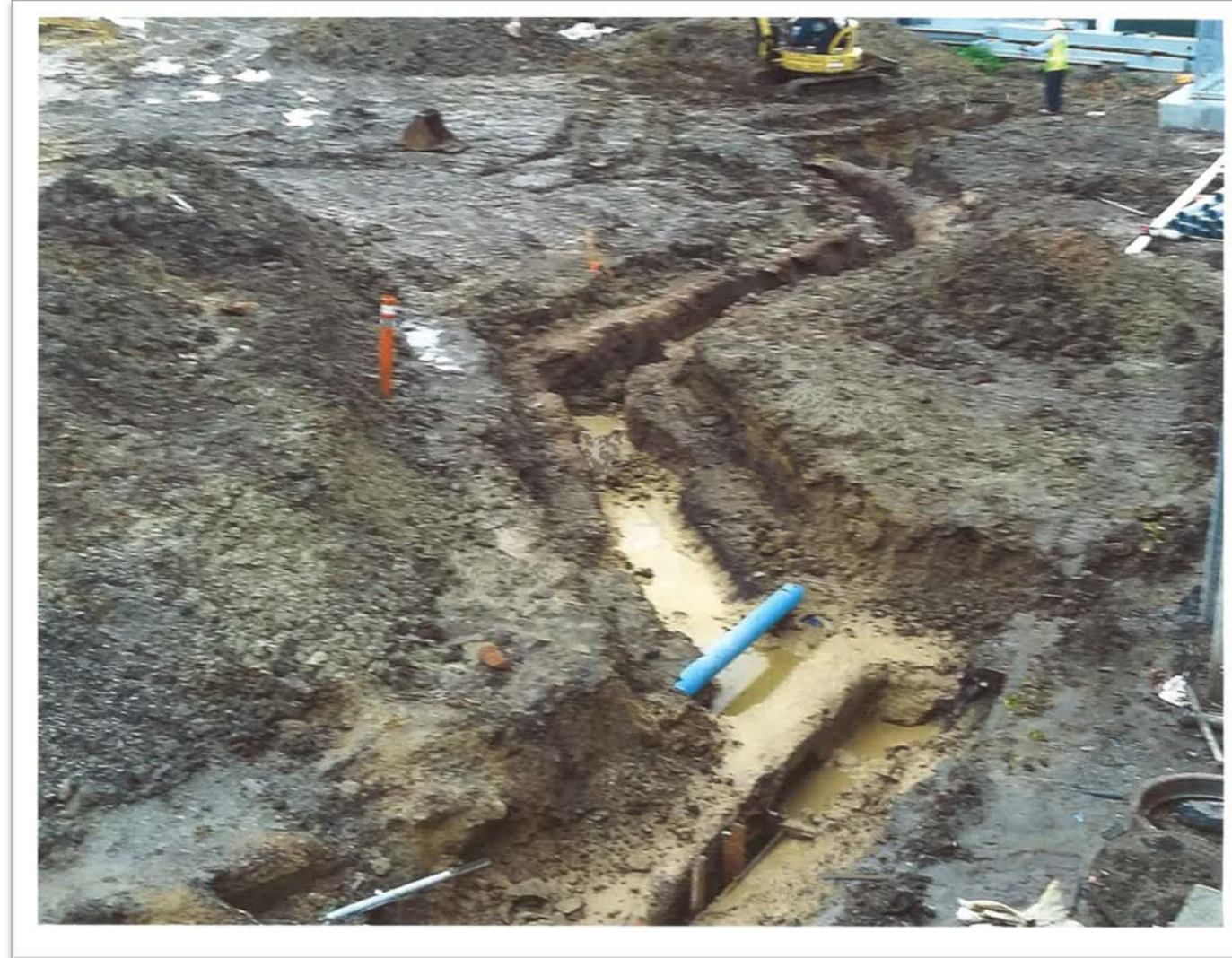
# Facts

- Contractor returns to site and completes the framing utilizing oversaturated sheathing and lumber. Then contractor installs roof and exterior building wrap
- Several weeks later mold is discovered in the enclosed ceiling vault when it begins to manifest outside of the top plates prior to installation of the drywall





# Oversaturated Trenches At Project Site





# Repair To Oversaturated Project Site



# Damages

- District incurred \$880,000 in mold remediation and \$1,600,000 in property damage. District tenders loss to all entities and their carriers. All deny coverage or liability as follows:





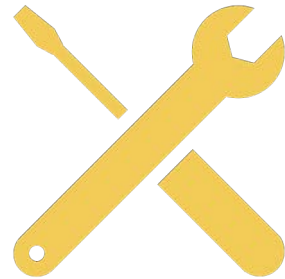
# Builders Risk

- Cost of Making Good
- Fungus, Wet Rot, Dry Rot and Bacteria Exclusion



# Builders Risk Exclusions

- **Perils Excluded:**
- This policy shall not pay for loss or damage caused by, resulting from, contributed to or made worse by any of the following excluded perils, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical loss or damage insured by this policy, except as specifically allowed below:



## B. Cost of Making Good

- **(1)** Faulty or defective workmanship, supplies or material;
- **(2)** Fault, defect, error, deficiency or omission in design, plan or specification;
- **(3)** Wear and Tear, gradual deterioration, inherent vice, latent defect, corrosion, rust, dampness or dryness of the atmosphere;
- Unless direct physical loss or damage by an insured peril ensures and then this Policy will cover for such ensuing loss or damage only.
- For the purpose of this Policy and not merely this exclusion, the property insured, or any portion thereof, shall not be regarded as damaged solely by virtue of the existence of any condition stated under **(1)**, **(2)** or **(3)** above.



# H. Fungus Exclusion

Any form of fungus, however caused, including but not limited to yeast, mold, mildew, smut, mushrooms, spores or any substance, product or by product by, released by or arising as a consequence of the past or concurrent existence of fungus. Any Expense to remediate the presence or effects of any of the foregoing shall also be excluded.



# Commercial General Liability

- Total Pollution Exclusion
- Mold Exclusion
- Damage to Property - Exclusion j



# CG 0001 04 13

- **J. Damage to property**

“Property damage” to:

- **(5)** That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operation, if the “Property damage” arises out of those operation;

**Or**

- **(6)** That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it...
- Paragraph **(6)** of this exclusion does not apply to “property damage” included in the “products completed operations Hazard”.



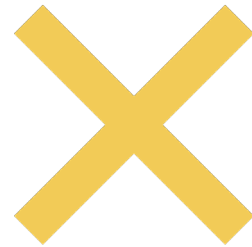
# Contractors Pollution Liability

- Excess - Policy shall not apply if there is other Valid and Collectible Insurance, then the policy will be excess of any other policy.



# Design Professional's Errors & Omissions

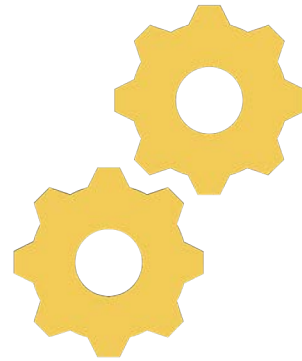
- 100% Construction related, no design flaws, no Breach of Contract
- Refusal to Voluntarily Participate





# Resolution

- District retains counsel who files Motion for Declaratory Relief



# Findings

- Contractor Pollution Liability triggered as BR and CGL exclusions rendered those coverages as uncollectible. Also court noted that the policy provided for a \$1,000,000 Sublimit for Mold and Fungus
- Designing an attic vault with only 2 feet of clearance from the top of the ridge to the “floor” of the attic and then sloping down to roof edge may have not provided sufficient volume of air in attic cavity to allow for proper evaporation. Design Flaw may have been a concurrent factor in mold development and District’s case should proceed as to Architect



# Settled:

## Architect E&O

- Indemnity \$1,550,000
- Expense: \$205,000
- Total: \$1,755,000

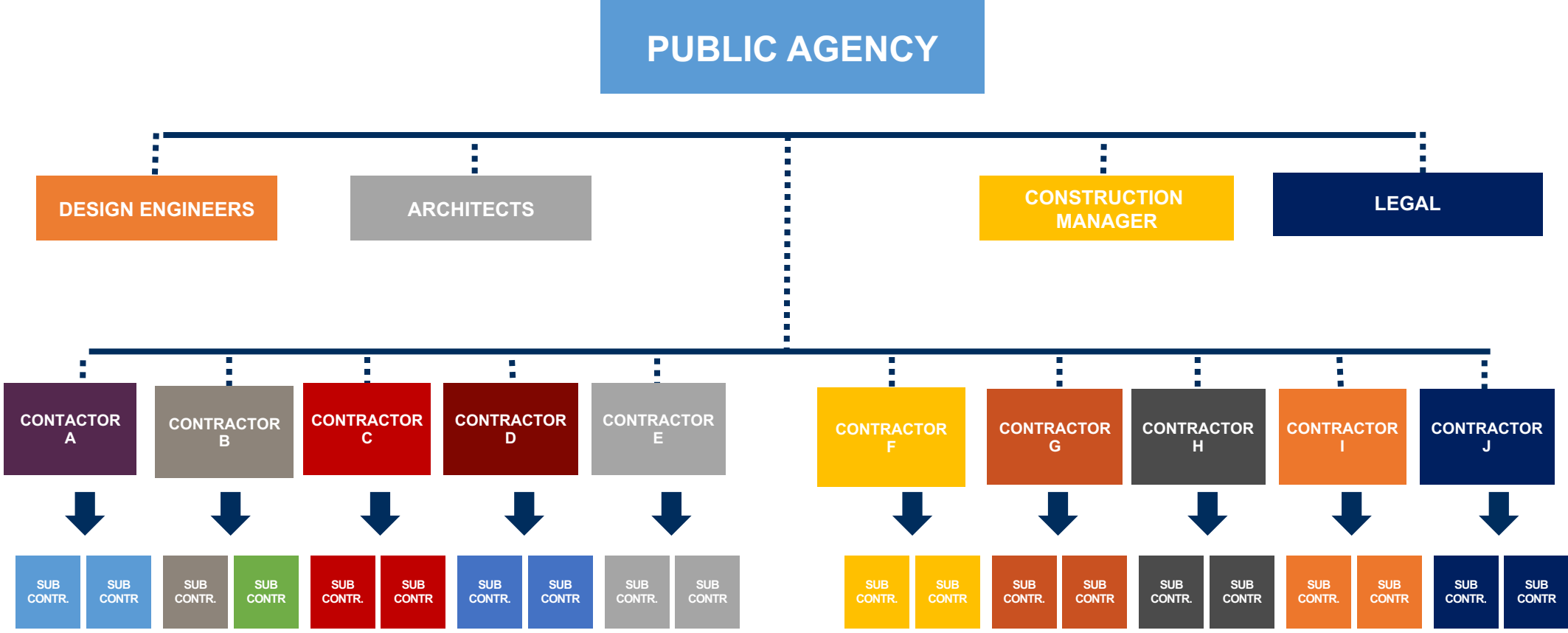
## Pollution Policy

- Indemnity \$866,666
- Expense: \$202,969
- Total: \$1,069,635

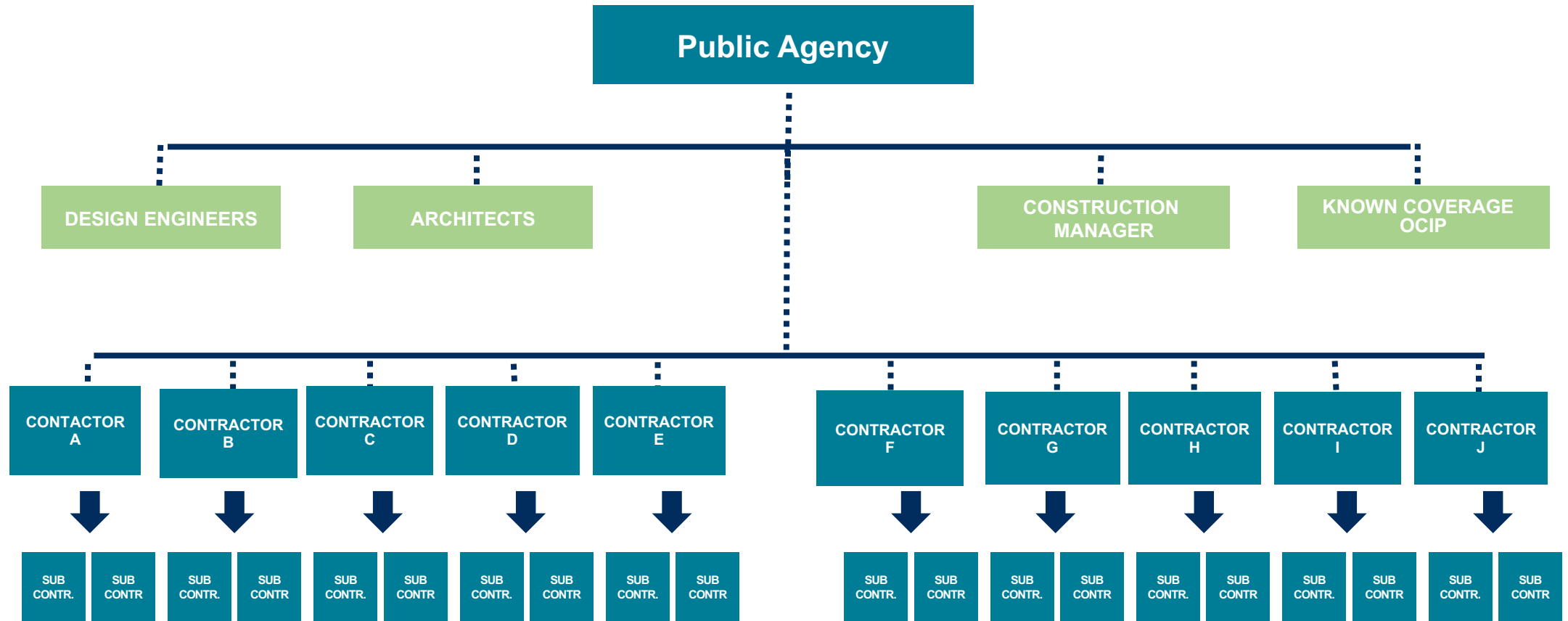




# Traditional Insurance Model



# OCIP Insurance Model



# Policies That Make Up the OCIP Program

- Coverage generally includes
  - Worker’s Compensation
  - Commercial General Liability.
- Can also include but not limited to
  - Builders Risk
  - Contractors Pollution Liability
  - Owners Protective Professional Indemnity
- Project Specific or “Rolling Wrap”
- Contractors must be enrolled to be covered
- Covers Bodily Injury /Property Damage Claims that occur on the project
- Construction Defect claims of Public Agency



# Case Study 2

- **Project**
- Two-story Administration and Classroom building, parking lot and decorative landscaping.



# Facts

- After landscaping completed but prior to project completion, District experiences severely cracked sidewalks adjacent to building, lifting of concrete walkways such that doors opening to exterior cannot be opened.
- Asphalt parking lot lifting and cracked.
- Concrete boring and soils samples taken show imported soils contain excessive amounts of expansive clay.
- Records show concrete subcontractor did not obtain fill soils from approved borrow site.
- When landscaper began irrigation, water seeped into soils causing clay to expand and lift causing concrete lift and cracks.







# Sidewalk Blocking Door Opening





# Sidewalk Lifting off of Curb





# Ramp Lifting Off Curb



# Damages

- Removal of cracked concrete walkways and parking lot asphalt
- Removal of expansive fill soils
- Importing engineered filled soils and recompaction
- Re-pouring of concrete flatwork and parking lot.
- \$1,165,000



# Coverage Issues

- **Builders Risk:**

Cost of Making Good- \$375,000 excluded for removal of asphalt, sidewalks and expansive soils as faulty workmanship not covered, only resulting damage.

- **Commercial General Liability:**

- Subsidence Exclusion- Soils Subsidence, soils movement, heaving or sinking of soils excluded under most CGL policies
- “Your Work” Exclusion- Cost to repair Your Work excluded



# Resolution

## **Owner controls coverage provided in OCIP**

- Soils Subsidence Exclusion endorsed off of policy
- Contract Works Endorsement amended so Property Damage that occurs to project during operations is excluded unless no other valid and collectible insurance is available
- Your Work Exclusion deleted off of policy



# Comparison

## Owner Controlled Insurance Program

**OCIP Paid: \$1,165,000**

Subsidence Exclusion deleted from policy.  
\$375,000 excluded by Builders Risk  
covered under OCIP CGL policy

## Traditional Risk Transfer

**Paid: \$0**

- Subsidence Exclusion generally included in Contractor CGL policy resulting in denial of coverage for the entire loss
- Typical CGL policy excludes Your Work eliminating costs for removal and replacement of contaminated soils
- District left to recover costs from contractors



THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## FUNGI OR BACTERIA EXCLUSION

This endorsement modifies insurance provided under the following:

### COMMERCIAL GENERAL LIABILITY COVERAGE PART

**A.** The following exclusion is added to Paragraph 2. **Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability:**

#### 2. Exclusions

This insurance does not apply to:

##### **Fungi Or Bacteria**

- a. "Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.
- b. Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.

This exclusion does not apply to any "fungi" or bacteria that are, are on, or are contained in, a good or product intended for bodily consumption.

**B.** The following exclusion is added to Paragraph 2. **Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability:**

#### 2. Exclusions

This insurance does not apply to:

##### **Fungi Or Bacteria**

- a. "Personal and advertising injury" which would not have taken place, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury.
- b. Any loss, cost or expense arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.

**C.** The following definition is added to the **Definitions** Section:

"Fungi" means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or byproducts produced or released by fungi.





**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **TOTAL POLLUTION EXCLUSION ENDORSEMENT**

This endorsement modifies insurance provided under the following:


### COMMERCIAL GENERAL LIABILITY COVERAGE PART

Exclusion f. under Paragraph 2., **Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability** is replaced by the following:

This insurance does not apply to:

#### **f. Pollution**

- (1) "Bodily injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.
- (2) Any loss, cost or expense arising out of any:
  - (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants"; or
  - (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".



Policy Number:

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

### **EXCLUSION – SUBSIDENCE OF LAND ENDORSEMENT**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

It is hereby understood and agreed that Paragraph 2. Exclusions of Section I – Coverage A – Bodily Injury and Property Damage Liability, Paragraph 2. Exclusions of Section I – Coverage B – Personal and Advertising Injury Liability, and Paragraph 2. Exclusions of Section I – Coverage C – Medical Payments are amended by the addition of the following exclusion at the end thereof:

This insurance does not apply to "bodily injury", "property damage", "personal and advertising injury" or medical expense resulting directly or indirectly from "subsidence of land".

As used in this exclusion, "subsidence of land" means earth movement, including but not limited to, mud flow, earthquake, land slide, settling, expansion, shrinking, sinking, slipping, falling away, tilting, caving in, shifting, eroding, or rising.

**All Other Terms, Conditions And Limitations Of This Policy Shall Remain Unchanged.**