

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672
2125 SCOMM 79: HOUSE SPEC. COMM. ON OIL & GAS, 1991-1992

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Table 6.4: Distribution of Indemnity Payments According to Primary Nature of Incident

Nature of incident	Number of claims	Total amount	Average amount
Release associated with treatment, storage, and/or disposal of waste products	100	\$2,333,916	\$23,339
Release associated with petroleum	56	1,348,576	24,082
Release associated with manufacturing process	20	2,284,124	114,206
Release associated with transportation	12	274,666	22,889
Other	12	366,624	30,552
Total	200	\$6,607,906	

The most frequent pollution incident—releases involving the treatment, storage, or disposal of waste products—occurred at manufacturing locations. Regarding the 56 petroleum releases, at least 29 of the claims involved underground storage tanks, as noted in some of the responses.

We also asked for the purpose of the indemnity payments. Table 6.5 provides a breakdown of the responses by the number of claims and the amount.

Table 6.5: Distribution of Indemnity Payments by Purpose

Purpose of payment	Number of claims	Total amount	Average amount
Cleanup/property damage/natural resource damage	119	\$5,641,893	\$47,411
Bodily/personal injury	72	849,898	11,804
All purposes above	7	111,077	15,868
Other	2	5,038	2,519
Total	200	\$6,607,906	

As table 6.5 indicates, most of these payments were for actions involving pollution cleanup, compensation for property damages, and restoration of the environment damaged by pollution. We did not ask whether any of these claims were associated with CERCLA cleanups.

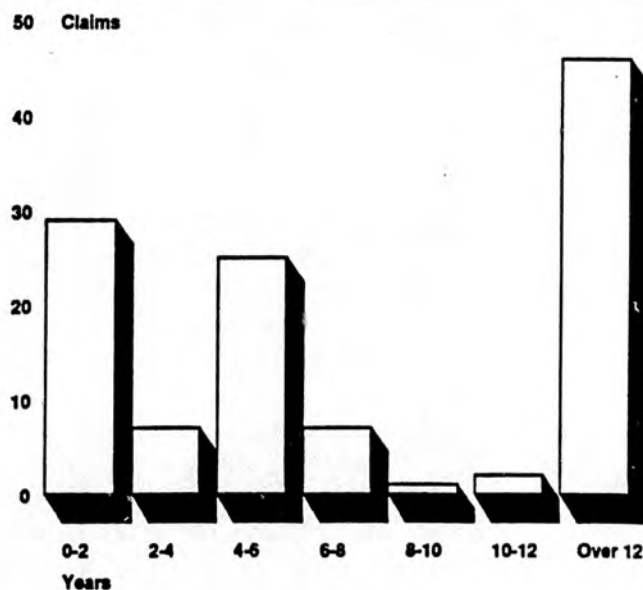
The "Tail" on Pollution Claims

The amount of time that can elapse between the end of the policy period and the date the claim is presented (called the "tail" by insurers) is an important issue in pollution insurance. Because pollution incidents and their effects on human health and the environment are not always detected promptly, many years may pass between the end of the policy

period and the presentation of a claim against that policy. For this reason, pollution liability is considered to be "long tail" by the insurance industry. Under "occurrence" policies, such as CGL policies, an insurer may be liable for pollution incidents that can be traced to the coverage period of an old policy, even though the policy period may have lapsed many years ago.⁵ Of the 200 closed claims for which we received severity questionnaires, 186 involved CGL policies. (Only 4 involved EIL policies; 10 involved other types of policies.)

In reviewing our questionnaire results, we found 78 claims were presented during the policy period and therefore had no tail, and 5 other responses had missing dates. The remaining 117 claims (all but 5 involving CGL policies) were presented after the expiration of the policy period. They had tails ranging from 1 month to 19 years, with the average being 7 years. Figure 6.1 shows the distribution of the claims by 2-year intervals.

Figure 6.1: The "Tail" on 117 Pollution Claims Closed in 1985



No values fall between the year groupings.

⁵For a discussion of the terms of an occurrence policy, see ch. 5.

Insurers have expressed concern about the possibility of large indemnity payments being made on very old policies. As figure 6.1 indicates, 46 claims had tails of more than 12 years. The payments on these claims totaled \$319,362. Nearly all of these claims stemmed from one pollution incident.

Legal Costs of Resolving Claims

Given the controversy over contract coverage (discussed in ch. 5), we asked whether the claim involved legal costs expended by the insurer in disputes with the insured party over terms of the policy's pollution coverage. In all, only five such disputes were reported. They all involved CGL policies, with legal costs totaling \$23,173 and averaging \$4,635 per claim (the median amount being \$4,019).

According to insurers, the legal costs of defending their insureds in lawsuits involving pollution claims can be substantial, and may in fact exceed the cost of the claim payment itself. Our questionnaire asked insurers whether their claims involved defense of such lawsuits and, if so, to specify the total dollar amount of legal expenses, court costs, and other related costs expended by the insurer in defense of the insured.

In all, 118 of the 200 closed claims involved the insurers' defense of suits brought by other parties against the insured.⁶ The total amount expended by the insurers in defending their insureds in these cases was \$2,247,670, averaging \$19,048 per case (the median was \$682). These 118 suits resulted in indemnity payments totaling \$4,348,157. (The average payment was \$36,849; the median payment was \$2,000.) Insurers reported that all but 3 of these claims were resolved through out-of-court settlements.

Limitations of Survey Results

When we developed our survey approach, insurers said that 1985 closed pollution claims would generally consist of relatively simple, inexpensive claims that could be resolved quickly. They predicted that our survey would show

- a low frequency of closed claims,
- relatively uncomplicated claims litigation, and
- low amounts of indemnity payments.

⁶Of these 118 lawsuits, 12 were brought by the federal government; 1 by a state government; 3 by county or local governments; 92 by citizens; and 10 by a combination of two or more of these parties.

The insurers strongly maintained that 1985 closed pollution claims would not be representative of the magnitude of their impending pollution liabilities resulting from past policies.

Given the fact that a number of insurers did not provide responses to our questionnaires, our results do not present a complete picture of the 1985 claims. Furthermore, we cannot be sure that the responses we obtained are representative of the complete picture. Also, given the small number of claims involved, it is possible that data on even a few additional claims not reported to us could significantly change average severity data. Nevertheless, we believe that enough insurers participated to give a good indication of the general character of 1985 pollution claims closed with payment, particularly since our survey results generally correspond to the insurers' predictions.

As predicted by insurers, the frequency of claims settlements is strikingly low, especially when contrasted with the much higher number of open claims (382 closed versus 11,915 open—about a 1:30 ratio). With regard to legal costs, only five of the claims involved disputes with the insured party over contract coverage, resulting in only about \$23,000 in legal costs to the insurers. Additionally, all but three of the claims involving the defense of the insured against lawsuits brought by other parties were reported to have been settled out of court, with insurers paying an average of only about \$19,000 per claim on defense costs. These data suggest that the claims generally did not involve prolonged litigation.

Perhaps the most important characteristic arguing for the simplicity of these claims is the low amount of the indemnity payments themselves. The 200 claims payments totaled only about \$6,600,000. And as indicated by the median payment of \$5,000, most of the claims involved far smaller payments than the average payment of about \$33,000 per claim.

Two other characteristics of the 200 surveyed claims that suggest their relative simplicity are noteworthy. First, only three claims involved pollution stemming from commercial treatment, storage, or disposal facilities—the type of facility that would be associated with CERCLA cleanups involving legal concerns over joint and several liability. Consequently, the surveyed claims may not have involved the liability concerns discussed in chapter 4, which insurers are most concerned about. Second, the surveyed claims did not involve costly bodily/personal injury settlements. Although 72 of the 200 settlements were exclusively for bodily/personal injury, only about \$850,000 was paid for them in total.

Our survey shows that the responding insurers generally did not make substantial pollution claims payments in 1985. However, since our survey represents only a slice of time, it does not provide a statistical basis for making projections about future pollution claims. Due to the small number of pollution claims that were closed in 1985 and the large number that remained open, it may take several more years of additional pollution claims experience before enough claims are closed to form a basis for making such projections. In the meantime, the extent of the insurers' impending pollution liability payments under old CGL policies remains an open issue.

Potential Usefulness of Additional Data on Pollution Claims

Although 50 insurers reported that they had nearly 11,900 open pollution claims at the end of 1985, we do not know how many of these will result in payments, let alone what the size of such payments might be.⁷ Our attempts to gather data on the amounts that insurers were reserving against open pollution claims were not successful because insurers consider this information to be confidential. Such information, in any event, might not be useful at this time. According to several major insurers, open pollution claims are generally still in a relatively immature phase of resolution, and it is difficult for insurers to estimate the ultimate expense of these claims.

As noted earlier, there was no central industry source on pollution indemnity payments at the time of CERCLA reauthorization in 1985-86. In 1987, however, ISO began to require insurers that reported data to it to indicate dollar losses due to environmental liability. These loss data will be broken down by payments for cleanup costs, property damage, and bodily injury. However, ISO's data will not capture all pollution claims. ISO's data are confined to data from CGL policies written by admitted insurers that form ISO's clientele.⁸ (ISO data represent about 75 percent of the commercial general liability market.) Pollution claims data for non-admitted surplus lines insurers are not being captured either by ISO or

⁷By way of comparison, 43 percent of an estimated 73,472 medical malpractice claims closed by insurance companies in 1984 were closed with payment. The average payment for injury was about \$81,000. The median was \$18,000. See *Medical Malpractice: Characteristics of Claims Closed in 1984* (GAO/HRD-87-55, April 22, 1987).

⁸An admitted insurer is one licensed by a state insurance commissioner to sell insurance within the state.

the state insurance departments.⁹ In our review, we were not able to determine the extent to which surplus lines carriers wrote pollution insurance in the past and, consequently, do not know how significant the lack of surplus lines data will be. Since no existing regulatory mechanism requires the collection of pollution data from the surplus lines market, this data void may well continue in the future.

A limited and sharply focused data collection effort might be useful in determining the extent to which insurers pay for pollution cleanup efforts. For example, although EPA gathers data on the dollar amounts paid by responsible parties at individual CERCLA site cleanups, it does not have data on how much of the responsible parties' costs are ultimately borne by their insurers. Data on the insurers' CERCLA-related payments would be key information in evaluating the insurers' contention that they are bearing a large portion of the expense of cleaning up the nation's most hazardous waste sites.

Conclusions

Our survey of pollution claims closed during 1985 shows that only 382 such claims were closed by the 75 insurers who responded to us. Additional data on the severity of 200 of these claims shows that indemnity payments were relatively modest, totaling about \$6,600,000—with an average of about \$33,000 per claim (with a median claim of \$5,000). These 200 closed claims did not, on average, involve substantial legal costs to the insurers, either over contract coverage disputes with insureds or in defense of the insured in lawsuits involving third parties. These 1985 results, however, cannot be used to project the magnitude of pollution claims that have not yet been resolved. Of the 75 responding insurers, 50 reported that they had about 11,900 unresolved pollution claims at the end of 1985.

Data on pollution claims closed since 1985 would be needed to monitor the magnitude of the insurers' pollution claims costs. Beginning in 1987, ISO is gathering data on an ongoing basis from most of the commercial liability insurance market on their CGL pollution claims losses. However, these data will not capture pollution payments made by all insurers under all types of policies.

⁹A surplus lines insurer is a company that generally underwrites risks or parts of risks for which insurance is not available through a company licensed in the insured's state. This business is, therefore, placed with a nonadmitted insurer (a company not licensed in the state) in accordance with surplus lines provisions of state insurance laws. (Source: A.M. Best.)

Matter for Consideration by the Congress

The extent to which insurers pay for pollution cleanups and related third-party bodily injury and property damage will almost certainly be raised by the insurance industry during the next CERCLA reauthorization. However, determining the amounts that insurers are paying is difficult because the industry does not have centralized, comprehensive data on these indemnity payments. Given this situation, we believe that the Congress should consider requiring insurers or responsible parties, as appropriate, to report to EPA the amounts of indemnity payments made to cover pollution cleanups and related third-party bodily injury and property damage.

Section 208 of SARA

SEC. 208. INSURABILITY STUDY.

Section 301 of CERCLA is amended by adding the following new subsection at the end thereof:

"(g) INSURABILITY STUDY.—

"(1) STUDY BY COMPTROLLER GENERAL.—The Comptroller General of the United States, in consultation with the persons described in paragraph (2), shall undertake a study to determine the insurability, and effects on the standard of care, of the liability of each of the following:

"(A) Persons who generate hazardous substances: liability for costs and damages under this Act.

"(B) Persons who own or operate facilities: liability for costs and damages under this Act.

"(C) Persons liable for injury to persons or property caused by the release of hazardous substances into the environment.

"(2) CONSULTATION.—In conducting the study under this subsection, the Comptroller General shall consult with the following:

"(A) Representatives of the Administrator.

"(B) Representatives of persons described in subparagraphs (A) through (C) of the preceding paragraph.

"(C) Representatives (i) of groups or organizations comprised generally of persons adversely affected by releases or threatened releases of hazardous substances and (ii) of groups organized for protecting the interests of consumers.

"(D) Representatives of property and casualty insurers.

"(E) Representatives of reinsurers.

"(F) Persons responsible for the regulation of insurance at the State level.

"(3) ITEMS EVALUATED.—The study under this section shall include, among other matters, an evaluation of the following:

"(A) Current economic conditions in, and the future outlook for, the commercial market for insurance and reinsurance.

"(B) Current trends in statutory and common law remedies.

"(C) The impact of possible changes in traditional standards of liability, proof, evidence, and damages on existing statutory and common law remedies.

"(D) The effect of the standard of liability and extent of the persons upon whom it is imposed under this Act on the protection of human health and the environment and on the availability, underwriting, and pricing of insurance coverage.

"(E) Current trends, if any, in the judicial interpretation and construction of applicable insurance contracts, together with the degree to which amendments in the language of such contracts and the description of the risks assumed, could affect such trends.

"(F) The frequency and severity of a representative sample of claims closed during the calendar year immediately preceding the enactment of this subsection.

"(G) Impediments to the acquisition of insurance or other means of obtaining liability coverage other than those referred to in the preceding subparagraphs.

"(H) The effects of the standards of liability and financial responsibility requirements imposed pursuant to this Act on the cost of, and incentives for, developing and demonstrating alternative and innovative treatment technologies, as well as waste generation minimization.

"(4) SUBMISSION.—The Comptroller General shall submit a report on the results of the study to Congress with appropriate recommendations within 12 months after the enactment of this subsection."

Objective, Scope, and Methodology

The objective of this report is to provide the Congress with the information sought by section 208 of SARA concerning the insurability of activities involving hazardous substances. Section 208 required us to review the liability and standard of care associated with the generation, transportation, storage, and disposal of hazardous substances. In conducting our work, the act directed us to consult with representatives of generators of hazardous substances, disposal facility owners or operators, persons liable for injury, groups comprised of persons adversely affected by releases of hazardous substances, groups organized for the protection of consumer interests, the Environmental Protection Agency, property/casualty insurers, reinsurers, and state insurance regulators.

This report concerns only the section 208 requirements. The other insurance and liability issues raised by the Congress in passage of SARA—cleanup contractor liability, post-closure liability, and petroleum tank liability—will be the subject of future reports. Environmental restoration insurance for the trucking industry was addressed in a May 1986 GAO report (Motor Carriers: The Availability of Environmental Restoration Insurance, RCED-86-150BR, May 19, 1986).

Because much of the data needed to perform this study are proprietary or unavailable in any readily accessible form, we relied on the voluntary cooperation of the insurance and hazardous substance industries. Specific data limitations are discussed in appropriate sections of this appendix.

SARA required an evaluation of eight specific issues, listed below (A through H).

(A) Current economic conditions in, and the future outlook for, the commercial market for insurance and reinsurance.

To determine the economic condition and outlook for commercial insurance, we reviewed the work already completed by GAO, the Congressional Research Service (CRS), and others on the economic conditions of the insurance industry and the data available in A.M. Best (the industry's statistical publication) on the economic conditions of the industry. However, the economic condition of the pollution line of the insurance market has not been documented, primarily because of the lack of specific pollution insurance data. As a result, we gathered data on this issue through discussions with insurance and reinsurance company executives, associations, and state regulators. We obtained opinions, anecdotal information, and other information on several issues:

- The status of the pollution insurance market as it relates to the economic condition of the industry as a whole.
- Which companies are writing pollution insurance, for whom, coverage provided, premiums charged, and the relative amount of premiums obtained by pollution liability insurance.
- Which companies have stopped writing pollution insurance and why.
- The lack of historical data on damages and risks needed to set premiums.
- The influence and control of insurers and reinsurers over the pollution liability insurance market.

In addition, we discussed with the insurance industry officials identified above the possible causes of observed changes in the pollution liability insurance and reinsurance markets and the impact on insurers of possible expansion and uncertainty of liability due to (1) recent court decisions under tort and other state and federal statutes and (2) technological uncertainty regarding the ability of waste handlers to safely store and treat hazardous materials.

Treatment, storage, and disposal facilities are required by RCRA to prove financial responsibility (with insurance being one method of doing this). We discussed the availability of pollution insurance with two associations representing TSDFs. To document financial responsibility requirements for TSDFs, we reviewed RCRA-mandated financial responsibility requirements and related implementing regulations. Through telephone contacts with hazardous waste officials in 15 states (Alabama, California, Colorado, Connecticut, Illinois, Indiana, Massachusetts, Michigan, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, and Texas) that regulated 68 percent of the TSDFs, we obtained information on state financial responsibility regulations. From officials at EPA headquarters and in 8 of its 10 regional offices (Regions I through VIII) and officials in the 15 states we contacted, we obtained estimates of the extent that insurance is used by TSDFs and the impact of not having insurance coverage. In addition, we spoke to 11 TSDF owners/operators to determine how they covered their pollution liability. We also reviewed data contained in EPA's Hazardous Waste Data Management System, the Consolidated Data Base developed for 1,538 land disposal facilities, and EPA's July 1985 survey of the Loss of Interim Status facilities.

Generators, however, are not required to have insurance or report how they insure. Given the time frame for this work, it was not practical to systematically survey the 100,000 generators of hazardous substances.

Generator insurability information was obtained primarily through discussion with four associations and five individual companies that volunteered to discuss this information with us. We also contacted three risk-retention groups that were in the formative stage and one that was unable to get started to determine the type and extent of coverage offered, membership, and premiums.

(B) Current trends in statutory and common law remedies.

To determine trends in remedies, we reviewed CERCLA and its 1986 amendments under SARA and case law for the standard of liability applied under CERCLA, as amended. In addition, we researched various potential liability situations that can arise in hazardous waste activities for parties that may be liable for releases. We also researched state statutes that provide remedies for personal injury and property damage caused by releases of hazardous substances. We researched court decisions and legal commentaries, such as the CERCLA 301(e) study, to determine common law causes of action and remedies for hazardous waste releases.

(C) The impact of possible changes in traditional standards of liability, proof, evidence, and damages on existing statutory and common law remedies.

To determine the impact of possible changes, we reviewed legal theories that have been developed in product liability cases that suggest possible changes in traditional standards in hazardous waste cases. We also reviewed state legislation to change tort law doctrines, such as joint and several liability and punitive damages, to determine how these changes might affect the ability of a victim to obtain a remedy.

(D) The effect of the standard of liability and extent of persons upon whom it is imposed under CERCLA, as amended, on the protection of human health and the environment and on the availability, underwriting, and pricing of insurance coverage.

On the basis of the information developed under issue B above, we discussed with insurance underwriters and risk assessors how the standards affect the availability, underwriting, and pricing of insurance. In addition, we discussed the standards with EPA officials to determine the impact on the financial responsibility requirement regulations.

(E) Current trends, if any, in judicial interpretation and construction of applicable insurance contracts, together with the degree to which amendments in the language of such contracts and the description of the risks assumed could affect such trends.

We reviewed legal articles and relevant cases that illustrate current interpretations of certain key terms and coverage contained in insurance policies, including "occurrence," "sudden and accidental," the insurer's duty to defend, and coverage of damage to the insured's property. We also reviewed the development over recent decades of contracts for comprehensive general liability insurance and environmental impairment liability insurance. We obtained from the Insurance Services Office Inc. copies of these contracts and discussed with members of the Environmental Litigation Insurance Association the impact of possible changes in insurance contract language.

(F) The frequency and severity of a representative sample of claims closed during the calendar year immediately preceding the enactment of this subsection.

In the early stages of this survey, we met with insurance association officials and were told that there was no central source for identifying the universe of insurers that offered pollution insurance, either as part of a CGL policy or as a separate EIL policy. Given this situation, the American Insurance Association (AIA) suggested that we include in our survey the 20 top writers of "other liability," an insurance category under which they said most pollution coverage would be written. We adopted this approach, but we expanded the number of insurers to include the top 50 writers of "other liability." We did this to ensure that we were capturing the pollution claims activity at the smaller insurance companies that each write less than 1 percent of "other liability." Altogether, these 50 insurers constituted over 80 percent of the "other liability" market share in 1985.

We also included all past and current members of PLIA. PLIA is a reinsurance pool formed in January 1982 to provide 100-percent reinsurance and necessary services for member insurers who wish to offer pollution insurance.

In addition, we included insurers who have been known to write pollution insurance but were not included in the two groups defined above. We identified these companies through interviews, trade publications, and EPA documents. Included among these were major U.S. reinsurers

whom we contacted to determine if they had written any direct pollution insurance.

In all, we contacted 104 insurance groups and companies. Although we aimed to be comprehensive in our survey and worked closely with insurance experts and associations in defining our target companies, we cannot determine the extent to which these 104 insurers include the entire universe of insurers who closed pollution claims in 1985.

Given the relatively short amount of time available to develop and administer the survey, as well as to analyze and report on the results, we kept the scope of the survey tightly focused on basic frequency/severity information. In developing the survey, we consulted insurance trade associations and companies on technical issues, such as the definition of a "closed" pollution claim, and on the elements involved in measuring a pollution claim's severity. In the end, we decided to gather frequency and severity information by means of two short questionnaires sent directly to insurers. The first questionnaire gathered frequency data, and the second gathered severity data. Copies of these questionnaires are found in appendix III.

In our cover letters to the questionnaires, we noted that the insurers' participation in the survey was voluntary. We do not have authority to require their participation. However, we encouraged the insurers to complete the questionnaires by emphasizing the importance of the information to the Congress. We also encouraged participation by extending a pledge of confidentiality covering the data sent to us. We promised that no information on individual insurers would be included in our report — only summaries of aggregated data. As a further measure to insure the confidentiality of the data, the link between the mailing list and the company codes on the frequency questionnaires was broken at the conclusion of the survey. The severity questionnaires never contained insurance company identification numbers and remained anonymous. (The companies used a separate mailing to indicate that they had sent us their completed severity questionnaires.)

The survey results represent data provided to us by insurers. We did not attempt to verify these data, since insurers consider their claims files confidential.

(G) Impediments to the acquisition of insurance or other means of obtaining liability coverage other than those referred to in the preceding subparagraphs.

Other possible impediments were discussed with officials of all organizations contacted in carrying out this review.

(H) Effects of the standards of liability and financial responsibility requirements imposed pursuant to this act on the cost of, and incentives for, developing and demonstrating alternative and innovative treatment technologies and waste generation minimization.

To determine the effects of the standard of liability and financial responsibility requirements on alternative and innovative technologies, we contacted EPA officials and companies with new technologies to update past and ongoing GAO, Congressional Budget Office (CBO), Office of Technology Assessment (OTA), and EPA reports on RCRA and CERCLA concerning permanent disposal and minimization technologies. These studies include: the GAO report, Hazardous Waste: EPA's Consideration of Permanent Cleanup Remedies (GAO/RCED-86-178BR; July 7, 1986); OTA reports, Serious Reduction of Hazardous Waste for Pollution Prevention and Industrial Efficiency, (September 1986), Superfund Strategy (March 1985), and Technologies and Management Strategies for Hazardous Waste Control, (March 1983); and the CBO report, Hazardous Waste Management: Recent Changes and Policy Alternatives (May 1985).

We also reviewed RCRA financial requirements and discussed with representatives of hazardous waste generators, handlers, and disposers, and the insurance industry the impact of insurance on new technology development and implementation.

As indicated above, we met with representatives of generators of hazardous substances, disposal facility owners or operators, persons liable for injury, groups comprised of persons adversely affected by releases of hazardous substances, groups organized for the protection of consumer interests, the Environmental Protection Agency, property/casualty insurers, reinsurers, and state insurance regulators. In addition to addressing specific audit issues with these representatives, we brought them together early in our work to review and discuss our approach to carrying out the mandates of the act.

Frequency and Severity Questionnaires

U.S. GENERAL ACCOUNTING OFFICE



Pollution Claims Survey
Response Form

For the purposes of this survey, "pollution claims" are defined as (1) those types of claims presented against direct insurance policies providing coverage for sudden and/or gradual pollution, e.g., Environmental Impairment Liability (EIL) insurance, and (2) any direct insurance claims of the same type presented against Comprehensive General Liability (CGL) or similar policies. Do not include workers' compensation and non-environmental products liability claims.

Use your own organization's definitions of "open" and "closed" claims.

NOTE TO INSURANCE GROUPS: The data you provide should represent the aggregate number of pollution claims for all affected companies that are part of your insurance group. (Please call John Finedore or Erin Bozik (202)-382-4326 if group data is not available.)

1. For calendar year 1985, how many pollution claims did your group/company close with payment? (FILL IN NUMBER. IF NONE, ENTER "0".)

NUMBER

Questions 2a-c, below, are included at the request of members of the insurance industry in order to help the Congress understand the extent of open pollution claims as of the end of 1985. Please provide this data if available.

- 2a. At the end of calendar year 1985, how many open pollution claims did your group/company have? (FILL IN NUMBER. IF NONE, ENTER "0".)

NUMBER

- 2b. Of the number given in Question 2a, how many of these open claims were presented against EIL insurance? (FILL IN NUMBER. IF NONE, ENTER "0".)

NUMBER

- 2c. Of the number given in Question 2a, how many of these open claims were presented against CGL policies in which a review of the facts, applicable law, and policy provisions revealed no coverage defenses? (FILL IN NUMBER. IF NONE, ENTER "0".)

NUMBER

Please detach this response form from the cover letter and return the form in the enclosed addressed, postage-paid envelope. In the event the envelope is misplaced, the return address is:

Mr. Hugh Wessinger
U.S. General Accounting Office
Room 4073A
441 G Street, N.W.
Washington, DC 20548

Thank you for your participation in this survey.

Appendix III
Frequency and Severity Questionnaires

U.S. GENERAL ACCOUNTING OFFICE

Survey of Pollution Claims Closed During 1985



INTRODUCTION

For the purposes of this survey, "pollution claims" are defined as (1) those types of claims presented against policies providing coverage for sudden and/or gradual pollution, e.g., Environmental Impairment Liability (EIL) insurance, and (2) any claims of the same type presented against Comprehensive General Liability (CGL) or similar policies. Do not include workers' compensation and non-environmental liability claims.

To avoid the double counting that would result from including reinsurance data, report only those pollution claims presented against direct insurance policies and provide claim costs prior to and exclusive of any reinsurance recoverable on the claim.

Complete one survey form for each pollution claim closed between January 1, 1985 and December 31, 1985, that resulted in a payment.

All information gathered on this survey will be kept confidential by the U.S. General Accounting Office. The data provided by you will be aggregated with data provided by other insurance companies. Only summaries of the aggregated data will be used in reporting information to the Congress. In order to assure confidentiality, this questionnaire contains no company identification code. The company code is found on the attached postcard. Detach the postcard and mail it separately when you mail the completed questionnaire. The postcard will let us know that your company has responded. A self-addressed, postage-paid envelope is provided so you can return your questionnaire(s).

In the event that the return envelope for the questionnaire is misplaced, the return address is:

Mr. Hugh Wessinger
U.S. General Accounting Office
Room 4076A
441 G Street, N.W.
Washington, DC 20548

If you have any questions about this survey, please call John Finedore or Erin Bozik on (202) 382-4326.

1. Against what type of policy was this pollution liability claim presented? (CHECK ONE.)

1. ☐ Comprehensive General Liability

2. ☐ Environmental Impairment Liability

3. ☐ Other (SPECIFY) _____

2. On what date did the insured first present the claim against your company? (FILL IN MONTH AND YEAR.)

_____/_____
Month / Year

3. Under what period(s) of the policy was this claim paid? (FILL IN DATES.)

FROM ____/_____
Month / Year

TO ____/_____
Month / Year

4. What is the primary business of the insured party? (CHECK ONE.)

1. ☐ Manufacturing

2. ☐ Mining/Smelting/Ore processing

3. ☐ Commercial waste treatment/storage/disposal

4. ☐ Municipal waste treatment/storage/disposal

5. ☐ Other (SPECIFY) _____

(QUESTIONS CONTINUE ON THE OTHER SIDE)

Appendix III
Frequency and Severity Questionnaires

5. What was the primary nature of the incident leading to this claim? (CHECK ONE.)
1. ☐ A release associated with a manufacturing process
 2. ☐ A release associated with the treatment, storage, and/or disposal of waste products
 3. ☐ A release associated with transportation (air, land, or water)
 4. ☐ Other (SPECIFY) _____

6. Were legal costs expended in a dispute between your company and the insured over the pollution coverage? (For example, a dispute over your company's duty to defend the insured.) (CHECK ONE.)
1. ☐ No ----> SKIP TO QUESTION 8
 2. ☐ Yes
7. What was the dollar amount of legal expenses incurred by your company in resolving this policy coverage dispute? (FILL IN DOLLAR AMOUNT.)
- \$ _____
8. Did this claim involve a suit against the insured? (CHECK ONE.)
1. ☐ No ----> SKIP TO QUESTION 11
 2. ☐ Yes
9. Please identify the party or parties that brought the suit. (CHECK ALL THAT APPLY.)
1. ☐ Federal Government
 2. ☐ State Government
 3. ☐ County/Local Government
 4. ☐ Citizen suit
 5. ☐ Other (SPECIFY) _____
10. What was the total dollar amount of legal expenses, court costs, and other related costs expended by your company in defense of the insured? (DO NOT INCLUDE COSTS YOU REPORTED IN QUESTION 7.)
- \$ _____
11. How was the amount to be paid on this claim determined? (CHECK ONE.)
1. ☐ Out-of-court settlement
 2. ☐ Jury/Judge award
 3. ☐ Other (SPECIFY) _____
12. What was the total cost to your company of the settlement/award on this claim prior to and exclusive of any reinsurance recoverable by your company on this claim? (INCLUDE THE AMOUNT OF ANY LUMP-SUM PAYMENT AND/OR THE COST OF ANY ANNUITY PURCHASED FOR FUTURE STRUCTURED PAYMENTS.)
- \$ _____
13. Which of the following were included under the terms of the settlement/award paid by your company on this claim? (CHECK ALL THAT APPLY.)
1. ☐ Cleanup (remedial/removal-type actions)
 2. ☐ Allegations of property damage
 3. ☐ Allegations of natural resource damage
 4. ☐ Allegations of personal/bodily injury
 5. ☐ Other (SPECIFY) _____

THANK YOU FOR
COMPLETING THIS QUESTIONNAIRE

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CONTRACTORS POLLUTION LIABILITY COVERAGE

Comparisons of the following policy forms outline the key provisions:

American International Group/
National Union Fire Insurance Company

Reliance National/
Planet Insurance Company

Please be advised that as of September 1, 1989, Reliance, through Environmental Compliance Services, has introduced a combined Professional Liability and Pollution Legal Liability form which is referred to as the Consultants Environmental Liability Policy.

CONTRACTORS POLLUTION LIABILITY COVERAGE COMPARISON

PLANET INSURANCE COMPANY

NATIONAL UNION FIRE INSURANCE COMPANY

Item	Planet Insurance Company	National Union Fire Insurance Company	Comments
INSURING AGREEMENT	To indemnify the insured against loss, the insured has become legally obligated to pay as a result of claims first made against the insured and reported to the company in writing during the policy period, or optional extended discovery period if applicable, for pollution conditions arising out of the performance by the named insured of operations designated in Item 5 of the declarations provided always that such pollution conditions are sustained in whole or in part subsequent to the retroactive date. It is a condition precedent to coverage under this policy that coverage is only afforded for operations performed by the named insured. Written notification of job status is reported to the company on a semi-annual basis.	To indemnify the insured against loss, the insured has or will become legally obligated to pay as a result of claims first made against the insured and reported to the company in writing during the policy period or extended discovery period if applicable, for pollution conditions emanating from locations designated in the declarations.	Insuring agreement format is similar and is typical claims made policy wording.
DEFINITIONS:			
1. Insured:	Insured means the named insured and any director, officer, partner or employee thereof while acting within the scope of his or her duties as such.	Insured means the named insured and any director, officer, partner or employee thereof while acting within the scope of his or her duties as such.	Difficult to name pure consultants as insureds.
2. Loss:	Loss means: 1. Monetary awards or settlements of compensatory damages arising from:	Loss means: 1. Monetary awards or settlements of compensatory damages arising from:	Loss definitions are the same.

(MISCC)

<u>Item</u>	<u>Planet Insurance Company</u>	<u>National Union Fire Insurance Company</u>	<u>Comments</u>
	a. Bodily injury as defined herein, or b. Property damage as defined herein, and 2. Costs, charges and expenses incurred in the investigation, adjustment or defense of claims for such compensatory damages.	a. Bodily injury as defined herein, or b. Property damage as defined herein, and 2. Costs, charges and expenses incurred in the investigation, adjustment or defense of claims for such compensatory damages.	
3. Bodily Injury:	Bodily injury means bodily injury, sickness, disease, mental anguish or shock sustained by any person, including death resulting therefrom, caused by pollution conditions arising out of the performance by the named insured of operations designated in Item 5 of the declarations.	Bodily injury means bodily injury, sickness, disease, mental anguish or shock sustained by any person, including death resulting therefrom, caused by pollution conditions emanating from the locations in the declarations.	Wording is essentially the same in both policies.
4. Property Damage:	Property damage means: 1. Physical injury or destruction of tangible property, including the resulting loss of use thereof. 2. Cleanup costs. 3. Loss of use of tangible property that has been physically injured or destroyed; provided that such physical injury or destruction, clean up costs and/or loss of use are caused by pollution conditions arising out of the performance of the named insured of operations designated in Item 5 of the declarations.	Property damage means: 1. Physical injury or destruction of tangible property, including the resulting loss of use thereof. 2. Cleanup costs. 3. Loss of use of tangible property that has been physically injured or destroyed; provided that such physical injury or destruction clean up costs and/or loss of use are caused by pollution conditions emanating from the locations designated in the declarations.	Wording is the same in both policies.
5. Pollution Conditions:	Pollution conditions means the discharge, dispersal, release or escape of smoke, vapors, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants,	Pollution conditions means the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other	Wording is the same in both policies.

(MISCC)

<u>Item</u>	<u>Planet Insurance Company</u>	<u>National Union Fire Insurance Company</u>	<u>Comments</u>
	contaminants or pollutants into or upon land, the atmosphere, any watercourse or body of water, which results in bodily injury or property damage.	irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, which results in bodily injury or property damage.	
6. Claim:	Claim means the assertion of a legal right alleging liability or responsibility on the part of the named insured, arising out of pollution conditions and shall include but not necessarily be limited to lawsuits or petitions filed against the named insured.	Claim means the assertion of a legal right alleging liability or responsibility on the part of the named insured, arising out of pollution conditions and shall include, but not necessarily be limited to, lawsuits or petitions filed against the named insured.	Wording is the same in both policies.
7. Territory:	The territory includes the United States, its territories or possessions or Canada for claims made or brought in the United States whose territories or possessions are in Canada.	The policy only applies to claims arising from pollution conditions in the United States, its territories or possessions or Canada and made or brought in the United States, its territories, possessions or Canada.	Wording is similar in both policies.
EXCLUSIONS			
1. Prior to Inception Date:	Coverage does not apply to any loss arising from pollution conditions existing prior to the inception date of this policy if any officer, director, partner or other employee of the named insured responsible for the environmental affairs, control or compliance, knew or could have reasonably foreseen that such pollution conditions could have been expected to give rise to a claim.	The insurance does not apply to losses arising from pollution conditions existing prior to the inception date of this policy, if any officer, director or partner or other employee of the named insured responsible for environmental affairs, control or compliance, knew or could have reasonably foreseen that such pollution conditions could have been expected to give rise to a claim.	Wording is the same in both policies.
2. Pecuniary relief:	Insurance does not apply to any claims or suit seeking non-pecuniary relief.	Insurance does not apply to losses arising from claims seeking non-pecuniary relief.	Wording is the same in both policies.

(MISCC)

<u>Item</u>	<u>Planet Insurance Company</u>	<u>National Union Fire Insurance Company</u>	<u>Comments</u>
3. Offshore facilities:	Coverage does not apply to losses arising from the ownership or operation of any "offshore facility" as defined in the under continental shelf lands act amendments of 1978 or the clean water act of 1977 as amended in 1978, or the "deep water port" as defined in the deep water port act of 1974 as amended, nor shall there be any coverage or liability resulting from omissions of drilling fluid, oil, gas or other fluids from any oil, gas, mineral, water or geothermal well of any nature whatsoever.	Insurance does not apply to losses arising from the ownership or operation of any "offshore facility" as defined in the outer continental shelf lands act amendments of 1978 or the clean water act of 1977 as amended in 1978 or any "deep water port" as defined in the deep water port act of 1974 as amended, nor shall there be any coverage for liability resulting from emissions for drilling fluid, oil or gas or other fluids from any oil, gas, mineral, water or geothermal well of any nature whatsoever.	
4. Workers' Compensation:	Coverage does not apply to any loss arising under any workers' compensation, unemployment compensation or disability benefits or similar law.	The insurance does not apply to any loss arising under any workers' compensation, unemployment compensation or disability benefits law or similar law.	
5. Contractual:	Coverage does not apply to any loss arising as a result of liability of others assumed by the named insured under any contract or agreement, other than covered operations set out above in Item 5 of the declarations.	Insurance does not apply to losses arising as a result of liability of others assumed by the named insured under any contract or agreement, however this exclusion does not apply to those contracts or agreements between the named insured and its clients for the operation specified in Part M of the contractors coverage endorsement.	
6. Nuclear:	This policy contains the standard nuclear exclusion and definition.	Standard nuclear exclusion and definition.	
7. Willful Acts:	The policy does not apply to losses arising from pollution conditions based upon or attributable to the insured's intentional, willful or deliberate non-compliance with any statute, regulation, ordinance, administrative complaint, notice of violation, notice	The coverage does not apply to losses arising from pollution conditions based upon or attributable to the insured's intentional, willful or deliberate non-compliance with any statute, regulation, ordinance, administrative complaint, notice of violation, notice	

(MISCC)

ItemPlanet Insurance CompanyNational Union Fire Insurance CompanyComments

letter, executive order or instruction of any other governmental agency or body.

letter, executive order or instruction of any governmental agency or body.

8. Acid Rain:

Coverage does not apply to any losses arising from pollution provisions based upon or attributable to acid rain conditions.

The coverage does not apply to any loss arising from pollution conditions based upon or attributable to acid rain conditions.

9. Professional Services:

Coverage does not apply to losses arising out of the rendering or the failure to render professional services by the insured.

It is hereby understood and agreed that this insurance does not apply to loss arising out of the rendering of or the failure to render professional services by the named insured, including:

a. The preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications.

b. Supervisory inspection or engineering services.

10. Superfund Sites:

Coverage does not apply to losses arising from operations performed at sites indemnified as being either proposed for or on the final national priorities list or any state "superfund" list unless specifically scheduled in the policy by endorsement.

It is hereby understood and agreed that the insurance does not apply to losses arising from operations performed at sites identified as being a proposed or on the final national priorities list or any state, "superfund" list unless specifically scheduled into the policy by endorsement.

Exclusions can be deleted.

11. Transporting hazardous waste materials:

This policy does not cover losses arising from any waste or materials to be transported via automobile, aircraft, watercraft or rolling stock beyond boundaries of the jobsites where covered operations are being performed.

It is understood and agreed that this insurance does not apply to loss arising from waste or materials transported by automobile, aircraft, watercraft or rolling stock beyond the boundaries of the jobsite.

Note reference to jobsite boundaries.

12. Underground Tanks:

Coverage does not apply to losses arising from the repair, installation or

It is hereby understood and agreed that no coverage will be granted for the

Separate coverage available.

(NISCC)

<u>Item</u>	<u>Planet Insurance Company</u>	<u>National Union Fire Insurance Company</u>	<u>Comments</u>
	maintenance of underground storage tanks and associated underground piping.	repair, installation or maintenance of underground storage tanks and associated underground piping.	
13. Asbestos:	Coverage does not apply to losses arising out of exposure to asbestos. In addition, there will be new coverage for loss resulting from the removal, cleanup or disposal of asbestos products, fibers or asbestos dust.	It is hereby understood and agreed that this insurance does not apply to any liability for property damage, bodily injury or any claims (including defense costs) arising out of exposures to asbestos. In addition, there will be no coverage for claims resulting from the removal, cleanup or disposal of asbestos products, fibers or asbestos dust.	Separate coverage available.
14. Completed Operations:	Coverage available up to 5 years.	2 years C.O. extension available.	
15. Available Limits:	\$3MM/\$6MM (defense costs are included in the limit)	\$5MM/\$5MM \$1MM/\$5MM in blanket coverage	Planet hopes to have \$5MM/\$10MM available by the end of 1989.
16. Extended Discovery:	12 months	12 months	
A) Premium	Up to 200% of policy premium	Up to 200% of policy premium	
17. Loss Reporting:	Must be made in writing to the insured during the policy period and including the optional extended discovery period.	Must be made in writing to the insured during the policy period and including the optional extended discovery period.	
18. Duty to Defend:	Company shall have the right but not the duty to assume the adjustment of any claim.	Company shall have the right but not the duty to assume the adjustment of any claim.	
19. Blanket Coverage Available:	Yes - contractors doing similar jobs on one or more projects. Non-similar jobs can be added to blanket policy on a case by case basis.	Yes - contractors doing similar jobs on one or more projects. Non-similar jobs can be added to blanket policy on a case by case basis.	The larger the contractor and/or the jobs performed, the harder it is to obtain blanket coverage.

(MISCC)

PROFESSIONAL LIABILITY INCLUDING POLLUTION

The following professional liability policies for Response Action Contractors and Engineers provide coverage for pollution liability, subject to the terms of the complete policy contract and application.

These abbreviated summaries were prepared as an outline of the policy contracts and liberty has been taken in describing some of the sections and clauses.

American International Group

Reliance National/Planet Insurance Co.

Demeter Ltd.

H.S. Weavers Underwriting Agencies, Ltd.

AMERICAN INTERNATIONAL GROUP

Lexington Insurance Company
Response Action Contractor
Errors and Omissions Insurance

Declarations:

Limit of Liability:	\$5 mm	Each Claim
	5 mm	Aggregate

Deductible:	Each Claim
	Aggregate

Policy Form:	Claims Made and Reported
	Policy
	Application included as
	warranty

Scheduled Project:

Retroactive Date:	Policy Inception
-------------------	------------------

I. Insuring Agreement:

- 1) To Pay on Behalf of the Insured
- 2) Compensatory Damages, including personal injury and property damage
- 3) Liability for negligent acts, errors, or omissions
- 4) Solely in performance of a "response action contract"

II. Defense and Settlement:

- 1) Insurer has right and duty to defend claim
- 2) Subject to other collectible insurance, insurer in its sole discretion may investigate and settle any claim.
- 3) Defense expense reduces applicable limit of liability

- 4) Insurers duty to defend ends when limit of liability has been paid for damages, prejudgment interest, and defense expenses.

III. Exclusions:

- 1) Liability of any insured imposed under a statutory standard of strict liability ---
- 2) Workers' Compensation, disability benefits, unemployment compensation law ---
- 3) Employee when engaged in insured's employment
- 4) Dishonest, fraudulent, or criminal acts or omissions
- 5) Knowing violation of federal, state or local laws or regulation
- 6) Plagiarism, infringement of a copyright, trademark, patent or design patent, industrial piracy, theft of trade secrets or unfair business practices. Personal Injury exclusion.
- 7) Any act, error, or omission prior to inception date of policy.
- 8) Any act, error, or omission with effecting or maintaining any insurance or bond
- 9) Failure to complete drawings, plans, or specifications on time; exception if failure results from negligent act, error or omission
- 10) Express warranties or guarantees or estimates of costs or completion dates of scheduled projects.
- 11) The design or manufacture of any goods or products ----
- 12) Claims made against any insured by any party where an ownership interest exists ---
- 13) Joint Ventures, unless specifically endorsed
- 14) Liability from ownership, maintenance, operation or use of watercraft, automobile, aircraft or any kind of motor vehicle --
- 15) Liability of others assumed by contract
- 16) Liability resulting from the consignment of any waste or other material to a disposal facility
- 17) Punitive or exemplary damages ---
- 18) Nuclear Liability

IV. Definitions:

- 1) Claim
- 2) Defense Expense
- 3) Damages
- 4) Insured
- 5) Personal Injury
- 6) Policy Period
- 7) Response Action Contract
- 8) Scheduled Project
- 9) Property Damage

V. Limits of Liability:

- 1) Defines maximum limit of liability regardless of number of insureds, claims, or persons making claims.
- 2) Defines maximum limit as sum of all claims arising from one negligent act, error, or omission.
- 3) Deductible will apply to each claim
- 4) Application of Aggregate Limit and Aggregate Deductible

VI. Deductible:

- 1) Deductible is applicable to each claim and shall be paid by the insured.
- 2) Deductible is applicable to defense expense.

VII. Conditions

- 1) Insured's duties in the event of a claim
- 2) Assistance and Cooperation of the Insured
- 3) Bankruptcy
- 4) Action Against Company
- 5) Subrogation
- 6) Assignment
- 7) Changes
- 8) Examination of Books and Records
- 9) Cancellation: 30 Days - Any other reason
10 Days - Nonpayment of Premium
- 10) Representations
- 11) Inspection and Audit

VIII. Extended Reporting Period:

- 1) Available if Insurer cancels or refuses to renew policy
- 2) Twelve months effective at cancellation date or policy expiration.
- 3) Additional premium - not to exceed 200% of annual premium
- 4) Offer of different terms and conditions or higher premium does not constitute a refusal to renew policy.
- 5) Does not increase or reinstate limits of liability.

RELIANCE NATIONAL

Planet Insurance Company
Consultants Environmental Liability Policy

Declarations

Limit of Liability:	\$2 MM	Each Claim	Blanket Coverage
	2 MM	Aggregate	
	3 MM	Each Claim	Project Basis
	6 MM	Aggregate	

Retention:

Policy Form: Claims Made Policy
Application included as warranty

Retroactive Date: Policy Inception

I. Insuring Agreement:

- | | | |
|------------|----|--|
| Coverage A | 1) | To indemnify the Insured |
| | 2) | Liability for damages by reason of act, error, or omissions in Professional Services rendered or that should have been rendered. |
| Coverage B | 1) | To indemnify the Insured |
| | 2) | Liability for damages for Pollution Conditions arising out of the performance of Professional Services rendered by the Insured. |

Both Coverage A and B subject to claims first made against the insured and reported to the company, in writing, during the policy period or optional extended discovery period.

No coverage for claim prior to inception date or retroactive date of the policy.

II. Definitions:

- 1) Insured
- 2) Claim
- 3) Damages
- 4) Policy Period
- 5) Professional Services
- 6) Pollution Conditions
- 7) Bodily Injury
- 8) Property Damage

III. Territory:

- 1) Claims from Professional Services rendered in United States, its territories or possessions or Canada and brought in this territory.

IV. Exclusions:

- 1) Dishonest, fraudulent, malicious, or knowingly wrongful act, error, or omission
- 2) Insured's services or capacity as officer, director --- of charitable organization --- pension or trust; a fiduciary under ERISA 1974
- 3) Any claim made by business enterprise --- in which an ownership interest exists
- 4) Any claim for bodily injury or property damage except as a result of an act, error or omission
- 5) To any claim arising out of false arrest, humiliation, detention or imprisonment, wrongful entry --- libel, slander --- Personal Injury exclusion
- 6) Claim arising out of discrimination ---
- 7) Claim arising out of violation of Securities Act of 1933
- 8) Liability of others assumed under any contract or agreement
- 9) Any claim arising from express warranties and guarantees; cost estimates of probable costs being exceeded.
- 10) Any claim arising out of the operation of any site or facility
- 11) Any claim arising out of errors and omissions resulting from laboratory analysis
- 12) Punitive damages or exemplary damages but defense will be afforded if suit also seeks Compensatory damages covered.
- 13) Any claim based on Insured's intentional, willful, or deliberate non-compliance with any statute, regulation ordinance, administrative complaint, notice of violation, notice letter, executive order, or instruction of any governmental agency or body.

- 14) Nuclear Liability
- 15) Workers' Compensation, unemployment compensation or disability benefits law or similar law.
- 16) Any claim arising from injury to any employee, director, officer or partner of the Insured
- 17) Any claim arising out of the ownership, maintenance, use, operation of automobile, aircraft, watercraft or rolling stock
- 18) Any claim arising out of goods or products manufactured, sold, --- Products Liability exclusion
- 19) Any Claim due to Property Damage to goods or products manufactured, sold --- arising out of such goods or products
- 20) Any claim arising from Pollution Conditions based upon or attributed to acid rain conditions
- 21) War exclusion
- 22) Any claim from radioactive matter
- 23) Any claim arising from any waste or materials to be transported -- beyond the boundaries of the job sites where professional services are being performed.
- 24) To any claim arising from the repair, installation, or maintenance of underground storage tanks and associated underground piping
- 25) Any claim arising out of the exposure to asbestos.
- 26) Any claim under Coverage A or Coverage B arising from property owned or occupied or used by the insured; property in the care, custody or control of insured; or property the insured has sold, leased, abandoned, or given away.

V. Optional Extended Discovery Period:

- 1) Available if insurer cancels or refuses to renew policy
- 2) Additional premium - not to exceed 200% of annual premium
- 3) Twelve months effective at cancellation date or policy expiration
- 4) Different premium, retention, limits of liability or policy conditions does not constitute a cancellation or a refusal to renew.

VI. Limits of Liability and Retention:

- 1) Each claim: Indemnity includes loss payments and claims expense in excess of retention amount.
- 2) Policy Aggregate: Total liability of company shall not exceed aggregate for all claims first made against the insured during the policy period and the optional extended reporting period if purchased.

Retention:

- 1) Borne by the insured
- 2) Shall include loss payments and claim expense

Multiple Claims: Coverage A and B

- 1) Doesn't increase insurer's liability
- 2) Single claim - same or related acts, errors, or omissions or pollution conditions; one retained amount.

Multiple Claims: Coverage A and B Combined

- 1) Limit of liability for each claim is total for coverages A and B Combined for damages out of same or related acts, errors, or omissions or pollution conditions; one retained amount.

Claim Expense:

- 1) Fees by any lawyer designated by company
- 2) Fees by any lawyer designated by Insured with written consent of the company
- 3) All other fees, costs, prejudgment and post judgment interest, and expenses resulting from the investigation, defense and appeal of a claim, if incurred by the Company.

VII. Claim or Suit Provisions:

- 1) The company shall defend any claim.
- 2) Insured provides written notice
- 3) Insured shall cooperate
- 4) If Company recommends settlement within retention and Insured refuses, company is not liable for any amount in excess of retention.
- 5) Company shall not be liable for amount in excess of possible settlement amount, subject to Limits of Liability and Retention amounts.
- 6) Policy is void if Insured commits fraud in proffering any claim.

VIII. Conditions:

- 1) Application - personal representations
- 2) Audit
- 3) Cancellation: 30 Days
10 Days - Nonpayment of premium
- 4) Premium Adjustment: Gross Receipts
- 5) Action Against Company
- 6) Assignment
- 7) Subrogation
- 8) Changes
- 9) Sole Agent
- 10) Choice of Law: New York
- 11) Other Insurance

DEMETER LTD.

ENVIRONMENTAL IMPAIRMENT LIABILITY INSURANCE POLICY

A wholly owned subsidiary of Terra Insurance Ltd. and is based in Bermuda. Among requirements for participation include being a member of Terra or HWAC.

Declarations:

Limits of Liability:	\$1 MM	Each Claim
	\$1 MM	Maximum Aggregate

Retention:	\$100,000	Maximum
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Premium:	\$300,000	Maximum
	\$ 75,000	Minimum

Policy Form:	Claims Made
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Retroactive Date:	Policy Inception
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Coverage:

- 1) To pay on behalf of the Insured
- 2) Damages and expenses caused by environmental impairment by reason of your actual or alleged operations, negligent acts, errors, or omissions.

Defense:

- 1) Expenses are included within the limits of liability
- 2) Insurer selects defense counsel and may settle claims within policy limit.
- 3) Obligation to defend claims ends when policy limit has been exhausted by payment of judgments, settlements, or expenses.

Limit of Liability:

- 1) Total limit of liability includes damages and expenses regardless of number of persons included in policy or number of persons making claims.
- 2) Limit of liability is in excess of the retention.

Extended Discovery Period:

- 1) Automatic 60 days discovery period if policy is cancelled or not-renewed by insurer.
- 2) Does not extend policy period, change scope of coverage, reinstate, or increase the limit of insurance.

Retention:

- 1) Applies to damages and expenses.
- 2) Policy limits apply excess of retention

Exclusions:

- 1) Prior Acts Coverage
- 2) for any DAMAGES that are not caused by ENVIRONMENTAL IMPAIRMENT;
- 3) arising from the manufacture or the manufacture and design of a product by YOU;
- 4) Asbestos exclusion
- 5) Arising from any condition on YOUR premises, including the dumping of toxic or radioactive substance, but this Exclusion will not be construed to include a CLAIM arising from YOUR testing activities or arising from the use, maintenance, or storage of substances used in YOUR testing activities;
- 6) Arising from:
 - a. implementation, construction, operation, or maintenance activities, of a waste disposal facility, whether or not at a waste disposal site; or

- b. the generation neutralization, transportation, storage or disposal of WASTE, except incidental to testing activities; or
 - c. ownership of any waste disposal site or facility;
- 7) Based upon or attributable to acid rain conditions;
- 8) Arising from ENVIRONMENTAL IMPAIRMENT in respect of which YOU were aware of noncompliance with any applicable statute or regulation or instruction relating to ENVIRONMENTAL IMPAIRMENT issued by competent authority;
- 9) Arising from YOUR actual or alleged OPERATIONS, NEGLIGENT ACTS, ERRORS OR OMISSIONS related to a contractual agreement or project for which YOUR work commenced prior to the Retroactive Date;
- 10. Arising from liability assumed by You under any written or verbal agreement or contract, including, but not limited to, hold harmless and indemnity provisions, warranties, guarantees, certifications or penalty clauses;
- 11. For any part of DAMAGES attributable to fines, penalties or the refusal to pay or demand to return all or part of professional fees;
- 12. Arising from liability arising out of the ownership, rental, leasing, maintenance, operation, loading or unloading, use or repair of any real or personal property. This includes, but is not limited to any automobiles, mobile equipment, aircraft, watercraft, or other conveyance of any kind;
- 13. Arising from liability for DAMAGES sustained by any of YOUR employees arising out of or in the course of their employment; workers' compensation, unemployment compensation or disability law, or under any similar law;
- 14. For DAMAGES to:
 - a. property YOU own, rent or occupy, or
 - b. property in YOUR care, custody or control, or
 - c. property over which YOU exercise physical control;

15. For liability arising out of YOUR failure to provide or maintain any form of insurance, suretyship or bond, or to advise or require others to do so;
16. Arising from dishonest, fraudulent, or criminal acts or omissions or acts of a knowingly wrongful nature committed intentionally by you or at YOUR direction, whether or not YOU intended the result;
17. For liability arising out of, due to or involving directly or indirectly YOUR insolvency, receivership, bankruptcy or liquidation;
18. Joint ventures unless designated;
19. Any claim made by any ownership entity with the insured.
20. Nuclear liability
21. Punitive or exemplary damages

Conditions:

1. Appeals: Insurer may elect to appeal a judgment at its expense
2. Arbitration: Hamilton, Bermuda under provisions of the Bermuda Arbitration Act of 1986. Three arbitrators
3. Assignment
4. Cancellation: Insured - 60 days
Insurer - 60 days
5. Notice
6. Premium Refund: Pro rata basis; payment made 30 days after cancellation date
7. Insurers Reasons for policy cancellation include:
 - a. non-payment of premium when due
 - b. unsatisfactory claims or loss experience
 - c. insured ceases to be eligible to the policyholder
 - d. insured files a materially false application

8. Changes
9. Insurer right to examine records, property, operation
10. Other insurance
11. Professional and Commercial General Liability Insurance
As a condition for any coverage under this policy YOU will maintain in effect professional and commercial general liability insurance policies written in forms acceptable to US.
12. Premiums
13. Recoveries
14. Severability
15. Your Agent
16. Subrogation
17. Territory: Insurance applies anywhere in the world.

Definitions:

1. Annual Premium
2. Cancellation Date
3. Claims
4. Claims Made
5. "DAMAGES" means:
 - a. amounts intended to compensate another person or organization for loss or injury to person property or for economic loss or;
 - b. the cost of identification, evaluation, control, removal, disposal, nullification, or neutralization of substances that cause ENVIRONMENTAL IMPAIRMENT.

6. "ENVIRONMENTAL IMPAIRMENT" means any one or a combination of the following actual, threatened or alleged:
 - a. release, emission, discharge, dispersal, disposal, escape, or seepage of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, asbestos, liquids, solids, or gases, WASTE, or other irritants, including thermal irritants, contaminants, or pollutants containing any of the foregoing on or into land, the atmosphere, or any watercourse or body of water.
 - b. generation of odor, noises, changes in temperature, or any other sensory phenomena.
7. Expenses
8. "OPERATIONS, NEGLIGENT ACTS, ERRORS OR OMISSIONS" means YOUR OPERATIONS, NEGLIGENT ACTS, ERRORS OR OMISSIONS arising out of the performance of YOUR architectural, engineering or related services or a series of related architectural, engineering or related services resulting in CLAIMS during the POLICY PERIOD.
9. Policy Period
10. Policy Year
11. "WASTE" means materials to be recycled, reconditioned or reclaimed.
12. "WE," "US," "OUR," or "OURS" means Demeter Ltd.
13. "YOU," "YOUR," and "YOURS" mean, the person or organization designated in the GENERAL DECLARATIONS Item 1, and
 1. any employee of YOURS while acting within the course and scope of that employee's duties for YOU and
 2. any executive officer, director or partner while acting within the course and scope of duties for YOU.

H.S. WEAVERS UNDERWRITING AGENCY
(LONDON)
PROFESSIONAL LIABILITY INSURANCE POLICY
FOR POLLUTION CONDITIONS

Declarations:

Limit of Liability:	\$1MM	Each Claim
	\$1MM	Aggregate
		(Policy Period & Discovery Period)

Retained Limit: Negotiable

Policy Period: Negotiable

Retroactive Date:

Discovery Period:

Policy Form:

Claims Made "Cost Inclusive" Policy Coverage is not for full errors and omissions and does not provide a duty to defend. Application becomes part of policy.

Condition:

This policy requires the maintenance of Contractors Pollution Liability Insurance and Commercial General Liability Insurance.

Insuring Agreement:

- 1) To indemnify the insured excess of Retained Limit
- 2) Claims first made resulting from a circumstance
- 3) Arises out of a negligent act, error or omission
- 4) In rendering or failing to render those professional services as a Response Action Contractor
- 5) Which results from Pollution Conditions emanating from designated location.

Territory:

Anywhere in the World

Definitions:

- 1) Insured
- 2) Pollution Conditions: Alleged or threatened discharge, dispersal, release or escape of pollutants.
- 3) Pollutants: Any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
- 4) Response Action Contractor
- 5) Subsidiary
- 6) Damages
- 7) Costs, charges and expenses
- 8) Policy Period
- 9) Claim
- 10) Policy Year
- 11) Discovery Period: See conditions

Limit of Liability:

- 1) Each claim
- 2) Policy Aggregate - includes policy period and discovery period

Retained Limit:

- 1) May vary in different policy years
(See declarations)
- 2) Must be paid by Insured as a prerequisite of any payment by underwriters

Defense and Settlement:

- 1) Insured has duty to defend its claims.
- 2) Underwriter has right to associate with defense at their own expense.
- 3) Settlement of claim needs consent of Insured and Insurer. If insured refuses to settle, underwriter's liability doesn't exceed settlement potential plus costs.

Exclusions:

- 1) Any act, error or omission caused intentionally by or at the direction of the Insured; or any dishonest fraudulent, criminal, or malicious act, error or omission committed by or at the direction of the insured;

- 2) Employment exclusion; Workers' Compensation, unemployment compensation, Employers' Liability, disability law or similar law.
- 3) Insolvency or bankruptcy of Insured; underwriters not relieved of their obligations
- 4) Express warranties or guarantees, estimates of probably construction cost or cost estimates being exceeded.
- 5) Failure to complete drawings, plans, specifications --- on time except if failures are the result of a negligent act, error or omission.
- 6) Ownership, maintenance, operation, or use of watercraft, automobile, motor vehicles, aircraft or mobile vehicle of any kind---except claims arising out of the rendering of or failure to render professional services.
- 7) The advising or requiring of, or failure to advise or require or failure to maintain any form of insurance, suretyship or bond, either with respect to the Insured or any other person;
- 8) Plagiarism, infringement of copyright, trademark, patent or design patent or unfair business or employment practices;
- 9) The withdrawal, inspection, replacement, closure, shutdown, or loss of use of any property unless it is established that the said withdrawal, inspection, replacement, closure, shutdown, or loss of use arose out of negligent acts, errors or omissions in rendering or failure to render professional services for others under a specific contract with others;
- 10) The non-payment of professional fees;
- 11) Any negligent act, error or omission which either at time of the circumstance giving rise to said claim or at the time said claim is first asserted, is insured by any other valid policy or policies whether such other insurance is collectible or not.
- 12) Claims arising out of the ERISA of 1974;
- 13) Libel, slander, injury to reputation, self-esteem or the right of privacy;
- 14) Asbestos --- except if insured encounters asbestos or asbestos conditions on any location designed which was not reasonably foreseeable at the commencement of the work
- 15) Liability in respect of any Deepwater Port as defined in the Deepwater Port Act of 1974 as amended.
- 16) Bodily injury or property damage arising from radioactive matter, except if the insured encounters radioactive matter on any location designated which was not reasonably foreseeable at the commencement of work.

- 17) Any claim or suit brought by the United States or any State Territory thereof as a result of or arising from administrative or enforcement proceedings instituted by the Environmental Protection Agency of the United States or any State or Territory thereof, or any claim or suit arising from the Insured's activities other than as a Response Action Contractor.
- 18) The Named Insured's conduct or participation in any joint venture, unless the Named Insured is identified in the Declaration as a joint venture.
- 19) The transportation of any wastes or hazardous materials or pollutants, beyond any location designated
- 20) The storage or disposal of any wastes or hazardous materials or Pollutants beyond the boundaries of any location designated.
- 21) Consequential damages or damages arising out of implied warranties unless the Insured's contract contains:
 - i) an absolute disclaimer of liability for consequential damages
 - ii) a disclaimer of implied warranties in a form sufficient to satisfy the requirements of the Uniform Commercial Code,
 - iii) a statement that where the Purchaser is given a remedy in the contract that such remedy shall be exclusive, and
 - iv) a release from liability of consequential damages, obtained from the Owner, where the Insured is not in privity of contract with the Owner

and any court or arbitration panel in which the action is pending refuses to apply the above mentioned limitations of liability.

- 22) Any liabilities assumed under contract by the Insured for which the Insured would not otherwise be liable.
- 23) Any services for which an architect or engineer is either not licensed or not qualified and services which are specifically related to the construction, installation, manufacture, erection, fabrication, supplying of materials or the administration, inspection, observation or supervision thereof.

Conditions:

- 1) Pollution Legal Liability Insurance: Insured required to have in full force
- 2) Other insurance
- 3) Warranty: Policy Application is part of policy

- 4) Conformity With State Statutes
- 5) Subrogation
- 6) Authorization
- 7) Action Against the Underwriters
- 8) Notice
- 9) Assignment
- 10) Changes
- 11) Cancellations: Underwriter: 90 days
Non-payment of Premium: 10 days
Insured: Short rate premium
- 12) Named Insured: Agent for all insureds
- 13) Discovery Period:
 - i) Retained Limit continues if applicable at beginning of Discovery Period
 - ii) If policy is cancelled by insured, there is no Discovery Period; No discovery if cancelled for non-payment of premium
 - iii) Insured has no right to provide Notice of Circumstance during Discovery Period
- 14) Audit
- 15) False and Fraudulent Claims
- 16) Service of Suit Clause

11

**SUPERFUND REAUTHORIZATION: JUDICIAL AND
LEGAL ISSUES**

OVERSIGHT HEARINGS

BEFORE THE

**SUBCOMMITTEE ON ADMINISTRATIVE LAW AND
GOVERNMENTAL RELATIONS**

OF THE

**COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES**

NINETY-NINTH CONGRESS

FIRST SESSION

ON

SUPERFUND REAUTHORIZATION: JUDICIAL AND LEGAL ISSUES

JULY 17 AND 18, 1985

Serial No. 19



Printed for the use of the Committee on the Judiciary



NATIONAL CONSTRUCTORS ASSOCIATION

1101 15th Street, N.W., Suite 1000, Washington, D.C. 20005 (202) 466-8880

July 18, 1985

STATEMENT FOR THE RECORD

Subcommittee on Administrative Law and
Governmental Relations
Committee on the Judiciary
The United States House of Representatives

Re: Superfund Legislation — HR 2817 (Superfund Amendments of 1985)

INTRODUCTION

The National Constructors Association represents many of the largest U.S. firms engaged in the design and construction of major industrial, commercial and process facilities worldwide. Our firms have been and continue to be very supportive of Superfund cleanup programs, and over long years of experience have acquired technical and managerial expertise which makes them some of the most capable potential contractors to undertake the cleanup of this nation's worst toxic waste sites. These firms, however, are extremely concerned that participation in cleanup activity will lead to imposition of liability without fault even though the cleanup activities are carried out with utmost care in accordance with the requirements of a response action plan which has been approved by the Environmental Protection Agency or the states.

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At present, a kaleidoscope of fifty different sets of state laws governs the standards of liability that may result from Superfund cleanup work. Moreover, the status of individual state law is ever-changing and often varies from case to case. Additionally, the strict, joint and several liability of Superfund itself may be construed to apply to remedial contractors. Clearly, the uncertain and unpredictable status of the law as it may be applied to Superfund cleanup work operates as a strong disincentive for responsible contractors to enter the marketplace of Superfund cleanup. It thus inhibits the original purpose of Superfund — to alleviate expeditiously the potential, but substantial, health risks posed by thousands of dumpsites across this country.

The public policy of this nation requires that a national uniform policy be adopted with respect to the legal standard of liability of those firms whose only connection to the hazardous waste site is the performance of cleanup services. NCA believes that the most sensible remedy is to adopt a national standard of liability which is based on misconduct in the performance of the particular Superfund contract and which is applicable to the states.

Such an approach has been included in HR 2817, the Superfund re-authorization measure under consideration by the Energy and Commerce Committee.

Additionally, a statutory maximum of financial responsibility as well as a uniform statute of limitations are necessary to create a reasonable business risk atmosphere so that qualified and responsible contractors can help carry out Superfund's purpose of cleaning up the environment.

It should be noted that the typical Superfund site involves four categories of responsible parties: (1) the generators of the wastes; (2) the persons who transported the waste to the site; (3) the persons who arranged for the transportation to the site and (4) the owners and operators of the site. Unlike

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uniform policy be firms whose only cleanup services. legal standard of the particular

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the cleanup contractors, each of these responsible classes will remain subject to the full panoply of potential liability theories of the various states under our suggested approach.

Clearly, the cleanup of these old and abandoned waste sites is a national priority. It is equally clear that the complex difficulties and hazards associated with the removal and subsequent treatment or disposal of these abandoned wastes cannot be accomplished safely without the participation of organizations that possess both scientific management skills and a high degree of scientific and technical expertise. Thus, any legislative attempt to promote the cleanup of hazardous waste sites must address the closely related problem of the potential, yet real, liability risks that face those firms which undertake Superfund cleanup work.

Simply put, the legal standard of liability for a remedial contractor engaged in Superfund work should be uniform and not a patch-work quilt of various standards based on the provisions of different state laws and judicial interpretations in the various state and federal courts.

The spectre of an undefined and unending liability is a serious deterrent for responsible contractors who are interested in engaging in cleanup work.

Neither the Principal Reasons for the Imposition of Strict Liability Nor the Traditional Factors that Determine Whether an Activity is "Abnormally Dangerous" for Purposes of Applying Strict Liability Apply to Superfund Cleanup Work

The potential application of the doctrine of strict liability to Superfund cleanup work is one of the greatest deterrents to those firms that are interested in Superfund work. Strict liability, as that term is used by our courts, means

liability despite the exercise of the utmost care.¹ It is often referred to as liability without fault.² The courts of many states have imposed strict liability upon a variety of activities that are considered to be "abnormally dangerous."³ Although the traditional premises for the imposition of strict liability do not apply to Superfund cleanup work, there is no certainty that remedial contractors will not be swept into the chains of strict liability that may be applied to those persons associated with the creation of the particular hazard that is the subject of cleanup activity.⁴ The premise of strict liability is to impose liability upon those persons who "introduced into the community an abnormal risk of a serious character."⁵ In essence, the imposition of strict liability requires a characterization of the activity itself as abnormally dangerous and a public policy decision that one is not free to conduct the particular activity without becoming subject to absolute liability for all harm that ensues regardless of fault.

The principal reasons for the application of strict liability are to assure that the costs of harm resulting from risks inherent in an abnormally hazardous activity be borne by the persons who create such risks and, in some cases, to deter abnormally dangerous activities. Neither of these principles apply to Superfund cleanup work.

1 See, e.g., Indiana Harbor Belt Railroad Co. v. American Cyanamid Co., 517 F. Supp. 314, 317 (N.D. Ill. 1981).

2 Prosser & Keaton, The Law of Torts §75 at p. 534 (5th Ed. 1984).

3 See, e.g., Restatement (Second) of Torts §§519 and 520.

4 See, e.g., National Steel Service Center v. Gibbons, 693 F.2d 817 (8th Cir. 1982); (under Iowa law, doctrine of strict liability for abnormally dangerous activities applied to railroad hauling tank cars loaded with propane even though the railroad acted in conformity with federal and state regulations and without negligence); Chavez v. Southern Pacific Transportation Co., 413 F. Supp. 1203 (E.D. Calif. 1976) (railroad held strictly liable for harm resulting from explosion that occurred while transporting 18 bomb-loaded boxcars under a contract with the Department of Navy).

5 Prosser and Keaton, The Law of Torts §78 at p. 555. (5th Ed. 1984).

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The firms which are hired to develop cleanup plans or do the physical work necessary to accomplish cleanup did not create the risk in the first place. Rather, the risk was created by the generators of the substances found at the cleanup site and by those persons associated with the improper disposal. In short, the remedial contractor's role is to alleviate a risk that was created and introduced to the community by others. In essence, the cleanup contractor acts as an instrument of the United States government in carrying out a governmental purpose. There simply is no justification for placing a remedial contractor under the burden of strict liability that applies to those who created the risk.

Furthermore, the national policy promoted by Congress in the Superfund legislation is to strongly encourage rather than to deter responsible cleanup of hazardous waste. Thus, while standards of strict liability may be appropriate for those who are responsible for creating the hazardous waste site, there is no rational basis for applying such standards to a remedial contractor.

In addition to the fact that the traditional justification for strict liability does not apply to Superfund work, it is also clear that Superfund cleanup work is not an "abnormally dangerous activity" as that term has traditionally been defined for purposes of strict liability. The Restatement of Torts sets forth six factors to be considered in determining if an activity is "abnormally dangerous" before strict liability principles will be applied: (1) the existence of a high degree of risk of harm to the person, land or chattels of others; (2) the likelihood that the harm that results will be great; (3) inability to eliminate the risk by the exercise of reasonable care; (4) the extent to which the activity is not a matter of common usage; (5) the inappropriateness of the activity to the place where it is carried on; and (6) the extent to which the value to the community is

outweighed by its dangerous attributes.⁶ Application of the fifth and sixth factors demonstrates that strict liability should not be applied to Superfund cleanup activity. Clearly, Superfund cleanup activity is appropriate — in fact, it is managed by the federal government and carried out under the direction and supervision of the EPA and the Corps of Engineers pursuant to a congressional mandate. Similarly, there is no question that the value which the community receives from Superfund cleanup work outweighs any dangerous attributes of the cleanup work.⁷

The National Constructors Association recognizes that some have raised the argument that remedial contractors should be held to a strict liability standard because such a standard will encourage the highest degree of care in the performance of Superfund work. This argument misperceives the nature of strict liability. The essence of the doctrine is that liability is imposed for undertaking the activity, not for the manner in which it is undertaken. Strict liability, therefore, deters the undertaking of the activity. Unlike liability imposed on the basis of a contractual obligation or negligence, it has no impact whatsoever on behavior once the activity is started.

Additionally, unlike the persons who are responsible for creating the site in the first place and who are presumably aware of the potentially harmful nature of their hazardous materials and, therefore, of the risks attendant to those materials, the remedial contractor often will not be in a position to weigh the risks inherent in a cleanup job before commencing physical work. This is particularly true with regard to abandoned sites because, more often than not,

6 Restatement (Second) of Torts §520.

7 Under state law at present, however, each court would make a determination of whether strict liability should be applied to the activities of remedial contractors by analyzing these factors on a case by case basis. Given the general trend toward expanding theories of liability, the remedial contractors' potential liability is extremely unpredictable and virtually impossible to insure against.

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the remedial contractor will have no way of knowing in advance what he will encounter during cleanup operations.

Simply put, there will be no blueprints to tell a remedial contractor what conditions or chemicals or gases are buried underneath the top soil of a hazardous waste dumpsite. No matter how carefully one plans and carries out a cleanup operation, it will be impossible to identify — let alone, eliminate — all risks before they are encountered. Thus, while it may be fair to impose strict liability upon those persons who created the problem on the basis that they, at least, were in a position to assess the risks of their enterprise, and they presumably created the risk for their own benefit, the reverse holds true for the remedial contractor who does not have sufficient initial information to assess the various potential risks of bidding on and receiving Superfund cleanup work.

The unpredictable liabilities facing cleanup contractors are compounded by and intertwined with the present insurance crisis in the environmental/pollution field. As the Wall Street Journal recently reported, "the pollution-liability insurance field has virtually collapsed."⁸ As a result of the tremendous liability risks and the unavailability of insurance coverage, a number of highly-qualified NCA member companies have declined to bid on toxic waste cleanup projects.

The problem of adequate pollution liability insurance has been recognized by Congress as it has called for studies concerning the availability of pollution insurance protection on reasonable terms. These studies resulted in a March 1982 Treasury Department Report entitled "Hazardous Substance Liability Insurance." As this Committee is undoubtedly aware, the Treasury report concluded that serious problems exist with respect to insuring pollution risks due to "the particular combination of liability and financial responsibility provisions

⁸ Wall Street Journal, 3/19/85, "Risky Business: Insurers Are Shunning Coverage of Chemical and Other Pollution," p. 1.

which tend to render the liability exposure of the insurer too uncertain for traditional underwriting practices."⁹

The situation has not improved since 1982. It has become worse and is illustrated by the following letter that was written by an NCA member company during the first week of March 1985 to a state government regarding the company's decision not to bid work on an inactive hazardous waste site:

Thank you for considering us qualified to receive the subject RFP. We have carefully reviewed the terms and conditions of the RFP and attended the pre-bid conference but we find, at this time, we are unable to resolve what appears to be an unlimited liability exposure. We must therefore respectfully decline this opportunity to assist you in this important assignment.

I am sure we all recognize the current concerns in performing toxic and hazardous waste work. Specifically, a participating contractor is exposed to lawsuits, deservedly or not, for real or imaginary reasons, not only during his participation on site but for an unlimited period of time into the future. Given the fact that insurance protection for these risks is becoming essentially unavailable, without the hope of indemnification by the State, a contractor becomes a self-insurer against completely undefined risks.

SOLUTION TO THE DILEMMA OF UNLIMITED LIABILITY FOR CLEANUP CONTRACTORS

A. National Standard of Liability

NCA does not seek to exculpate remedial contractors from third-party liability. Rather, it urges Congress to establish a national standard of responsibility for remedial contractors that is based upon misconduct.

The purpose of this national standard of liability is to create an environment which encourages responsible contractors to enter the business of cleaning up hazardous waste. Such a provision will permit contractors to enter into contracts to provide response action with an ability to estimate and control, from the outset, their exposure to damages.

⁹ Department of the Treasury, Hazardous Substance Liability Insurance at v (March 1982).

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The authors of HR 2817 have taken that first step with the inclusion of a provision which establishes a national liability standard for remedial action contractors. This standard holds them responsible only for their own negligence. However, it does not in any way eliminate their exposure to liability should they be found negligent.

B. Maximum Liability Exposure

The National Constructors Association believes the establishment of a statutory limitation on liability is essential to encourage the broadest possible participation by qualified contractors in the cleanup process. This statutory limitation on financial responsibility would simply recognize the need to keep the potential liability of a remedial action contractor in some reasonable balance with the compensation being received for cleanup services. Responsible contractors, particularly those with significant assets and public firms with shareholders and boards to whom they must report, are understandably reluctant to risk their entire corporate assets for a contract which offers a low financial return for a potentially devastating risk.

Those who fail to appreciate this dilemma may misperceive the nature of the construction industry. Engineering and construction contractors are not unfamiliar with high-risk projects. However, they normally negotiate contracts which provide for a shared risk with the client. What risk they do assume is further minimized by insurance coverage.

Contractors, engineers and their clients also recognize that it is virtually impossible under the best of circumstances to build a perfect job or design a plan which anticipates all possible needs. Contracts routinely provide clauses to handle adjustments necessary to deal with unforeseen developments, changes, and errors.

There is almost no way under current law that a remedial action

contractor can protect itself against the potential liability which may result from such unforeseen circumstances in a hazardous waste cleanup. Insurance cannot be obtained to cover this risk, and state and federal clients have not or cannot assume the risk themselves. I should add at this point that margins of profit within the construction industry are extremely low — generally 3% to 10% of the contract price — and do not hold out the prospect of substantial rewards for the risk of hazardous waste work. On an average cleanup contract projected to be \$10 million the profit for the contractor would probably be as little as \$500,000 — a number unlikely to entice a major construction firm to risk tens of millions of dollars of potential liability.

Although the Army Corps of Engineers and EPA do not report a substantial shortage of contractors at this time, both have expressed concern about future capacity under an expanded Superfund program unless these liability concerns are addressed. Until this year many contractors were still able to insure their activities. As those who have been doing this work are notified of non-renewal of their insurance coverage the pool of qualified contractors may actually shrink at the same time the funding for the program increases under the new authorization.

Some states have already experienced procurement problems as they seek contractors to carry out their cleanup programs. The state of California was recently involved in protracted negotiations and a bid protest procedure as it attempted to award nine regional cleanup contracts. One NCA company was among several which refused to sign contracts awarded to them because of onerous liability provisions. The negotiations and bid protest process imposed considerable delays on that procurement process and added an additional layer of non-productive transaction costs which drain the funds available to perform cleanups themselves. We believe that Congress can head off future problems by

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adopting the national standard of liability provisions of HR 2817 and establishing a ceiling on the liability of remedial action contractors. The liability of remedial contractors should not be disproportionate to the compensation such contractors will receive from their cleanup activities, or financially responsible contractors will be deterred from participation in the cleanup.

Clearly the public interest is served by establishing a rational ceiling on liability for cleanup contractors. Such a ceiling coupled with the national standard of liability set forth in HR 2817 should:

- Eliminate the need for protracted contract negotiations and bid procedures.
- Lower the amount of non-productive transaction costs associated with cleanup contracts.
- Ensure the participation of an adequate pool of responsible, qualified contractors in the hazardous waste field.

C. Statute of Limitations

Contractors are also subject to undue exposure and deterrence because of the long period of time which may lapse between their performance of work and the manifestation of harm from a non-sudden release. In terms of time limits, there is no definable cut-off to liability since the Superfund law permits a claimant to bring an action within three years of his "discovery" of a loss. Given the nature of damages caused by toxic substances, "discovery" is a very elastic concept and could well occur many years in the future.

While the standard currently applies to claims and actions against a party which has created, owns, or operates a particular waste site, it is wholly inappropriate for application to a party whose sole activity at the site is to carry out a contract for response action services. A clean-up, or "response action" contractor would be engaged in activities designed to carry out the very

purposes for which the Superfund was created — the remediation of existing hazardous conditions and the prevention of future harm to persons, property, and the environment. Such a contractor would encounter a situation not of its own making, where actual or potential dangers already exist, and where future harm or loss may be inevitable but not yet discernible. Moreover, after a response action contractor's work is completed, it would not be involved in any continuing or additional activities of the owner or operator of the site. Thus, a response action contractor would have a discrete, limited relationship to the site, for the sole purpose of rectifying pre-existing conditions and limiting future harm. It is inequitable to subject a party acting for beneficial purposes to the same potentially extensive period of liability which applies to a party which caused the hazardous conditions.

The insurance industry has stated that, if pollution insurance is made available for cleanup work in the future, it will be offered on a "claims made" basis only. "Claims made" insurance, in order to fully protect a contractor under the current statute, will have to be maintained indefinitely. Contractors bidding on hazardous waste cleanup projects in the present have no way of calculating into their bids the cost or availability of pollution insurance many years from now. Indeed, they have no assurance that insurance coverage will be available at all in future years. Even if insurance coverage is at some time available, insurers will at any point have the option of cancelling individual coverage or coverage for the industry as a whole on the basis of bad claims experience. In order to reduce the deterrent to cleaning up the environment that this risk presents, and to ensure consistency among the states, a reasonable statute of limitations or repose should be established with respect to claims against remedial contractors.

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NCA urges Congress to enact legislation encompassing reasonable limits on the potential liability of cleanup contractors. Such legislation will permit contractors to proceed with cleanup contracts on the same basis on which they perform other contracts, being held liable for their own misconduct, but without the prospect of incalculable and potentially devastating liability which is beyond their control. Reasonable limitations on liability will encourage NCA members and other responsible contractors to proceed with the vital national enterprise of cleaning up the environment. We would of course be pleased to work with the members of this Committee to provide information and answer any questions which may assist in the Committee's consideration of this important problem.

Respectfully submitted,

National Constructors Association

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LAWS OF ALASKA

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Source

SCS CSHB 567(Fin)

Chapter No.

191

AN ACT

Relating to oil discharge prevention and contingency plan requirements, financial responsibility requirements related to oil, penalties, and inspection authority of the Department of Environmental Conservation; relating to the oil and hazardous substance release response fund and responses to oil and hazardous substance emergencies; authorizing the Department of Environmental Conservation and municipalities to enter into agreements pertaining to vessel traffic control and monitoring systems; and providing for an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

THE ACT FOLLOWS ON PAGE 1, LINE 18

UNDERLINED MATERIAL INDICATES TEXT THAT IS BEING ADDED TO THE LAW AND BRACKETED MATERIAL IN CAPITAL LETTERS INDICATES DELETIONS FROM THE LAW; COMPLETELY NEW TEXT OR MATERIAL REPEALED AND RE-ENACTED IS IDENTIFIED IN THE INTRODUCTORY LINE OF EACH BILL SECTION.

Approved by the Governor: June 26, 1990
Actual Effective Date: June 27, 1990

AN ACT

Relating to oil discharge prevention and contingency plan requirements, financial responsibility requirements related to oil, penalties, and inspection authority of the Department of Environmental Conservation; relating to the oil and hazardous substance release response fund and responses to oil and hazardous substance emergencies; authorizing the Department of Environmental Conservation and municipalities to enter into agreements pertaining to vessel traffic control and monitoring systems; and providing for an effective date.

* Section 1. AS 29.35.020 is amended by adding a new subsection to read:

(d) A municipality may enter into agreements with the United States Coast Guard, the United States Environmental Protection Agency, and other persons relating to development and enforcement of vessel traffic control and monitoring systems for oil barges and tank vessels carrying oil operating in or near the waters of the state.

* Sec. 2. AS 46.03.759(c) is amended to read:

(c) Subject to the \$500,000,000 maximum set under (a) of this section the court shall assess four times the penalty set out in (a) of this section if the court finds

(1) the discharge was caused by the gross negligence or

Chapter 191

intentional act of the defendant;

(2) the defendant did not take reasonable measures to contain and clean up the discharged oil; or

(3) the defendant did not act or respond in accordance with an approved oil discharge prevention and contingency plan.

* Sec. 3. AS 46.03.823(a) is amended to read:

(a) A person who is a response action contractor with respect to a release or threatened release of a hazardous substance whose acts or omissions are not contrary to a response plan or order by a state or federal agency having jurisdiction over the release or threatened release is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the release or threatened release unless the release or threatened release is caused by an act or omission of the response action contractor that is negligent or grossly negligent or constitutes intentional misconduct. To show negligence by a response action contractor, a claimant must show that the acts or omissions of the contractor under the response action contract were not in accordance with generally accepted professional standards and practices at the time the response action services were performed.

* Sec. 4. AS 46.03.823(b) is amended to read:

(b) The liability limitation under (a) of this section

(1) does not apply to a response action contractor who would otherwise be liable for the release or threatened release under state or federal law even if that person had not carried out a response action with respect to the release or threatened release; and

(2) does apply only to releases for which notification the department was provided and received in the manner prescribed under state law (STRICTLY LIABLE UNDER THIS SECTION).

* Sec. 5. AS 46.03.823(e) is amended to read:

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(e) This section does not affect the liability of a response action contractor that may arise from the response action contractor's failure to comply with the terms or conditions of a

(1) response action contract or a remedial action plan if one has been approved by the department; or

(2) contingency plan approved by the department where the response action contractor is the plan holder.

* Sec. 6. AS 46.03.823(g)(2) is amended to read:

(2) "response action contract" means a written contract or agreement to provide response action with respect to a release or threatened release of a hazardous substance, entered into by a person with

(A) the department; [OR]

(B) another person who has entered into an agreement with the department that provides for response action subject to the department's oversight and control;

(C) a federal agency with jurisdiction over the release or threatened release; or

(D) another person potentially liable for the release or threatened release under state or federal law;

* Sec. 7. AS 46.03.823(g)(3) is amended to read:

(3) "response action contractor" means

(A) a person who enters into a response action contract with respect to a release or threatened release of a hazardous substance and who is carrying out the contract, including a cooperative organization formed to maintain and supply response equipment and materials that enters into a response action contract relating to a release or threatened release; and

(B) a person who is retained or hired by and is under

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the control of a person described in (A) of this paragraph to provide services related to the response action contract.

* Sec. 8. AS 46.04.020(e) is amended to read:

(e) The department shall enter into negotiations for memoranda of understanding or cooperative agreements with the United States Coast Guard, the United States Environmental Protection Agency, and other persons in order to

(1) facilitate coordinated and effective oil discharge prevention and response in the state, including agreements relating to development and enforcement of vessel traffic control and monitoring systems for tank vessels and oil barges operating in or near the waters of the state;

(2) provide for cooperative review of oil discharge prevention and contingency plans submitted to the department under AS 46.-04.030;

(3) provide for cooperative inspections of oil terminal facilities by the department and the United States Coast Guard or United States Environmental Protection Agency; and

(4) provide for cooperative oil discharge notification procedures.

* Sec. 9. AS 46.04.030 is amended to read:

Sec. 46.04.030. OIL DISCHARGE PREVENTION AND CONTINGENCY PLANS.

(a) A person may not cause or permit the operation of an oil terminal facility in the state unless an oil discharge prevention and contingency plan for the facility has been approved by the department and the person is in compliance with the plan [. THE DEPARTMENT IS ONLY STATE AGENCY WHICH HAS THE POWER TO APPROVE AN OIL DISCHARGE CONTINGENCY PLAN FOR THE PURPOSES OF THIS SECTION].

(b) A [AFTER JANUARY 1, 1981, A] person may not cause or permit

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AMERICAN INSURANCE ASSOCIATION
LAW DEPARTMENT

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990

Mr. Tom Gillis
U.S. Environmental Protection Agency
OS-510
401 M Street, S.W.
Washington, D.C. 20460

Re: Comments of the American Insurance Association
on Superfund Response Action Contractor
Indemnification Guidelines

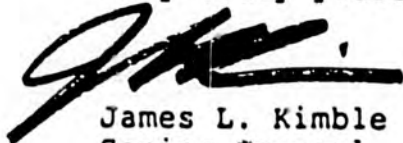
Dear Mr. Gillis:

Enclosed please find comments of the American Insurance Association to the Proposed Guidelines for Superfund Response Action Contractor Indemnification published in the Tuesday, October 31, 1989, Federal Register.

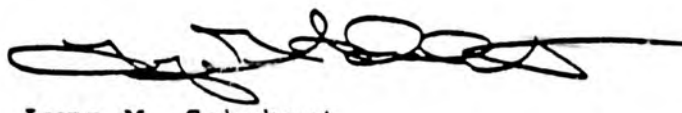
Should you have any questions, please do not hesitate to contact either of us on this matter.

Thank you for your consideration.

Very truly yours,



James L. Kimble
Senior Counsel



Lynn M. Schubert
Counsel

Enclosure

ROBERT J. VAIRO
CHAIRMAN

DEAN R. O'HARE
CHAIRMAN ELECT

ROBERT J. HAUGH
VICE CHAIRMAN

WILLIAM E. BUCKLEY
VICE CHAIRMAN

ROBERT E. VAGLEY
PRESIDENT

**COMMENTS OF THE AMERICAN INSURANCE ASSOCIATION
TO THE EPA DRAFT INDEMNIFICATION GUIDELINES
PUBLISHED IN THE TUESDAY, OCTOBER 31, 1989, FEDERAL REGISTER**

The American Insurance Association is a trade association representing major property and casualty insurers across the United States. Many of these insurers write both liability insurance and surety bonds. These companies are concerned with the indemnification guidelines published in the Tuesday, October 31, 1989, Federal Register from the perspective of both liability insurance and surety bonds.

These comments will be divided into two general sections. First, a discussion of the overall concerns of sureties regarding bonding hazardous waste projects, as well as the specific provisions of the Section 119 Indemnification Guidelines. Second, a discussion of the availability of pollution liability insurance for remedial action contractors (RACs).

Potential lack of indemnification is one of a number of problems which currently exist for insurers who wish to write surety bonds for contractors involved in hazardous waste cleanup projects.

SURETY ISSUES

OVERALL SURETY CONCERNS

Many sureties have expressed concern regarding bonding these projects due to a perceived lack of certainty as to their liability for claims other than those traditionally covered by performance and payment bonds, i.e., performance of the work in accordance with the plans and specifications and payment of covered subcontractors and suppliers on the project. Under the current state of the law it is unclear that a surety for a RAC will not be subjected to liability for tort claims as well as traditional payment and performance bond claims, perhaps even under strict liability. This liability might even be extended to claims which are not sustainable against the principal.

**Liability of a Surety is Coextensive
With That of Its Principal**

For example, under normal circumstances the liability of a surety is measured by the liability of its principal. Under Section 119 of the Superfund Amendments and Reauthorization Act of 1986 (SARA) a cleanup contractor or RAC is no longer subject to "strict liability" for actions brought due to the hazardous waste site, but rather, is liable only under a negligence standard. However, under the Federal Comprehensive Emergency Response Compensation and Liability Act (CERCLA), any party who generates or contracts for the disposal, transport or treatment of hazardous waste may be strictly liable for claims made due to the removal. Should a RAC be defaulted on a project, the surety, under traditional surety principles, normally would have the right to hire a completing contractor to finish the project. However, under CERCLA it could be construed that the surety, by taking over a defaulted contract, has contracted for the removal of hazardous waste, and has subjected itself to strict liability, a standard greater than that of its principal. This is clearly inequitable, but not unfeasible under the current state of the statutes.

**A Surety Bond Does Not Compensate
Tort Liability Claimants**

Further, there is no statutory definition of the types of claims covered under the bonds. Normally performance and payment bonds do not provide coverage for liability claims, however, environmental law is an area rife with expansion of insurance liability far beyond those claims originally anticipated by the contracting parties. Twenty years from now when a liability claim is made on a hazardous waste cleanup project and there is no liability insurance and no RAC capable of satisfying the claim, the surety bond may be the only avenue left for payment to the injured party. Such a misconstruction of policy terms is not unheard of in current court decisions relating to personal injury and environmental damage.

**Design Should Not Be Included
in Bonded Contract**

Another concern of the sureties is the cleanup contract itself. A surety bond covers construction. It normally does not cover design. Many of the contracts being proposed for Superfund cleanup are design-build projects requiring surety bonds for the entire project, both the design of a state-of-the-art technology for disposing of the waste and construction of the requisite facility. While sureties do guarantee many contracts that include design liability, they

would be uncomfortable to underwrite a bond which would guarantee this type of state-of-the-art technology. This is traditionally covered by professional errors and omissions policies, which probably will not be available for these risks.

**Date Certain for Termination of
Bond Liability is Imperative**

There also exists the question of when the bond liability terminates. It is necessary that the liability terminate when the project has been completed and all appropriate claims by subcontractors and suppliers on the project have been paid. A surety bond is not a long-term insurance policy which is designed to pay claims far into the future. There must be a date after which no further claims will be entertained.

§119 INDEMNIFICATION PROPOSAL

The EPA §119 indemnification guidelines recognize that a lack of indemnification for the RAC could mean that sureties will be reluctant to provide performance and payment bonds for Superfund projects^{1/}.

Indemnification Must Run to the Surety

Indemnification by the EPA or the contracting authority could be of some benefit, but not as currently proposed.

Rather, the proposed indemnification guidelines would not solve even the one issue of protection of sureties from third party liability. The first and foremost problem is that the proposed indemnification does not specifically run to the surety. Therefore, if a surety who has written the statutorily required bonds for the RAC takes over and completes the project, it will not be provided with the same protection that its principal has under the same contract, regardless of whether it is considered an arranger or merely the completing surety. Since there is no viable pollution liability insurance, and no realistic expectation of any, indemnification is the only mechanism available for the protection of the RAC and the surety. However, unless the indemnification runs to the surety, the surety loses any benefit of the indemnification if the contractor defaults on the project. If indemnification is important to encourage RAC participation in Superfund cleanup, it is just as important for the surety. However, the indemnification must run to the surety.

^{1/} 54 Federal Register 46015.

The RAC and the surety are not the parties responsible for the creation of the hazardous waste site, but the ones who are cleaning up a toxic situation. These parties should be protected from the "probable and catastrophic risk" of loss cited by the EPA's Indemnification Task Force. ^{2/}

Congress contemplated that indemnification would relate to the "nature and magnitude" of the risks facing RACs, ^{3/} taking into account that liabilities may "potentially exceed both the contract amount and the company's net worth." ^{4/} EPA indemnification is to address "the legitimate long-term liability concerns of contractors." ^{5/} A surety which provides the required bond allowing the RAC to perform hazardous waste cleanup should be similarly protected.

§119 Indemnification Proposal Would Discourage Competition

The indemnification scheme proposed contains a number of flaws of more general concern. One of the underlying principles of public contracting is to achieve the best product at the lowest price through competition. One of the advantages to greater surety participation is the increase in the number of good contractors who will be able to bid on this work. However, some of the terms of the proposed indemnification guidelines will inhibit competition by a large number of contractors.

For example, on firm fixed price contracts, RACs are required to have added to their bids the "costs" of indemnification. The "costs" are tied to the limit of indemnification requested and the amount of the deductible.

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- ^{2/} U.S. EPA, Task Force on the Indemnification of Response Action Contractors (undated) at 1.
- ^{3/} Report of the House Committee on Judiciary, H.R. Rep. No. 99-253 (III), 99th Congress, 2d Sess., reprinted in 1986 U.S. Code Cong. & Admin. News, 3038, 3050 [hereinafter Judiciary Report].
- ^{4/} Report of the House Committee on Energy and Commerce, H.R. Rep. No. 99-253 (I), 99th Cong., 2d Sess., 92 reprinted in 1986 U.S. Code Cong. & Admin. News, 2835, 2874.
- ^{5/} Judiciary Report, supra note 3, at 3050.

The contractor with the lowest price when the bid and indemnification "costs" are added will be awarded the contract. The concept behind this proposal appears to be to discourage RACs from requesting indemnification. However, due to the unavailability of liability insurance, this would leave the RAC with little or no coverage. This is not in the best interest of the public. Rather, this leaves the public at risk for damages incurred which are not compensable by the RAC.

For negotiated or cost reimbursement contracts the program calls for the deductible amount to be adjusted according to the limit of indemnification requested by the RAC. A contractor which requested the full amount of indemnification available, \$50 million, would be required to carry a deductible of -- \$3.5 million. This virtually eliminates the small contractor from participation in the program. Further it discourages sureties from wanting to write bonds for a contractor who must accept \$3.5 million in loss before it is indemnified.

The Amount and Time Period of the Indemnification are Inadequate

Two other major flaws in the program are the dollar limit of indemnification and the length of time of the coverage.

Indemnification is limited to \$50 million. Regardless of the deductible question, \$50 million is not enough to protect against the magnitude of losses which can reasonably be expected by RACs under this program. In fact, the consultant hired by the EPA to study this matter, Tillinghast, Nelson & Warren, Inc., recommended a \$200 million limit. 6/

The second issue, time, also needs to be addressed. The proposal states that indemnification will cover claims which arise during the contract and for ten years after completion. Ten years does not allow for the long term nature of health related claims. In fact, Section 119 does not require a time limit on indemnification. To fulfill the Congressional intent of RAC protection either no time limit or a much longer period must be included.

6/ Letter from Gregory Berg, Tillinghast, Nelson & Warren, Inc. to Robert J. Mason, Environmental Protection Specialist, U.S. Environmental Protection Agency, August 7, 1987, at 3.

Even in order to recover the limited indemnification proposed, RACs must demonstrate through documentation that diligent efforts have been made to obtain adequate insurance at a fair and reasonable price. Not only is this a burdensome and unnecessary requirement, but the EPA proposes to use this requirement to retroactively refuse to indemnify the RAC if the EPA determines that at the beginning of the contract the RAC failed to adequately document its diligent search for insurance.

**Proposal Increases Confusion as to
RAC Standard of Liability**

The EPA also proposes not to indemnify the RAC where the RAC is found both strictly liable and negligent and the cause of action is inseparable. Since RACs are not strictly liable for harm under Superfund, this must refer to instances where a state imposes strict liability on RACs under state law. Again this questionable nature of the indemnification will make this a less desirable bond to write from a surety prospective.

All in all there are a number of concerns which the surety industry would like to see addressed. Section 119 indemnification is one of these concerns. A more viable indemnification program for both RACs and their sureties would be an important first step toward making Superfund a workable program.

RESPONSE ACTION CONTRACTOR LIABILITY INSURANCE ISSUES

**THE PROPERTY/CASUALTY UNDERWRITING CYCLE
DOES NOT AFFECT THE AVAILABILITY OF RAC
POLLUTION LIABILITY INSURANCE**

We continue to be concerned about EPA's repetitive theme that the principal reason for the current unavailability of pollution liability insurance for response action contractors (RACs) and other pollution-related risks is the cyclical nature of the property/casualty insurance industry. While the dissertation in the Federal Register notice associated with "cash flow underwriting" and the property and casualty insurance market "business cycle" is generically accurate, it is irrelevant to the availability problems associated with pollution liability insurance. Property and casualty insurers did not abandon the pollution liability insurance market in 1984 because their financial capacity was limited due to underwriting losses.

There is no correlation between the availability of pollution liability insurance and the "insurance cycle." A review of the property/casualty insurance industry's return on net worth (GAAP) from 1984 through 1988 indicates that the most recent underwriting cycle peaked in 1986 and 1987.

Return on Net Worth (GAAP)	1984	1985	1986	1987	1988	7/
	1.8%	3.9%	13.0%	12.9%	11.5%	

There is no documentation that suggests that pollution liability coverage was more available during this period. In fact, while unavailability persists, coverage was less accessible in 1986-87 than it is today.

The pollution liability insurance market has never been robust. At its zenith, the market could best be described as a specialty insurance market with perhaps a dozen domestic property and casualty insurers providing pollution liability insurance coverage in response to the financial responsibility requirements in the Resource Conservation and Recovery Act (RCRA). As individual insurers became aware of the enormous retroactive liability exposure triggered by misinterpretations of the commercial general liability (CGL) policy for old or abandoned facilities, they ceased writing new coverage, and the market virtually disappeared.

Comparisons to other insurance markets such as medical malpractice insurance or product liability insurance are misleading. The CERCLA liability standard is retroactive, nearly absolute, joint and several liability, and the potential liability exposure exceeds the total assets of the property and casualty insurance industry. In addition, medical malpractice and products liability claims have not resulted in the massive case load of coverage dispute cases in which insurers and their policyholders dispute the meaning of contract language.

7/ Data for 1984 to 1987 is based on A.M. Best's Aggregates and Averages. The 1989 edition of this publication which contains 1988 data, will not be available until mid-summer 1989. Consequently, 1988 experience above is based on the ISO-NAII "Operating Results: Year-End 1988 Analysis," dated March 27, 1989.

**RAC POLLUTION LIABILITY INSURANCE
AVAILABILITY IS LIMITED**

The current pollution liability insurance market for RACS is extremely limited. A recent GAO study ^{8/} reports that there are three risk spreading entities currently providing pollution liability for response action contractors: the American International Group (AIG), Reliance Insurance Company, and one risk retention group, Demeter Limited. Even these risk spreading mechanisms provide coverage on a limited basis:

"The representative added that AIG will knowingly insure response contract activities only when it can assess the potential risks and that the policies would generally be site-specific. (page 31)

"The only RACs Reliance will insure, according to the representatives, are construction firms subcontracting for site-specific work. Reliance does not insure EPA prime contractors because they work at multiple sites, according to the representatives. (page 32)

"Demeter Limited... insures only professional engineering firms against pollution risks. Demeter will not insure remedial or construction contractors. A Demeter representative told us that Demeter has issued 13 policies to architectural and engineering firms. (page 32)

While the continuing emphasis on the insurance cycle is misleading, the background remarks do reference federal and state pollution laws, coverage dispute cases, unavailability of reinsurance, and underwriting difficulty as problems which have contributed to the unavailability of pollution liability insurance. In addition to these very real concerns, property casualty insurers are now faced with the conceptual development of toxic tort damage theories which are in a nascent, evolutionary stage.

^{8/} United States General Accounting Office, Report to the Congress, Superfund Contractors Are Being Too Liberally Indemnified by the Government, September 1989, GAO/RCED-89-160.

IMPEDIMENTS TO RAC INSURABILITY

The RAC Legal Standard in SARA Does Not Preempt State or Common Law

Although response action contractors are exempt from liability under federal law except in the case of a release caused by their negligence, gross negligence, or intentional misconduct, SARA Section 119 does not preempt conflicting state liability standards which could create a strict, joint and several liability standard for RACs. The RAC legal standard established in SARA is significant because it represents a departure, albeit limited, from the standard of strict, joint and several liability generally applied under CERCLA, but the provision does not alter or limit the liability of response action contractors which might arise under state or common law.

The premise of strict liability is to impose liability upon those persons who "introduced into the community an abnormal risk of a serious character." Prosser and Keaton, The Law Of Torts, § 78 at p. 555. (5th Ed. 1984). The Restatement of Torts sets forth six factors to be considered in determining if an activity is abnormally dangerous before strict liability principles will be applied: (1) the existence of a high degree of risk of harm to the person, land or chattels of others; (2) the likelihood that the harm that results will be great; (3) inability to eliminate the risk by the exercise of reasonable care; (4) the extent to which the activity is not a matter of common usage; (5) the inappropriateness of the activity to the place where it is carried on; and (6) the extent to which the value to the community is outweighed by its dangerous attributes. Application of the fifth and sixth factors indicates that strict liability should not be applied to Superfund cleanup activity. See Restatement (Second) of Torts, § 520. Under state law, however, each court would make a determination of whether strict liability should be applied to the activities of remedial action contractors by analyzing these factors on a case-by-case basis. Given the general trend toward expanding theories of liability, the remedial action contractors' potential liability is unpredictable.

In addition, twenty-three states adhere to a strict liability standard by statute for RACs who arrange for treatment, disposal or contributed to the release of pollutants.

Evolving Speculative Toxic Tort Damage Theories Are Extremely Difficult to Insure

A vast majority of situations that result in toxic tort damages involve gradual, repeated, or continuous discharges that

make it difficult to identify the "event" that generated the damages. Injuries allegedly resulting from hazardous discharges can stem from multiple causes and take a long time to develop. This makes it difficult to determine the exact cause of injury and forces the court to speculate on the nature and severity of future harm to the claimant.

State and federal statutory law and common law associated with environmental liability have responded to the vagaries of toxic tort causation by expanding the use of medical presumptions, applying strict, joint, and several liability; creating retroactive liability; constructing new damage theories; and eliminating or reducing defenses.

A menu of damage theories, including enhanced risk of future harm, mental anguish, immunotoxicity, and medical monitoring, is available to the claimant. In many instances, all these damage theories are alleged by plaintiffs in a single action. These toxic tort causes of action, combined with the use of epidemiological data to prove or disprove causation, have resulted in awards for injuries that may occur decades in the future or that may never occur.

Damages for enhanced risk of future harm, mental anguish, and medical monitoring are not new. These theories have been applied in the past in situations involving traumatic injuries with obvious causality. Traumatic accidents that result in manifest bodily injury may also result in the development of future injury -- for example, a head injury may cause epilepsy. These theories, however, are now being applied to nontraumatic medical conditions that may result in harm decades in the future. While these theories of damages may not be novel, proof of causation associated with a potential rather than an actuality is extraordinarily murky. Awards may be granted based on a biostatistician's ability to quantify contingencies.

Currently, these damages theories are acknowledged in a few states, and the court usually demands the traditional tort law preponderance of the evidence test for granting an award. However, emerging common law theories may quickly be exported to other states where traditional causation requirements may be ignored, particularly in instances in which the facts indicate that the defendants acted irresponsibly. Such a decision may be adopted as a precedent by other jurisdictions and applied to situations in which the defendant acted properly, compounding the difficulties in predicting trends in toxic tort liability law.

Future Damages

Although epidemiologists continue to debate the extent of bodily injury associated with hazardous substances, it is presumed that many such illnesses do not manifest themselves until the end of a latency period. Theories of damages that grant a present award based on the likelihood or potential for harm in the future are being rationalized and refined to respond to this complex problem.

A majority of toxic tort cases associated with enhanced risk of future harm and mental anguish demand a moderately high level of proof before granting an award. Requests for damages for enhanced risk of future harm generally call for an existing injury, e.g., asbestosis, and a reasonable medical probability that another disease will develop, e.g., cancer. In cases involving mental anguish, the court insists upon a present manifestation of injury, and the development of the future disease must be foreseeable or reasonably probable.

In isolated cases, however, juries are being asked to deliberate on increasingly conceptual notions, such as the sincerity of the plaintiff's fear. The courts are also placing more reliance on epidemiological studies, which represent an inexact science. The foreseeability and probability tests for an award in tort law may be met by applying biostatistics, which address causation as a potential regarding a control group rather than an actuality regarding a specific claimant.

Medical Surveillance Claims

The courts are increasingly recognizing the cost of medical surveillance as an independent element of damages. Ayers v. Jackson Township, 525 A. 2d 287 (1987), is the leading case advocating damages for medical surveillance.

A vast majority of the cases involving medical monitoring are linked to damages associated with increased risk of future harm. Medical surveillance awards hinge on a finding of "reasonable probability" that a future disease will develop. Some courts demand a quantifiable, greater than 50 percent, risk of disease before granting an award, while other courts ask the claimant to demonstrate a current physical injury. In some instances, the court does not ask for quantifiable proof of enhanced risk, but accepts any evidence tending to prove a medically significant increase of risk.