Report on Insurance Recovery Under the Landfill Cleanup Act

Office of the
Minnesota Attorney General
Hubert H. Humphrey III

Pursuant to 1994 Minn. Laws Chap. 639
Art. 2 Sec. 5

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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January 16, 1996

Ms. Kim Austrian
Director
Legislative Commission on
Waste Management
85 State Office Building
100 Constitution Avenue
St. Paul, MN 55155

Dear Ms. Austrian:

Attached please find a copy of the Minnesota Attorney General's Report on Insurance Recovery under the Landfill Cleanup Act." The Legislature directed the Attorney General to do this report pursuant to 1994 Minn. Laws ch. 639, art. II, sec. 5.

The Attorney General will be receiving additional comments from the insurance industry and policyholders as instructed by the authorizing legislation. To the extent necessary the Attorney General will incorporate those comments and file an amended Report before any committee hearings occur. If you have any questions, please contact me.

Sincerely,

JOHN K. LAMPE
Assistant Attorney General

(612) 296-7293

AG:19427 v1

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January 16, 1996

Ms. Kim Austrian
Director
85 State Office Building
100 Constitution Ave.
St. Paul, MN 55155

Re: Draft of Attorney General's Report on Voluntary Buy-Out Program

Dear Ms. Austrian:

Enclosed please find a draft of the Minnesota Attorney General's Report on the Voluntary Buy-Out Program of the Minnesota Landfill Cleanup Act. The Attorney General intends to submit a copy of its Report to the Legislature on January 16, 1996. However, the Attorney General will accept comments through January 16, 1996, and submit a revised Report on January 22, 1996. Therefore, if you have comments on this draft, please submit them to the Attorney General by January 16, 1996. These comments can also be sent by facsimile at (612) 297-4139.

As you will notice, chapter 6 of the Report has not been included. This is the chapter on recommendations. This chapter is still in the works. However, the broad outlines of the Attorney General's recommendations are contained in Chapter I.F. If you have any questions, please call me.

Sincerely,

John K. Lampe by jkm

JOHN K. LAMPE
Assistant Attorney General

(612) 296-7293

Enc.

AG:18804 v1

More on the way
Message left
7/2/96

STATE OF MINNESOTA

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January 26, 1996

Ms. Kim Austrian
Director
Legislative Commission on Waste Management
85 State Office Building
100 Constitution Ave.
St. Paul MN 55155

Re: Final Report on Insurance Recovery

Dear Ms. Austrian:

Enclosed please find the Attorney General's Office Final Report on Insurance Recovery under the Landfill Cleanup Act. Work is underway to make this Report and related materials available on-line via the World Wide Web. If you wish to be placed on an electronic mail mailing list for updates on the Insurance Report Web Site, please send e-mail to Mehmet.Konar-Steenberg@state.mn.us.

I appreciate your interest in this Study. If you have any questions regarding the Report, please contact me.

Sincerely,

JOHN K. LAMPE
Assistant Attorney General

(612) 296-7293

Enc.

REPORT ON

INSURANCE RECOVERY

UNDER THE

LANDFILL CLEANUP ACT

Hubert H. Humphrey III
Minnesota Attorney General

Presented to:

The Minnesota Legislative Commission on Waste Management

January 29, 1996

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The Attorney General conducted this study pursuant to the Laws of Minnesota for 1994, chapter 635, article 2, section 5, known as the Landfill Cleanup Act. The Authors of this Legislation are:

Chief Authors:	*Steven Morse*, Senate *Jean Wagenius*, House of Representatives
Senate Co-Authors:	*Doug Johnson* *Gene Merriam* *Ted Mondale* *Dennis Fredrickson*
House Co-Authors:	*Dave Battaglia* *Willard Munger* *Dennis Ozment* *Steve Trimble*

The Study Group that prepared this Report includes:

William Gosiger, Legal Assistant; Mehmet Konar-Steenberg, Assistant Attorney General; John K. Lampe, Assistant Attorney General; Julie Mildenberger, Legal Secretary; Karen Santiano-Francis, Legal Assistant; and Professor Andrew Whitman, Carlson School of Management

The following individuals have also assisted at various times during the project:

Art GallardoJohnson, Database Architect; Kurt Hines, Student Worker; Lisa Hertzberg, Consumer Information Specialist; Connie Hoye, Legal Secretary; Allison O'Toole, Assistant Consumer Information Specialist, Sharon Paradise, Legal Assistant; Eric Peck, Assistant Attorney General; Paige Purcell, Legal Secretary; Susan Schmidt, Legal Assistant; Dave Shannon, Student Worker; Eileen Sommers, Legal Assistant; Alan Williams, Assistant Attorney General; and Curtis Zaun, Law Clerk

The Commissioner of the Minnesota Pollution Control Agency and his staff have also contributed significantly to this Report.

The statements in this report are solely intended to assist the Minnesota Legislature in evaluating the Voluntary Buy-Out Program. They do not necessarily represent the legal position of the State of Minnesota.

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CHAPTER ONE

EXECUTIVE SUMMARY

Introduction

The passage of the Landfill Cleanup Act in 1994 announced a radically new approach by the Minnesota Legislature to cleaning up a most troublesome category of "Superfund" sites -- solid waste landfills. The central goal of the Act is to deal with landfill cleanup in a way that saves concerned parties money, gives parties certainty regarding future liabilities, and spreads costs in a fair way.

Savings

Under the Act, the Minnesota Pollution Control Agency (MPCA) takes over cleanup of 106 closed municipal waste landfills. Potentially responsible persons (PRPs)[1] and their insurers will save money because the MPCA is better equipped to efficiently administer an undertaking of this size and has proven itself to be more efficient at cleanup than the United States Environmental Protection Agency (U.S. EPA). In addition, by offering insurance carriers the option of voluntarily "buying out" their contractual liability related to the clean up of these landfills, taxpayers, businesses, and insurers can save even more by avoiding the high costs of insurance claim litigation.

Certainty

By enabling the MPCA to proceed with landfill cleanup, the Act gives the public confidence in the safety of drinking water supplies and sets the stage for the possible reuse of these properties for other purposes. The Act also gives certainty to businesses, municipalities, and insurers by reducing or eliminating the threat of protracted litigation over landfill cleanup costs and by reducing exposure to certain types of lingering liability.

Fairness

Responsibility for solid waste landfill cleanup is a societal problem. The Act seeks to spread the cost of landfill cleanup fairly to all segments of society -- taxpayers, businesses, and their insurers. Taxpayers will pay their share through up to $90 million in general obligation bonds. Businesses and other waste generators pay through solid

[1] The term "potentially responsible person(s)" is used throughout this report. While this term can connote a distinct legal status, for the purposes of this report this term is interchangeable with the term "responsible person(s)" under MERLA.

waste assessment fees. Insurers with exposure for coverage of liable policyholders will pay either through voluntary settlement of their contractual obligations, or as a result of vigorous pursuit of insurance claims by the Attorney General.

In adopting this new approach, the Minnesota Legislature directed the Attorney General to conduct this study to analyze a central feature of the Act: the legal mechanism by which the State of Minnesota will obtain insurance recovery from insurance carriers to fund a portion of the Landfill Cleanup Program. At stake is the insurers' fair share of potentially more than $350 million in estimated costs and damages the State has incurred or will incur at these sites -- costs for which Minnesota citizens and businesses are already making their contribution. As directed by the Legislature, this report focuses on (1) estimating insurance carriers' fair share of cleanup costs, (2) evaluating the insurance recovery mechanism under the Act, and (3) recommending changes to ensure a fair contribution from insurance carriers.

A. Major Conclusions of this Study

The Attorney General has reached three major conclusions regarding the insurance recovery aspects of the Act:

1. Previous Estimates of the Potential Insurance Recovery Must Be Revised

In 1993, the consulting firm of KPMG Peat Marwick estimated that approximately $30 million of the landfill cleanup costs expended by the State could be recovered under insurance policies providing coverage at these landfills.[2] Research conducted by the Attorney General for this report concludes that substantially more than $30 million could be recovered.[3] The Attorney General estimates that from $108 to $211 million could be recovered from insurers based on current cost estimates. This range exists because the application of legal principles is highly dependent on the facts involved at each landfill.

2. Greater Incentives are Needed to Maximize Insurer Participation in a Voluntary Recovery

Whether to voluntarily resolve liability is ultimately a business decision for insurers. This report concludes that a reasonable settlement with the State of Minnesota could save the insurance industry a substantial amount of money that would otherwise be expended on litigation

[2] KPMG PEAT MARWICK, MINNESOTA DEPARTMENT OF COMMERCE, ANALYSIS OF INSURANCE COMPANY EXPOSURE FOR SOLID WASTE FACILITY CLEAN-UP 2 (Nov. 22, 1993).

[3] All estimates in this report are based on current dollars, i.e., not adjusted for inflation, unless otherwise stated. KPMG Peat Marwick's estimates of insurance carrier exposure are based on current dollars as are MPCA's estimates of future cleanup costs.

and administration of claims. Such a settlement should also be attractive to insurance carriers given the number of sites involved. The MPCA has an advantage over private parties in terms of economies of scale and has been more efficient than the U.S. EPA cleaning up Superfund sites. The federal government recently ceded cleanup control at all 106 sites to the MPCA. In short, by reaching a reasonable settlement insurance carriers can establish a national precedent that complex Superfund sites can be cleaned up efficiently without the expense of seemingly unending litigation. The Attorney General recommends additional incentives to further encourage insurer participation, including a broader liability release than is currently in the Act. For example, the State may have claims at these sites for natural resource damages; these claims can be turned into an incentive for settlement by negotiating a fair recovery for these costs in exchange for a release from future natural resource liability at these sites.

3. The Current Voluntary Buy-Out Mechanism Requires Modification to be Fully Successful

The legal mechanism for voluntary resolution of insurers' liabilities currently in the Act -- the Voluntary Buy-Out Formula -- will likely fail to accurately assess carriers' actual exposure and as a result may not draw the minimum level of insurer participation required by the Act for the buy-out to succeed.[4] This potential inaccuracy results from the formula's reliance on sales of general liability policies during critical years as the basis for insurers' buy-out shares. For a variety of reasons, these sales may not accurately reflect an insurance carrier's exposure. Therefore, the Attorney General recommends an exposure-based insurance recovery mechanism in place of the current sales-based mechanism. Such a mechanism would base each insurer's share on a rough approximation of the insurer's actual liability exposure and is far more likely to draw insurer participation.

The remainder of this executive summary provides background on the Landfill Cleanup Act, explains estimates of insurance carriers' potential exposure, explains the way the Act's current insurance recovery provisions function, and recommends changes to the Act to facilitate a fair and reasonable settlement of claims with insurance carriers.

B. Background on the Landfill Cleanup Act

In 1994 the Minnesota Legislature enacted the "Landfill Cleanup Act" to expedite and reduce the cost of the environmental cleanup of permitted landfills that have stopped accepting municipal waste. The Act applies to 106 landfills in Minnesota.

Under the Act, the MPCA assumes responsibility for the operation and cleanup of these landfills once certain closure requirements has been met by the parties presently responsible for

[4] The Act currently requires that insurers offer a minimum aggregate buy-out amount of $30 million; otherwise the buy-out does not go forward. MINN. STAT. § 115B.45 (1994 & Supp. 1995).

cleaning up these landfills. The Act also creates a mechanism by which potentially responsible parties at the landfills can be asked to assign rights to insurance coverage for the cleanups at landfills to the MPCA. The Attorney General is authorized under the Act to pursue these claims on behalf of the MPCA.[5]

To avoid what would probably be very lengthy and costly litigation of these claims, the Minnesota Legislature created an "insurance buy-out program." Under this program, insurance companies with potential liability at landfill sites are able to pay to the State of Minnesota a lump sum established by a formula set forth in the legislation. In consideration of the amount paid, the insurer would be released from liability for environmental response costs at participating landfill sites.

The buy-out and subsequent release from liability illustrate the savings and certainty aspects of the Act. The fact that proceeds from insurance policies constitute just one of several sources of funding under the Landfill Cleanup Act underlines the Act's effort to distribute costs fairly. The resolution of insurers' liabilities provides insurers certainty for the future.

To help to determine the insurance industry's fair share of cleanup costs for these sites, the Legislature directed the Attorney General's Office to conduct a wide-ranging evaluation of the insurance buy-out program. In the words of the Legislature, the evaluation was to be conducted "in light of the legislature's intent to maximize the net revenue to the State under the program."[6] In the context of the Landfill Cleanup Act, the Attorney General interprets this provision to mean that the Attorney General must advise the Legislature on the best way for the State to position itself for a reasonable settlement with insurance carriers, or for the vigorous pursuit of insurance claims. To this end, the Attorney General has reviewed a significant amount of information, including more than 1600 requests for information to potential responsible parties, files of municipalities and other state agencies, thirty years' worth of files maintained by MPCA on the landfills in the program, responses to more than 30 requests for information to insurance carriers, reports of other consultants such as KPMG Peat Marwick and Ernst & Young, and numerous formal and informal discussions with interested parties.

C. Extent of Potential Insurance Carrier Exposure

Based upon evidence reviewed since the commission of this study, the Attorney General concludes that a recovery greater than the $30 million estimated by Peat Marwick is likely. The Attorney General estimates a recovery ranging from $108 - $211 million.

[5] MINN. STAT. § 115B.44.
[6] 1994 Minn. Laws ch. 639, art. II, § 5.

Several factors account for the difference between Peat Marwick's estimates and those of the Attorney General:

- Peat Marwick's estimates do not capture all the costs for which the State will have claims (such as natural resource damages and operational costs). These costs add to the potential recovery. Table I(a) summarizes the costs.

- Cleanup and associated costs at large metropolitan sites are higher than Peat Marwick predicted. Thus, insurance exposure is greater.

- Fewer policies contain pollution exclusions that limit coverage than estimated by Peat Marwick.

- More parties have retained evidence of insurance coverage than estimated by Peat Marwick.

- Many more landfills have shown evidence of a release.

- Available insurance limits under policies issued to responsible persons far exceed Peat Marwick's estimates.

D. Insurance-Related Provisions in the Act

The Attorney General concludes that a statutory settlement mechanism of some kind is essential to avoiding the transaction costs (legal, administrative, and other similar costs) which would result if litigation becomes necessary to recover all the State's claims. Litigation of all claims would involve over 350 carriers and thousands of insurance policies.

The Act currently has a settlement mechanism known as the Voluntary Buy-Out Program. The Attorney General has determined that the Voluntary Buy-Out Program suffers from two main problems. First, the Program will not likely accomplish the Legislature's goal of "maximiz[ing] net revenues to the State." Separate simulations conducted by the Attorney General and by the consulting firm of Ernst & Young for the American Insurance Association supports this conclusion. Under those simulations, the Voluntary Buy-Out Program would rise from $20.6 to $45 million. This is well short of the Attorney General's estimate of insurance industry exposure.

Second, many insurance carriers will not likely participate in the Voluntary Buy-Out Program in its present form. This is so because the Voluntary Buy-Out Program will not accurately portray the potential exposure of each carrier. The Voluntary Buy-Out Program establishes a formula to determine a buy-out price for each carrier based on the amount of premiums a carrier received in Minnesota for liability insurance during the years 1970-73. However, this study has found that, at least with respect to the large landfills, premium volume (i.e., sales of liability policies) does not accurately reflect potential indemnity exposure. This

potential inaccuracy in estimating exposure would likely lead to reduced participation by insurers in any settlement.

E. Legislative Recommendations

In light of these findings the Attorney General has three major recommendations intended to raise the chances of a successful voluntary resolution of insurers' fair share of cleanup costs.

1. Exposure-Based Settlement Mechanism

The Attorney General recommends replacing the premium-based settlement mechanism in the Voluntary Buy-Out Program with one based on exposure. Under this kind of mechanism a carrier's "buy-out" share will more accurately reflect that carrier's indemnity exposure at the landfills covered by the Landfill Cleanup Act. Any exposure-based settlement mechanism must be (a) flexible, to deal with new information; (b) expeditious, to avoid high transaction costs for the State and insurance carriers; and (c) sufficiently accurate, to avoid potential unfairness.

2. Direct Resolution

The Attorney General recommends that the Legislature amend the Landfill Cleanup Act to make more explicit the State's ability to resolve its claims for costs related to landfill cleanup. The Act currently provides for the assignment of claims from policyholders to the State. However, the assignment process may require the State to expend considerable time and resources dealing with both the carrier and policyholder on each claim. In contrast, a direct resolution provision would save transaction costs by allowing the State to deal directly with carriers in the settlement of claims instead of going through the more involved assignment process.

3. Settlement of All the State's Claims

The Attorney General recommends that the Act provide for the settlement of all the State's environmental claims associated with pollution at the landfills in the program in order to ensure a complete and certain settlement and to encourage carrier participation. As currently worded, the Landfill Cleanup Act explicitly provides only for the resolution of claims for environmental response costs. As noted above, there are other claims the State could make related to these landfills, such as claims for natural resource damages and reimbursement of the MPCA's operational costs. Offering carriers a release from these potential liabilities will encourage them to participate in the voluntary buy-out.

F. Overview of the Report

The chapters of this report provide detailed explorations of the matters presented in this executive summary:

- **Chapter II** puts the study in context with an examination of federal and State Superfund law and how the Landfill Cleanup Act brings innovation to State Superfund law with respect to landfills.

- **Chapter III** then takes up the question of why insurance carriers, not just Minnesota taxpayers and businesses, should help fund the cleanup of these Landfills.

- **Chapter IV** builds on this analysis, addressing the issue of how much insurers should pay by examining the Peat Marwick study of insurance carrier exposure and why the overall exposure of the insurance industry is greater than depicted by Peat Marwick. It also describes how that exposure can be reduced through a settlement.

- **Chapter V** evaluates the Voluntary Buy-Out Program currently in the Landfill Cleanup Act.

- **Chapter VI** recommends changes to the Landfill Cleanup Act in the area of insurance recovery. These changes are designed to increase the likelihood of a reasonable settlement that saves money for all parties involved and ensures speedy cleanup and more certainty regarding future liability, in a way that is fair to insurers, businesses, the public, and the State.

The Attorney General's Study Group has received comments on an earlier draft of this Report. The Attorney General has attempted to integrate or respond to those comments in the course of this Report. In addition, written comments are included in Appendix F.

CHAPTER TWO

SUPERFUND AND THE LANDFILL CLEANUP ACT

Introduction

The Landfill Cleanup Act builds on earlier efforts by the Legislature to effectively address Minnesota's environmental cleanup needs. Specifically, the Landfill Cleanup Act modifies the Minnesota Environmental Response and Liability Act (MERLA, or the State Superfund law),[7] in two very innovative ways. First, it transfers cleanup responsibility for the 106 Program landfills from mostly private parties to the Minnesota Pollution Control Agency (MPCA) in order to reduce the overall cost of cleanups. Second, the Act seeks to reduce the cost of litigation normally associated with Superfund cleanups by eliminating most cost recovery actions by the State and other parties.

To put these changes in context, this chapter briefly reviews how landfill cleanup under state and federal Superfund laws worked prior to the passage of the Landfill Cleanup Act. Then it details how the Landfill Cleanup Act has changed the way cleanup works at landfills covered by the Act.

A. State and Federal Superfund Law Before the Landfill Cleanup Act

The federal Superfund law, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[8] came into effect on December 11, 1980. It's Minnesota counterpart, the MERLA, came into effect in 1983. Both laws work to clean up sites which are sources of environmental contamination, and are often referred to collectively simply as "Superfund."

Traditionally, Superfund has had two forms of financing: taxes or fees paid by producers of chemical feedstocks and hazardous waste, and funding by liable parties who either implement or pay the cost of cleanup. Superfund liability is established by showing that (1) a release into the environment occurred at a "facility," i.e., a site; (2) the release involved hazardous substances; and (3) the party in question is a "responsible person."[9] Responsible persons (RPs) include: (1) owners and operators of the sites; (2) persons who transported hazardous substances to a site; and (3) generators of waste brought to a site.[10] These persons are liable for the cleanup

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[7] MINN. STAT. ch. 115B.
[8] 42 U.S.C. §§ 9601-9675 (1994).
[9] MINN. STAT. § 115B.04, subd. 1; *see* 42 U.S.C. § 9607.
[10] MINN. STAT. § 115B.03, subd. 1; 42 U.S.C. § 9607(a).

of a site regardless of negligence or other "fault."[11] They are also jointly and severally liable, which means that any single RP is potentially liable for the entire cost of cleaning up a site.[12] An RP who must pay cleanup costs may then seek contribution from other RPs for costs it has been required to pay.[13]

The federal Superfund law has generated significant controversy since its passage. Criticism of federal Superfund boils down to two complaints: (1) Superfund cleanups under the United States Environmental Protection Agency's (U.S. EPA) oversight are too slow, complicated, contentious, and costly; and (2) the Superfund liability scheme has resulted in excessive litigation, especially between groups of RPs and between RPs and their insurers.[14] Recently, the U.S. Congress has attempted to address some of these perceived problems with the federal Superfund law. As of the date of this report, however, those efforts have not generated a sufficient consensus to assure passage of a reform bill.

The liability scheme was not altered in 1994 federal legislation, -- but certain changes were made to avoid third party countersuits and let de minimis RPs settle quickly. The U.S. EPA supported a Superfund reform proposal in the last session of Congress that responded to criticisms of the program. In the current session of Congress new proposals have been introduced and some in Congress are proposing that so-called retroactive liability be abolished altogether. At the time this report was completed, the passage of these proposals appears to be in doubt.

State counterparts to federal Superfund such as MERLA have generated much less controversy. This may be due in large part to more efficient state program implementation as well as aspects of State Superfund laws which ameliorate some of the harsher elements of federal Superfund liability. For example, MERLA includes what is known as the "innocent owner exception" to liability and exceptions for secured lenders, trustees, and fiduciaries.[15] In addition, Minnesota's Land Recycling Act (a portion of MERLA) creates safe-harbors for innocent prospective purchasers of contaminated property.[16] And, as explained below, the Minnesota Landfill Cleanup Act now includes additional changes in traditional Superfund law to make landfill cleanups more expeditious and less costly.

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[11] MINN. STAT. § 115B.04, subd. 1; 42 U.S.C. § 9607(a).
[12] MINN. STAT. § 115B.04, subd. 1; 42 U.S.C. § 9607(a).
[13] MINN. STAT. § 115B.08, subd. 2; 42 U.S.C. § 9613(f).
[14] *See* Alan Williams, Statement of the Office of the Attorney General, the State of Minnesota, Hubert H. Humphrey III, Attorney General Hearing on H.R. 2500, the Reform of Superfund Act of 1995 5-6 (November 2, 1995) (copy available at the Environmental Protection Division of the Minnesota Attorney General's Office).
[15] MINN. STAT. § 115B.04, subds. 2-7.
[16] Williams, *supra* note 14, at 3-4.

B. The Minnesota Landfill Cleanup Act

As its name indicates, the Minnesota Landfill Cleanup Act deals strictly with landfills. Landfills as a class of Superfund sites have presented a particularly tough set of problems, the key ones being slow cleanup, high costs, and threats of litigation against hundreds of small waste contributors. The problem is one of numbers. Most non-landfill Superfund sites have a limited number of RPs. These smaller groups can generally work out cleanup solutions among themselves in a reasonably efficient and fair manner. Landfills, on the other hand, some of which have been open for as long as 50 years, may have hundreds or even thousands of identifiable RPs who brought or had their waste brought to the site.

Minnesota's Oak Grove Landfill illustrates these problems. As far back as 1967, the site accepted industrial and mixed municipal solid waste for disposal. After the discovery of contaminated groundwater, federal and state authorities named the Oak Grove Landfill a Superfund site and U.S. EPA identified a relatively small group of RPs to conduct the cleanup. In the spring of 1993, the identified RPs sent out demand letters to hundreds of businesses that had used the landfill threatening to sue for contribution to the cleanup if their demand for a contribution payment was not met.

Oak Grove is important for another reason. Faced with the threat of massive litigation over liability at the Oak Grove site involving businesses of all sizes, the Legislature acted by adopting the Landfill Cleanup Act, which does three things to solve the problems at landfills: (1) it provides for state-implemented cleanup to assure more efficient and expeditious remediation; (2) it reduces transaction costs by minimizing future landfill Superfund litigation; and (3) it changes the funding of cleanups to ensure that costs are more fairly spread among the general public, businesses, and the insurance industry. Each of these changes is described more fully below.

1. Future Cleanup

The Act establishes a procedure by which the MPCA takes over responsibility for the future cleanup and maintenance at a site from owners and operators and RPs that had been conducting cleanups in the past. Under this procedure RPs who are under state or federal cleanup orders (or owners or operators) must complete certain landfill closure or cleanup actions in order to obtain a "Notice of Compliance" from the MPCA.[17] Once a Notice of Compliance is issued, the Act directs the MPCA to maintain and monitor the landfill and take any additional cleanup actions that may be required in the future.[18] This process greatly simplifies and expedites cleanup and reduces cleanup costs.

[17] MINN. STAT. § 115B.40, subds. 4, 5, 7.
[18] MINN. STAT. § 115B.40, subd. 7(b)(1).

2. Reducing Litigation

To minimize future litigation among RPs, those persons wishing to receive a Notice of Compliance must waive their claims to recover cleanup costs from others who may be responsible for the cleanup.[19] Additionally, once a Notice of Compliance has been issued, the Act narrows the authority of MPCA to recover its landfill cleanup costs by limiting recovery from responsible persons only "to the extent of the insurance coverage held by the owner or operator or responsible person."[20] These provisions are designed to reduce cost recovery litigation, especially to put an end to the Oak Grove-type litigation by RPs seeking contribution from other parties that may be liable at the landfills. RPs that have expended significant amounts of money toward the cleanup of a site have an incentive to agree to waive their cost recovery claims because the Act provides for reimbursement of such costs if such waivers are executed.[21]

3. Funding for the Cleanups

The Landfill Cleanup Act provides cleanup funding from three primary sources: (1) a solid waste collection fee imposed on transporters of solid waste; (2) general obligation bonds,[22] and (3) outstanding insurance coverage of responsible parties for environmental cleanup costs associated with landfills in the program. In short, businesses provide funding through solid waste collection fees; the general public through the issuance of general obligation bonds; and, finally, the insurance industry through either voluntary resolution of their liability or pursuit of insurance claims by the Attorney General.

The two alternative means of recovering insurance proceeds -- voluntary resolution or pursuit by the Attorney General -- are set forth in the Act. First, the Act provides for a "Voluntary Buy-Out Program" for insurance carriers.[23] Under this program, insurance carriers with indemnity exposure at qualified landfills are able to voluntarily pay to the State a lump sum established by a formula set forth in the Landfill Cleanup Act.[24] In exchange the carrier would gain the security of being released from liability for environmental response costs incurred by the MPCA at the 106 qualified landfills.[25] Payments made by insurance carriers under the buy-out program are deposited in the landfill cleanup account and become available to fund MPCA response actions at the landfills.[26]

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[19] MINN. STAT. § 115B.40, subd. 7(a)(2).
[20] MINN. STAT. § 115B.40, subd. 7(b)(2).
[21] MINN. STAT. § 115B.43.
[22] *See* 1994 Minn. Laws ch. 639, art. III. In addition, a certain amount of funding will also be provided through public and private financial assurance accounts required under State solid waste regulations.
[23] MINN. STAT. §§ 115B.45-.46.
[24] *Id.*
[25] MINN. STAT. § 115B.45.
[26] *Id.*

The Voluntary Buy-Out Program has two minimum participation requirements. First, an individual carrier cannot "buy-out" its liability unless it contributes at least $200,000.[27] Second, aggregate buy-out commitments from the insurance industry must total at least $30 million.[28]

To protect State interests in the event of a failure of the Voluntary Buy-Out Program, the MPCA may seek the assignment of rights under insurance policies held by RPs for coverage of environmental response costs.[29] Beginning January 1, 1997, the Attorney General can pursue the insurance claims that have been assigned to the MPCA under the Program.[30]

4. Progress Under the Landfill Cleanup Act

In 1994 and 1995, the MPCA, with advice from the Attorney General began to implement the Act. Progress at the time this report was completed included the following:

- One hundred and six closed landfills are qualified under the Act.
- Parties have entered into 42 agreements that set the stage for MPCA's assumption of responsibility for future cleanup at qualified landfills.
- MPCA has begun design work at 13 landfills, relocated one landfill, and sampled wells at 39.
- MPCA has processed 9 reimbursement requests of eligible recipients.

In addition, with the assistance of the Attorney General, the MPCA has entered an agreement with the U.S. EPA that transfers authority for 10 landfills on the federal Superfund list (and the remaining 96 landfills) to the State of Minnesota.[31] Finally, the MPCA has sent a letter of general notice regarding insurance recovery to over 300 insurance carriers. This notice explains the obligations of carriers under the Act and the benefits gained by carriers under the Act.

The next chapter of this report deals with the question of why the insurance industry should contribute to the cleanup of these landfills. Chapter IV then examines the level of contribution that should be made by insurers, bringing hard data on actual insurance policies to bear on previous coverage estimates by KPMG Peat Marwick. Chapter V analyzes whether an

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[27] MINN. STAT. § 115B.44, subd. 8.

[28] MINN. STAT. § 115B.45. The formula by which each carrier's buy-out shares would be determined are analyzed more fully in Chapter V.

[29] MINN. STAT. § 115B.44, subd. 1; MINN. STAT. § 115B.40, subd. 4(a)(5)(i).

[30] MINN. STAT. § 115B.44, subd. 2.

[31] MINNESOTA POLLUTION CONTROL AGENCY, MINNESOTA LANDFILL CLEANUP PROGRAM - 1995 ANNUAL REPORT: LAYING THE FOUNDATION (Oct. 1, 1995).

appropriate amount of contribution would likely be obtained from the insurance industry under the current Voluntary Buy-Out Program. Finally, Chapter VI addresses how the Landfill Cleanup Act can be amended to ensure the insurance industry pays its fair share.

CHAPTER THREE

WHY INSURERS SHOULD ALSO CONTRIBUTE

Introduction

The starting point in approaching the issues surrounding the recovery of insurance proceeds for environmental cleanup costs is establishing why insurers should be expected to pay. The most compelling reason insurers should contribute to the cost of cleaning up the landfills covered by the Landfill Cleanup Act is that they voluntarily contracted to do so by issuing, in return for premiums, comprehensive general liability (CGL) policies written to insure all risks of bodily injury and property damage liability arising from a broad spectrum of commercial activity. Insurers' contractual obligations under Minnesota law to pay for environmental damage is chronicled here in three parts. First, it is shown that liability for harm to the environment has been a legal fact of life in Minnesota for more than a century. Second, it is shown that some thirty years ago insurers as an industry revised their CGL policies to explicitly recognize what courts had already found implicit in CGL policies -- the existence of coverage for gradual pollution damage. This situation lasted until the early 1970s, when so-called "qualified pollution exclusions" began to appear in insurance policies. This sets up the third period of insurer liability analyzed here -- insurers' liability in Minnesota for policies containing qualified pollution exclusions.

This chapter then explains why insurers ought to resolve their liability specifically under the Landfill Cleanup Act. If amended as recommended in this report, the Landfill Cleanup Act will provide insurers their best opportunity to resolve their contractual liability in a way that provides savings, certainty, and fairness to all parties involved.

A. Insurer's Contractual Responsibility for Environmental Claims Under Minnesota Law

There are many reasons which may be forwarded to justify why insurers should bear a fair share of environmental cleanup costs. Like other members of society, insurers were among those who benefited during the years when landfill-related pollution was not considered a major societal priority. Unlike other members of society, it may be argued that insurers by their nature were best suited to predict and provide for this kind of risk.[32] The premium benefit insurers derive from their function as society's risk experts also suggests insurers should bear some responsibility for landfill cleanup costs.

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[32] *See, e.g., Developments in the Law: Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1578-1579 n.40 (1986).

However, insurance, first and foremost, is a matter of contract.[33] Thus the primary reason insurers should pay for environmental cleanup cost claims is because they have already agreed to do so -- in the contracts they signed with their policyholders. It is the policies insurers wrote which will be the basis for determining insurers' fair share of Program funding. Therefore this section lays out insurers' contractual obligations to pay for environmental cleanup costs related to landfill cleanup. Because the subject policies span several decades and because coverage provisions varied over time, this section explores insurers' contractual liability in three historical phases.

1. Implicit Liability: Historical Environmental Liability in Minnesota

One objection insurers have voiced in the past to paying environmental claims is that such liability was not expected,[34] and that they allegedly never contracted to assume that risk. However, liability for environmental harm has been a legal fact of life in Minnesota for more than one hundred years.[35] And for nearly that long Minnesota courts have recognized that policyholders' understanding of the evolving liabilities they are subject to under the law is an important consideration in interpreting insurance contracts.

Liability for environmental harm in Minnesota has been a legal constant from the present day to at least as far back as 1885, when the Minnesota Legislature enacted a statutory prohibition on the contamination of drinking water supplies. (This was approximately 50 years before insurers even began writing general liability policies to cover commercial activity.) That law empowered the State to compel responsible parties to "remedy the pollution, or to cleanse or purify the polluting substances."[36] In 1895, a common law opinion by the Minnesota Supreme Court applied strict liability to a tort claim where oil from defendant's 250,000-gallon storage tank seeped into neighboring wells and cellars.[37]

Minnesota environmental law has grown from these early property law roots. Recent developments include the passage of the Minnesota Environmental Response and Liability Act (MERLA) in 1983.[38] MERLA's remedy provisions provide that responsible parties may be

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[33] 1 GEORGE J. COUCH, COUCH CYCLOPEDIA OF INSURANCE LAW § 1:4 (M. Rhodes 2d ed. 1984); *see also* DUNNEL'S MINNESOTA DIGEST *Insurance* § 1.01a (4th ed. 1995).

[34] *See, e.g.*, Orin Kramer & Richard Briffault, *Cleaning up Hazardous Waste: Is there a Better Way?*, INS. INFO. INST. PRESS (1993).

[35] *See generally Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 183 (Minn. 1990).

[36] *Id.* (citing Act of March 7, 1885, ch. 225, 1885 Minn. Gen. Laws 296, *codified at*, MINN. STAT. ch. 6, § 99a (1879-1888 Supp. vol. 2)).

[37] *Minnesota Mining & Mfg. Co.*, 457 N.W.2d at 183 (citing *Berger v. Minneapolis Gaslight Co.*, 62 N.W. 336, 336-337 (Minn. 1895)).

[38] MINN. STAT. ch. 115B.

required to clean up contaminated properties. Interestingly, the Minnesota Supreme Court in 1990 noted that this remedy "was not novel or unforeseeable to the insured or insurance companies," as "[t]his remedy has existed under prior statutes and, moreover, the costs of restoring property to its original condition has been a long-recognized measure of damages in common law pollution cases."[39] More recently, of course, the Legislature passed the Landfill Cleanup Act. These modern developments are in line with Minnesota's long-standing commitment to environmental responsibility under the law.

This legacy of environmental protection is important because Minnesota courts recognize that policyholders have a legitimate expectation that their insurance policies will cover emerging liabilities to which they are exposed under the law.[40] As long ago as 1912 the Minnesota Supreme Court said:

> [t]he object and purpose of the contracting parties is not to be lost sight of in construing a contract [of insurance], nor is the rule that in case of ambiguity it must be resolved against the one who prepared the instrument. The language in the lengthy document before us was not the choice of the assured. Recognition needs be taken of the enormous growth of liability insurance of late years. The hazards of modern industries and the risks connected with some of the advantages of present-day life call for this kind of insurance. Policies attempting to fill this demand should, if possible, be construed so as not to be a delusion to those who have bought them.[41]

And in 1990 the Minnesota Supreme Court, after reviewing the history of environmental liability in Minnesota, turned back insurers' arguments that CGL policies were never written or priced to cover Minnesota Pollution Control Agency (MPCA)-mandated cleanup costs. The Court noted that "[l]iability for groundwater contamination has been recognized in Minnesota for many years. . . . Thus, the parties in these cases were aware of the potential liability for groundwater contamination at the time they entered the insurance policies at issue in these cases."[42] In other words, the history of environmental liability in Minnesota bears on the interpretation of CGL policies, and that history speaks for itself.

Even if one were to ignore the history of environmental liability in Minnesota, this should not diminish insurance coverage under CGL policies. The risk of unexpected expansion

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[39] *Minnesota Mining & Mfg. Co.*, 457 N.W.2d at 183 (citation omitted).

[40] *Id.* at 181-182 (policyholders can reasonably expect CGL policies to provide coverage for any economic outlay compelled by law to rectify or mitigate damages caused by the policyholder's acts or omissions).

[41] *Donarski v. Lardy*, 88 N.W.2d 7, 12 (Minn. 1958) (quoting *Patterson v. Adan*, 138 N.W. 281, 283 (Minn. 1912)). The *Donarski* court commented upon this quotation that "[t]his statement was made in 1912. It appears to us that it has even greater significance today than it did then."

[42] *Minnesota Mining & Mfg. Co.*, 457 N.W.2d at 183.

of liability due to scientific or legal evolution is a principal reason why people buy insurance in the first place; if the liability system was wholly predictable, most businesses and municipalities could simply self-insure based on prior years' losses. It is precisely because there are occasional, unexpected shifts in liability rules and in scientific capabilities that policyholders pay premiums under insurance contracts, to spread the risk of unforeseen liability with maximum efficiency to all sectors of the economy. This risk protection is why the insurance industry exists and it is what Minnesota policyholders contracted and paid premiums for.

In short, insurers have been on notice for more than one hundred years of Minnesota's legal recognition of liability for environmental harm and their potential exposure to that liability. Moreover, the long legal history of environmental liability in Minnesota strongly suggests that liability for environmental harm was an implicit part of every CGL insurance policy not containing explicit language to the contrary.[43]

2. Explicit Liability: The 1966 Policy Modifications

Insurers' liability for environmental claims remained implicit in CGL policies only until 1966. In that year the insurance industry, reacting to the needs of policyholders and to a long line of decisions from the courts,[44] modified the standard form CGL policy language to explicitly cover pollution claims arising from long-term, gradual pollution.

The 1966 CGL policies generally promised to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of (a) bodily injury or (b) property damage to which this insurance applies, caused by an occurrence."[45] Documentary evidence from insurers and insurance brokers makes clear that the 1966 policy was specifically designed and marketed by insurers to cover gradual pollution claims:

> Manufacturing risks producing insecticides, plant foods, fertilizers, weed killers, paints, chemicals, thermostats or other regulatory devices, to name a few, have

[43] *See Minnesota Mining & Mfg. Co.*, 457 N.W.2d at 183. The result has been the same in other jurisdictions. *See, e.g., AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1264 (Cal. 1990) ("Because the policies in question here are 'comprehensive,' it was within the insured's reasonable expectation that new types of statutory liability would be covered as long as they were written within the ambit of the language used in the coverage provisions."). *See also* note 45.

[44] Appendix B to this report is a list of representative cases that construed pre-1966 CGL polices to cover pollution and other gradually occurring injuries and damage.

[45] Continental Life Insurance Company, Comprehensive General Liability Insurance Policy (January 1, 1968).

created gradual [property damage] exposure. They need this protection and should legitimately expect to be able to buy it, so we have included it.[46]

* * *

TO OUR CLIENTS:

The basic forms for third party liability insurances (General, Products, Automobile, etc.) have not been changed since 1955 . . . As of October 1, 1966 very sweeping revisions are being made, following several years of draughting committee work by members of the underwriting associations of both stock and mutual casualty insurance companies.

Perhaps the most significant change is that all policies now cover injury or damage which results not just from "accident" (something generally considered to have taken place at a definable instant of time) but from gradual happenings such as pollution of streams, emanations of effluent from stacks, disposal of waste products and so forth. The great majority of our clients have enjoyed this type of coverage . . . as to bodily injury liability, but in the area of damage to the property of others, there has been the greatest resistance to such an extension either by certain underwriters or with respect to individual accounts. Now the broadened cover is available quite generally . . .[47]

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[46] Gilbert Bean, *The New Comprehensive General and Automobile Program -- The Effect on Manufacturing Risks*, MUTUAL INS. TECH. CONF., Nov. 5-16, 1965, at 1, 10 (Mr. Bean was one of the drafters of the new language), *quoted in* Steven Bradbury, *Original Intent, Revisionism and the Meaning of the CGL Policies*, 1 ENVTL. CLAIMS J. 279, 283 (1989); *see also* Pendygraft, Plews, Clark & Wright, *Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation*, 21 IND. L. REV. 117, 142 (1988) (citing statements of other insurance company executives involved in the 1966 CGL revisions).

[47] Letter from Johnson & Higgins, Insurance Brokers, to Clients (September 1, 1966) (copy on file with the Attorney General and available for inspection) (emphasis added). This quotation rebuts the claim of the Minnesota Insurance Federation that " the insurance industry did not contemplate - either implicitly or explicitly - in the original underwriting design and pricing of its general liability insurance policies the costs which the [Attorney General's Report] now seeks to transfer to it." Letter from Robert Johnson, Minnesota Insurance Federation, to John K, Lampe, Minnesota Attorney General's Office 3 (January 19, 1996) (copy in Appendix F). As this quotation demonstrates, according to a major insurance broker, the broadened coverage "for *gradual happenings such as . . . disposal of waste products*" was "*perhaps the most significant change*" in the occurrence based policies introduced in 1966.

Nationally, "the insurance industry sought and received substantial rate increases from State regulatory authorities, indicating the acceptance of a broader category of risk in the 1966 form."[48] Courts across the country have consistently held that the 1966 form policies provide broad coverage for a range of long-term exposures, including those associated with pollution.[49]

3. Qualified Liability: 1970 to 1986

In 1970 the insurance industry developed a "Contamination or Pollution Exclusion Endorsement," ostensibly to clarify that the coverage changes made in 1966 did not extend coverage to deliberate polluters. This endorsement (in its various forms) later came to be called the "qualified pollution exclusion."[50]

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[48] Bradbury, *supra* note 46, at 283 (citing Pfennigsdort, *Environment, Damages, and Compensation*, 1979 AM. B. FOUND. RES. J. 349, 438.

[49] Bradbury, *supra* note 46, at 295 n.23 (citing *Steyer v. Westvaco Corp.*, 450 F. Supp. 384 (D. Md. 1978); *Aetna Cas. & Sur. Co. v. Martin Bros.*, 256 F. Supp. 145 (D. Or. 1966); *Grand River Lime Co. v. Ohio Cas. Ins. Co.*, 289 N.E.2d 360 (Ohio Ct. App. 1972)); *see also New Castle County v. Hartford Acc. & Indem. Co.*, 933 F.2d 1162, 1197 (3rd Cir. 1991) (noting that "[t]he standard, occurrence-based policy thus covered property damage resulting from gradual pollution.").

[50] An example of a "sudden and accidental" qualified pollution exclusion is:

> This insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

An example of an unexpected/unintended qualified pollution exclusion is:

> It is agreed that the insurance does not apply to bodily injury or property damage arising out of any emission, discharge, seepage, release or escape of any liquid, solid, gaseous or thermal waste or pollutant if such emission, discharge, seepage, release or escape is either expected or intended from the standpoint of any insured or any person or organization for whose acts or omissions any insured is liable, or resulting from or contributed by any condition in violation of or non-compliance with any governmental rule, regulation or law applicable thereto.

The specific wording of the qualified pollution exclusion, in its various forms, varies. The two examples above are not presented as the only forms of the qualified pollution exclusion or as the most common or frequent forms of the qualified pollution exclusion. They are merely two examples.

There has been substantial controversy surrounding the interpretation of one form of these qualified pollution exclusions known as the "sudden and accidental" pollution exclusion. This exclusion was first incorporated into an endorsement and presented to consumers and State regulators backed by the insurance industry's claims that the endorsement was presented to consumers and State regulators backed by the insurance industry's claims that it was necessary to clarify the kinds of pollution releases covered by the 1966 changes. According to insurers, the central issue requiring clarification was the coverage available for accidental versus intentional pollution. The insurance industry explained that under the new endorsement "[c]overage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident."[51] Similarly, in presenting the new endorsement for approval by State regulators the insurance industry submitted a standard explanatory memorandum which stated:

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of an occurrence. The above exclusion clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries where the pollution or contamination results from an accident except that no coverage will be provided under certain operations for injuries arising out of discharge or escape of oil into any body of water.[52]

Starting in the 1980s, insurers argued that the 1970 endorsement was an exclusion of coverage for gradual pollution of any sort, intentional or accidental. In other words, insurers began arguing that the endorsement had a temporal aspect, limiting coverage only to "boom"-type[53] situations and eliminating any coverage for unintentional, gradual leaks.[54] Policyholders has argued against the temporal interpretation.

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[51] Letter from Mutual Insurance Rating Board (IRB) to Members and Subscribers Writing General Liability Insurance (June 9, 1970), *quoted in* Bradbury, *supra* note 46, at 284.

[52] IRB standard explanation, *quoted in Anderson v. Minnesota Ins. Guar. Assoc.*, 534 N.W.2d 706, 708 (Minn. 1995) (emphasis in quoting opinion), *reh'g denied*, (Minn. Sept. 20, 1995). On May 19, 1970, the endorsement was submitted by the IRB to the state insurance commissioner, accompanied by a letter from one Henry E. Griffendorf, Jr., which described the endorsement as reflecting "an advisory manual change relating to a contamination or pollution exclusion." Letter from Henry E. Griffendorf, Jr., IRB, to Thomas C. Hunt, Insurance Commissioner, State of Minnesota (May 19, 1970).

[53] This useful term is taken from Robert N. Sayler, *The Emperor's Newest Clothes: Revisionism and Retreat -- The Insurers' Last Word on the Pollution Exclusion*, MEALY'S LITIGATION REPORTS: INS., Oct. 8, 1991, at 27, 27.

[54] This apparent reinterpretation was not wholly unanticipated. State regulators in Kansas, West Virginia and Georgia expressed misgivings about the endorsement when it was first presented. When Kansas disapproved the endorsement, the IRB wrote to the state insurance commissioner, stating that the endorsement "would not restrict available coverage but

Although rejected elsewhere,[55] this temporal interpretation of one version of the qualified exclusion -- known as the "sudden and accidental" exclusion--was affirmed by the Minnesota Supreme Court in 1995, on the theory that the terms "sudden and accidental" were unambiguous in denoting a temporal aspect.[56]

Nevertheless, it would be wrong to generalize from this decision that under Minnesota law insurers' liability under policies containing qualified pollution exclusions is nonexistent. This is so for several reasons. First, the Minnesota Supreme Court in another recent case found that the same exclusion did not bar coverage for environmental damage under the facts presented. In *SCSC Corp. v. Allied Mutual Insurance Company*, the Minnesota Supreme Court held that policyholders have the opportunity to make a factual showing that the exclusion does not eliminate coverage.[57] In that case, the Minnesota Supreme Court held that evidence from a hydrogeologist that pollution entered the groundwater in one or two discrete releases due to heavy rains rather than in a gradual manner supported a finding by the jury that damage resulted from a "sudden and accidental" event.[58] Under the terms of the exclusion, the sudden and accidental nature of the occurrences nullified the exclusion and restored coverage. Thus, although the existence of a "sudden and accidental" exclusion in an insurance policy restricts the range of polluting events that are covered under that insurance policy,[59] insurance recovery

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'definitely clarify' that coverage would not be available for expected or intended pollution damage." Letter from Lawrence E. Brown, Jr., IRB, to Frank Sullivan, Kansas Commissioner of Insurance (June 18, 1970), *quoted in* Sayler, *supra* note 53, at 38-39. West Virginia held public hearings to determine whether the endorsement was "inconsistent, ambiguous or misleading, or [would] . . . limit the overall insurance coverage to the extent that such coverage is no longer sufficiently broad to be in the public interest." Price, *Evidence Supporting Policyholders in Insurance Coverage Disputes*, 3 NAT. RESOURCES & ENV'T 17, 48 (Spring 1988). In Georgia insurers responded to similar concerns by stating that "The impact of the proposals on the vast majority of risks would be no change. It is rather a situation of clarification which will make for a more complete understanding by the parties to the contract of the intent of coverage." *Claussen v. Aetna Cas. & Sur. Co.*, 676 F. Supp. 1576, 1583 (S.D. Ga. 1987), *question certified*, 864 F.2d 1217 (11th Cir. 1989).

[55] *See, e.g., Just v. Land Reclamation Ltd.*, 456 N.W.2d 570 (Wis. 1990); *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 607 N.E.2d 1204 (Ill. 1992); *Claussen v. Aetna Cas. & Sur. Co.*, 380 S.E.2d 686 (Ga. 1989).

[56] *Anderson,* 534 N.W.2d 706.

[57] *SCSC Corp. v Allied Mut. Ins. Co.*, 536 N.W.2d 305, 314 (Minn. 1995).

[58] *Id.* at 310-313.

[59] *See Krawczewski v. Western Cas. & Sur. Co.*, 506 N.W.2d 656, 659 (Minn. Ct. App. 1993) (where pollutants take from one to thirteen years to travel from the landfill to the groundwater, the release cannot be considered sudden as a matter of law), *review denied*, (Minn. Nov. 23, 1993), *cited in Dakhue Landfill v. Employers Ins.*, 508 N.W.2d 798, 803 (Minn. Ct. App. 1993); *Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co.*, 503 N.W.2d 793 (Minn. Ct. App. 1993)

remains available for liability stemming from episodic pollution and must be considered in any determination of insurers' fair share.[60]

Second, a review of actual policies from the period indicates that many policies written in Minnesota containing qualified exclusions used less restrictive formulations than the "sudden and accidental" formula. For example, some policies used the phrase "unintended and unexpected," which does not bear the same temporal interpretation given the "sudden and accidental" provision.[61] As a result these policies should provide substantially greater coverage than those containing the "sudden and accidental" exclusion.[62]

Third, pollution exclusions did not appear in policies as of a single date, but instead were introduced by insurers over a period of years. Although the insurance industry presented the "sudden and accidental" exclusion for regulatory approval in 1970, the Attorney General has found policies issued to potentially responsible persons lacking any kind of pollution exclusion from as late as 1982.

Fourth, the Minnesota Supreme Court has held that the allocation of liability where multiple insurance policies may be "on the risk" over a period of time is governed by principles of equity.[63] Given the tremendous scope of the State's effort to clean up its most contaminated landfills, the fact that latent environmental damage has in many cases been found to begin almost

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("[T]he pollution of the groundwater taking place over two decades cannot reasonably be considered 'sudden.'"), *review denied*, (Minn. Sept. 30, 1993).

[60] The Insurance Federation of Minnesota takes issues with this statement, citing the Court of Appeals decision in *SCSC Corp. v. Allied Mut. Ins. Co.*, 515 N.W.2d 588, 599 (Minn. Ct. App. 1994). However, the Supreme Court on appeal was very clear in stating that there may be multiple causes of groundwater damage at a site but if the policyholder can show one event that is covered -- i.e., one event that is sudden and accidental, the policyholder has met its burden of proof. As the Court stated "if testimony *shows ten direct causes*, but the insured shows that only one of these causes is a covered cause, the insured has met its burden of proof. Coverage is not defeated simply because a separate excluded cause contributes to the damages." *SCSC Corp.*, 536 N.W.2d at 315 (emphasis added). Thus, the Court did not deny coverage under the qualified pollution exclusion even though it found that there was"*continual leaching* of the chemicals from the soil into the groundwater [which] did result in damages to SCSC." *Id.* at 318 (emphasis added) Rather the Court simply found that this gradual pollution did not negate coverage for the sudden and accidental event which happened at the site.

[61] *See Dakhue Landfill*, 508 N.W.2d at 803-804 (unintended/unexpected pollution exclusion raises different issues than the "sudden and accidental" pollution exclusion).

[62] *See id.* at 804 (coverage based on whether a reasonable policyholder would have expected or intended the release rather than whether it was "sudden"); *see also City of Johnstown, N.Y. v. Bankers Standard Ins.*, 877 F.2d 1146, 1150-1152 (2nd Cir. 1989).

[63] *Northern States Power v. Fidelity & Cas. Co. of New York*, 523 N.W.2d 657 (Minn. 1994).

immediately upon the opening of a landfill,[64] and the fact that most of these landfills opened before pollution exclusions were added to policies, there are strong equitable arguments to be made for allocating a larger share of liability to pre-exclusion policies.

Finally, other theories of liability may also render the pollution exclusion inapplicable in certain instances. Cases brought under these theories have not been addressed by the Minnesota courts.[65]

By about 1986 most CGL policies were being written to include a new so-called "absolute" pollution exclusion, thought to leave no doubt that the coverage for pollution damage explicitly provided for just twenty years earlier was finally and completely eliminated. Nevertheless, as this section makes clear, prior to this absolute exclusion thousands of CGL policies were sold to Minnesota businesses which undeniably cover environmental damage shown to have occurred while those policies were in effect. It is these CGL policies written prior to the absolute exclusion which are the source of insurers' contractual obligation to pay for environmental cleanup costs, and it is these policies the Attorney General is charged by law with pursuing in the event a voluntary settlement is not achieved.[66]

To ignore these contractual obligations and leave taxpayers and businesses bearing the entire cost of cleanup would be to grant insurers a massive windfall -- in the form of decades worth of premium and investment income -- at the taxpayers' and business community's expense. For this reason the Attorney General is committed to achieving a fair but appropriate insurance recovery. Because the Attorney General believes that voluntary settlement of insurers' liability would be more productive than litigation in terms of maximizing the State's revenues,

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[64] *See, e.g., Dakhue*, 508 N.W.2d at 801 ("[A]n MPCA staff hydrogeologist, testified that in his opinion, a release of leachate probably occurred at the Dakhue Landfill within the first few months of the commencement of operation in November of 1971.").

[65] For example, insurance policies sometimes provide coverage for damages resulting from certain personal injury offenses such as trespass. Courts have found pollution of third-party property to amount to trespass or wrongful invasion of private occupancy. The sudden and accidental pollution may not bar coverage for such claims. *See, e.g., Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1040-42 (7th Cir. 1992); *Titan Holdings Syndicate, Inc. v. City of Keene*, N.H., 898 F.2d 265, 270-73 (1st Cir. 1990); *but see Harrow Products, Inc., v. Liberty Mut. Ins. Co.*, 64 F.2d 1015, 1022-24 (6th Cir. 1995). Additionally, the pollution exclusion may be inapplicable to generators of waste whose waste was collected and disposed of by independent haulers. *Compare United States Fidelity & Guar. Co. v. Specialty Coating Co.*, 535 N.E.2d 1071, 1077-78 (Ill. App. 1989), *appeal denied* 545 N.E.2d 133 (Ill. 1989) *and SCSC Corp. v. Allied Mut. Ins. Co.*, No. 90-021573 (Minn. Dist. Ct., Hennepin Cnty. July 1, 1993) (ruling exclusion does not apply to the activities of third persons) *with Park Ohio Indust., Inc. v. Home Indem. Co.*, 975 F.2d 1215 (6th Cir. 1992) (exclusion not restricted to "active" polluters).

[66] MINN. STAT. § 115B.44.

the next section explains the benefits of a voluntary settlement for insurers under the Landfill Cleanup Act.

B. Why Insurers Should Resolve Their Liability Under the Act

While the federal Superfund reform debate continues, the Landfill Cleanup Act today offers a different way of resolving insurers' liability which offers insurers benefits over Superfund.

First, under the Act the State is already working to make sure insurers pay only what is fair. Other members of society are paying their fair portion: Taxpayers will fund up to $90 million in general obligation bonds, while businesses are paying a solid waste assessment fee of $.60 per cubic yard of waste to fund the Program. More than $11 million was collected in fiscal 1995 from solid waste fees alone.[67] Insurers will be expected to pay only a share of the environmental cleanup costs if they choose a voluntary settlement.[68]

Second, insurers can save if they choose to settle promptly and voluntarily under the Act. Industry analysts suggest that the opportunity to quickly resolve insurers' outstanding liability has value to insurers in itself:

> [I]n this area, just as in most other lines of business, aggressive and expeditious handling of claims has become critical. Once it had become clear that insurers will likely have an exposure to this issue, those companies that continue to 'stonewall' the issue run the risk of ultimately paying more than those that have quickly addressed their exposures and have taken decisive action to resolve them.[69]

One concrete illustration of how prompt settlement can save insurers money concerns "reserves." Insurers are required by law to set aside money to pay for expected exposure.[70] When exposure is resolved, these reserves can be used in effect to pay for the resolution of claims. Currently insurers with significant environmental exposure (estimated at $32 billion in discounted dollars)

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[67] MINNESOTA POLLUTION CONTROL AGENCY, LAYING THE FOUNDATION, *supra* note 31, at 6.

[68] The corollary to this point is that if an insurance recovery is not pursued -- either through voluntary settlement or litigation -- insurers will have received a windfall from taxpayers and businesses. If insurers do not agree to resolve their liability voluntarily, coverage for the entire cost of cleanup will be pursued by the Attorney General.

[69] *Environmental Liability Strains P/C Insurers*, STANDARD & POOR'S CREDIT WK., October 30, 1995, at 1, 4.

[70] MINN. STAT. § 60A.12, subd. 5. In addition, the Commissioner of Commerce has the power to require an insurer to maintain additional reserves if, in his judgment, the insurer's reserves are inadequate. MINN. STAT. § 60A.12, subd. 7.

have reserves estimated by industry experts to be in excess of $18 billion in discounted dollars.[71] Several insurers have increased their reserves to cover exposure related to environmental claims.[72] By settling claims under the Landfill Cleanup Act, insurers can reduce their reserves and demonstrate to shareholders that claims can be resolved expeditiously and at lower costs than at typical federal superfund sites where costs far exceed those estimated at Minnesota landfills.

Third, voluntary settlement saves insurers (not to mention taxpayers) the frequently enormous costs of environmental litigation and other transaction costs. A recent report by Standard & Poor's estimates that litigation and administration costs currently represent about 36% of the insurance industry's total costs per Superfund site.[73] In other words, more than one-third of the dollars currently spent by insurers at Superfund sites goes to pay lawyers and other non-remedial expenses. The Landfill Cleanup Act seeks to reduce these kinds of transaction costs and maximize dollars for remediation by encouraging voluntary settlement of insurers' liability.

Fourth, under the Act voluntary settlement buys insurers and their shareholders certainty about the future. A settlement provides a valuable release from current liabilities and -- perhaps more importantly -- unknown and unpredictable future expenses and the specter of lingering liability. In Chapter VI this study recommends further enhancing this certainty benefit by expanding the scope of the release from liability already in the Act to include release from liability for natural resource damages and other contingencies. The Attorney General endorses a prompt, voluntary resolution of insurers' liability, and in Chapter VI recommends additional incentives and discounts be added to encourage a prompt resolution.

Conclusion

This chapter has spelled out the contractual nature of insurers' obligation to pay their fair share of landfill cleanup, and explained why insurers should take advantage of the opportunity to resolve their liability voluntarily under the Landfill Cleanup Act. The next vital question is the level of contribution that should be made by insurers. This the subject of the next chapter, which

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[71] L. H. Otis, *Insurers Need $408 Billion to Pay Pollution Claims, S & P Says*, NATIONAL UNDERWRITER PROP. & CASUALTY -RISK & BENEFITS MGMT., Oct. 30, 1995, n.44, at 1(2).

[72] *E.g.*, Jeffery Sheban, *Nationwide Adding $1.1 Billion to Reserves*, COLUMBUS DISPATCH, Dec. 11, 1995, at 1995 WL 11857007 (Nationwide Insurance Enterprise will set aside an additional $1.1 billion to strengthen reserves for potential asbestos and environmental claims).

[73] *Environmental Liability Strains P/C Insurers, supra* note 69, at 2.

uses hard data gathered by the Attorney General and MPCA to revise earlier estimates of insurer liability by KPMG Peat Marwick.

CHAPTER FOUR

ESTIMATING INSURERS' LIABILITY: HARD DATA AND THE PEAT MARWICK STUDY

Introduction

The previous chapter established why insurers should pay their fair share. The next logical question is, How much should insurers be expected to pay?

This question has already been the subject of one study, conducted by KPMG Peat Marwick, November 22, 1993. That study played an important role in the Legislature's effort to pin down the appropriate parameters of the Landfill Cleanup Program and the Voluntary Buy-Out scheme. After extensive research, the Attorney General has determined that revision of several important conclusions of the Peat Marwick study are warranted.

The primary methodological constraint on Peat Marwick's study -- which the authors themselves identified -- is that the study did not examine actual insurance policies and other hard data regarding cleanup costs. The study had to rely mostly on informed discussions with Peat Marwick insurance experts, underwriters, and MPCA staff members. These discussions then formed the basis for the assumptions from which Peat Marwick derived its estimate of $30 million in indemnity exposure for future cleanup costs and $20 million in transaction cost exposure. This chapter tests those assumptions with real data gathered from actual landfill sites and a review of insurance policies purchased by potentially responsible persons.

Briefly, the Attorney General concludes that Peat Marwick's $30 million figure significantly underestimates insurers' exposure. As stated previously, the Attorney General estimates exposure to be between $108 and $211 million. The Attorney General has found five factors which account for this greater estimate of insurance industry exposure:

- Cleanup and associated costs are higher than Peat Marwick predicted at large, metropolitan sites. This means insurance exposure is correspondingly greater.
- Fewer policies contain broad pollution exclusions which limit coverage.
- More parties have retained evidence of insurance coverage.
- Many more landfills have shown evidence of a release.
- Available insurance limits far exceed Peat Marwick's estimates.

The Attorney General's estimate includes exposure for a) past cleanup costs; b) future cleanup costs and c)MPCA operational expenses. It does not include exposure for natural resource damages or a long term remedy to the contamination at the landfills. In considering overall damages, the Attorney General believes that juries composed of Minnesota citizens would value state natural resources, such as pure water, very highly. Therefore the estimates of recovery could be much higher than stated here.

The range in the Attorney General's estimate is based primarily on the variability of one assumption -- the number and years of policies triggered. The $108 million estimate assumes that policies would be triggered at landfills over a number of years (generally from 16-19 years). If this happens, recovery may be reduced. It is reduced because if costs are evenly spread over a greater number of years, more policies will contain sudden and accidental pollution exclusions which might limit coverage. The higher estimate of $211 million assumes (as did Peat Marwick) that only an initial two years of policies would be triggered and these would be near the time when a landfill opened. The second estimate is higher than the first even though fewer policies are triggered because those triggered have fewer pollution exclusions. Neither estimate assumes any recovery under an insurance policy with a sudden and accidental pollution exclusion.[74]

Section A of this chapter provides background on the Peat Marwick and Attorney General studies. Section B describes the various costs that the State has incurred or will incur which are covered under liability insurance policies. Finally, Section C makes a detailed comparison of the estimates of exposure made by Peat Marwick and the Attorney General's Insurance Study Group.

A. Background on the Peat Marwick and Attorney General Studies

The Peat Marwick study presented two different estimates of insurance recovery under environmental and insurance law as it existed in Minnesota in 1993. The difference in these estimates turned on the interpretation of the qualified pollution exclusion (see Chapter III) which had yet to be ruled on by the Supreme Court at the time the Peat Marwick study was prepared.

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[74] The Insurance Federation of Minnesota states that the Attorney General's estimate of $108 to $211 million in estimated exposure "rests, in large measure, upon the erroneous contention that the issues of whether the "sudden and accidental" pollution exclusion bars coverage in the landfill context, and how damages between triggered policies will be allocated in the landfill context, are open to argument in the landfill context." Letter from Robert Johnson, *supra* note 47, at 8. This statement is incorrect. First, estimates of the Attorney General, as stated above, assume no recovery under insurance policies with "sudden and accidental" pollution exclusions in them. Second, as explained below, the form in which *NSP* allocation takes in the context of a landfill is by no means settled. For that reason, the Attorney General provides two estimates of recovery.

The lower Peat Marwick estimate was based on an assumption that the validity of the qualified pollution exclusion in insurance policies would be upheld by the Minnesota Supreme Court. Under this scenario Peat Marwick estimated that the insurance industry's indemnity exposure would be approximately $30 million, with transaction cost exposure an additional $20 million.

A second, higher estimate was based on the assumption that the qualified pollution exclusion would be invalidated by the Court. Under this second scenario, Peat Marwick concluded that the insurance industry's exposure would be $210 million for future cleanup costs and $30 million for transaction costs.

As noted in Chapter III, the Minnesota Supreme Court in 1995 upheld the validity of the qualified pollution exclusion in *Anderson.*[75] For purposes of this discussion, therefore, the $30 million estimate of industry indemnity exposure will be deemed to be the relevant Peat Marwick estimate for future cleanup costs and $20 million for transaction costs.

The Attorney General's Study Group has been able to incorporate this and other legal developments into its study to provide more current figures. In the time since the Peat Marwick study was completed the Minnesota Supreme Court decided two additional cases which are very relevant to estimating insurance coverage for environmental contamination, *NSP*[76] and *SCSC Corp.*.[77] Both cases dealt with the issue of allocating coverable costs across multiple policies and periods of self-insurance. Both decisions held that allocation of costs is an equitable process, meaning that a court must decide on a case-by-case basis how to fairly allocate costs among policies. Although it is difficult to gauge precisely how these cases might affect recovery under the Act, both will have some impact on insurance industry exposure.[78] For that reason, this study identifies conclusions which depend on assumptions about cost allocation issues.

In addition to being able to factor in legal developments, the Study Group has had the benefit of being able to research and analyze more hard data. This data has been collected from an array of sources, including:

- Responses to over 1600 requests for information sent this year by the MPCA to potential responsible persons at landfills in the program. Responsible persons are mostly businesses of

[75] 534 N.W.2d 706.
[76] 523 N.W.2d 657.
[77] 536 N.W.2d 305.
[78] Peat Marwick states in its' report that "a holding that site costs must be allocated between multiple policies based on the damage that occurred during each policy period could reduce insurance company exposure by as much as 90 percent from the figure presented in the main body of this report. KPMG PEAT MARWICK, *supra* note 2, at B-2. This would leave a recovery of $3 million. The Attorney General reaches a far different conclusion concerning the effect of the cost allocation among multiple policies.

various sizes that either hauled or generated waste brought to landfills subject to the Landfill Cleanup Act.

- Thirty years' worth of information contained in MPCA files on the 106 landfills and potential responsible persons

- Responses to requests for information sent to over thirty insurance groups.

- Numerous formal and informal discussions with the parties most affected by this legislation, including MPCA staff, the Department of Commerce, policyholders, policyholder attorneys, insurance carriers, actuaries, insurance carrier attorneys, academics, insurance agents, and environmental consultants. The number of telephone discussions with businesses that received the MPCA's request for information alone exceeds 500.

So far the Study Group has gathered evidence of approximately 16,000 insurance policies of PRPs involved at the landfills covered by the Landfill Cleanup Act To date, evidence of over 12,000 policies has been reviewed. The information gathered thus far, however, represents only a fraction of the total information available. This evidence mainly concerns the 10 to 15 sites at which the insurance carriers have the highest overall estimated exposure, but even the information gathered concerning these sites is only a portion of what is available. The Attorney General's study thus continues; the results presented here are not intended to be definitive but are intended to provide a general indication of the potential recovery available, and, more importantly, help guide the Legislature on how to restructure the Landfill Cleanup Act to ensure a fair but adequate insurance recovery.

B. Analysis of Costs

Before presenting a direct comparison of Peat Marwick's assumptions and the Attorney General's findings, it will be useful to detail the various types of costs which will form the basis for the State's insurance claims and eventual insurance recovery. These costs fall into five broad categories: future cleanup costs, past cleanup costs, MPCA operational costs, natural resource damages, and long-term remediation.

1. Future Cleanup Costs

A very important category of costs that the State can recover from insurance carriers is future clean-up costs.[79] The MPCA has projected these costs at the 106 closed landfills covered by the Act would amount to $222 million.[80] Although this is obviously a large portion of overall

[79] These future clean-up costs are used in this report to refer to environmental response costs as identified in the Landfill Clean-Up Act.

[80] This estimate of future cleanup costs is actually lower than the approximately $340 million estimated future cleanup costs that Peat Marwick considered in its study. The MPCA revised

costs, it is worth emphasizing that this is not the only category of recoverable costs. Nevertheless, because it is the only category considered in the Peat Marwick study, our analysis will begin here before moving on to consider other costs.

For purposes of this report there are two fundamental questions regarding future cleanup costs: What is the nature of future cleanup costs, and which future cleanup costs could form the basis of an insurance claim?

The MPCA's 1994 Closed Landfill Assessment Report (CLAR) identifies three kinds of future cleanup costs the MPCA will incur: costs for remedial activities, post-closure care, and contingency activities.[81] Remedial activities correct emergency situations, complete investigations, and design and close sites. Contingency actions are future remedial actions that might be necessary. Post-closure care includes actions over the next 30 years to maintain covers, monitor groundwater and surface water, collect and treat leachate, and maintain groundwater treatment and gas venting systems.[82] The estimated costs for each of these activities are summarized in Table IV(a) below:

ACTIVITIES	COSTS
Remedial Activities	$ 63,282,971
Post-Closure Care	$114,475,370
Contingency Activities	$ 44,596,050
TOTAL	**$222,354,391**

These total cost estimates are based on current dollars and are not adjusted for inflation.

Which of these costs are covered? Typical policies require that costs constitute "damages" before they are covered. Under Minnesota law, only those costs that pay for remediation, abatement, or control of contamination of the environment can be considered damages. The vast bulk of the costs to be incurred by MPCA under the Landfill Cleanup Act are directly tied to remedying and controlling the extent of environmental harm or maintaining the systems that prevent further environmental harm and are therefore covered by insurance.[83]

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its estimate because new data and refinements of the old data lead to the increased accuracy of the $222 million estimate. This change in estimates does not seem to alter the fundamental conclusion of the Peat Marwick study, because as stated below in Section C, Peat Marwick assumes that factors other than overall costs played a more important role in reducing recovery.

[81] MINNESOTA POLLUTION CONTROL AGENCY, CLOSED LANDFILL ASSESSMENT REPORT (CLAR) 14 (Jan. 1995).

[82] *Id.* MPCA's estimates cover remedial action costs over a ten year period and post-closure care and contingency activities over 30 years.

[83] Certain landfills, known as "Class D" sites, present little threat to public health or the environment. For this reason MPCA will spend virtually no money at these sites for remedial work. *Id.* at 12-13, A 2-3. MPCA will only spend money at these sites to prevent the threat

It is vital to keep in mind that MPCA's cleanup cost estimates are significantly below national estimates at federal Superfund sites. Even when past and future cleanup costs are considered, the most expensive landfill cleanup of the listed Minnesota landfills -- approximately $25 million at Freeway Landfill -- would be considered a very inexpensive federal Superfund site (where cleanup costs now range from $35 million to $50 million)[84]. This is especially noteworthy since landfills are generally more expensive to cleanup than other types of Superfund sites. The savings in cleanups at Minnesota landfills can in large part be attributed to the efficient landfill cleanup program designed by MPCA and MPCA's advantage in terms of economies of scale in dealing with the cleanup of 106 landfills.[85] Insurance carriers will benefit significantly from this efficiency insofar as future cleanup costs -- for which they are liable -- are reduced.

2. Past Cleanup Costs

PRPs have already expended significant amounts of money to clean up the landfills covered by the Landfill Cleanup Act. Under the Landfill Cleanup Act, the MPCA is required to reimburse certain PRPs for these expenditures.[86] So far, MPCA has reviewed approximately $49 million in reimbursement requests. To the extent these costs are covered by insurance, the State will have a right to collect those costs once it receives an assignment pursuant to Minnesota Statute, section 115B.44. Table IV(b) shows that if these costs are added to the future cleanup costs at the large sites, the potential recovery increases to $272 million.

ACTIVITIES	COSTS
Past Cleanup Costs	$ 49,300,000
Remedial Activities	$ 63,282,971
Post-Closure Care	$114,475,370
Contingency Activities	$ 44,596,050
TOTAL	**$271,654,391**

3. Transaction Costs

A third type of cost in addition to past and future cleanup costs for which insurance carriers have substantial exposure are MPCA's operational expenses, also known as "transaction

from becoming significant -- i.e. money for post-closure care and contingency actions. Therefore, such costs are tied to the extent of contamination present at those sites.

[84] AMERICAN ACADEMY OF ACTUARIES, COSTS UNDER SUPERFUND: A SUMMARY OF RECENT STUDIES AND COMMENTS ON REFORM i (August 1995).

[85] MINNESOTA POLLUTION CONTROL AGENCY, LAYING THE FOUNDATION, *supra* note 31, at 16; *see* MINNESOTA POLLUTION CONTROL AGENCY, CLAR, *supra* note 81 at B10-B13.

[86] MINN. STAT. § 115B.43.

costs." Transaction costs in general include expenditures for governmental operations and litigation associated with ensuring the cleanup and remediation of a site.

Three groups generally incur transaction costs at Superfund sites: the MPCA, PRPs and insurance carriers. Under the Landfill Cleanup Act, transaction costs incurred by PRPs are largely eliminated with the transfer of control over cleanup and long-term care to the MPCA. Thus, only transaction costs of the MPCA and insurance carriers are at issue.

Peat Marwick estimated that insurance carriers have exposure for transaction costs of approximately $20 million. This estimate, however, does not consider the transaction costs incurred by MPCA. Under MERLA, a responsible party is liable for MPCA's operational costs.[87] These costs are ones which a responsible party is legally obligated to pay as a result of property damage, i.e., contamination to the groundwater. These costs should be covered by insurance policies as damages just as cleanup costs are covered.[88] Therefore, insurance carriers would also have exposure for such costs.

a. Operational Costs

The MPCA estimates that over the next 30 years, it will expend approximately $60 million dollars to run the Landfill Cleanup Act. This assumes an average annual budget of approximately $2 million over the next 30 years. This is slightly less than MPCA's projected operational costs for 1996.[89] The following table IV(c) summarizes the addition of these costs:

[87] Operational costs include those expended by MPCA for things such as the operation of the Landfill Cleanup Program including planning, monitoring, and oversight activities and legal services. The MPCA can collect reimbursement of such costs pursuant to Minnesota Statute section 115B.17, subdivisions 2 and 6.

[88] *See Minnesota Mining & Mfg*, 457 N.W.2d 175; *SCSC Corp.*, 536 N.W.2d at 315 (costs incurred in responding to state and federal environmental agencies are covered "damages" within the meaning of a CGL policy); *NSP*, 523 N.W.2d at 661 (citing *Minnesota Mining & Mfg.*, stating, "We have held that claims for 'response costs' may qualify as 'damages' under standard CGL policies"); *see also Northern States Power Co. v. Fidelity & Cas. Co. of New York*, 504 N.W.2d 240, 245-246 (Minn. Ct. App. 1993) ("Mandated expenditures necessary to clean up the groundwater and the contaminated soil causing the groundwater pollution and other expenses causally related to remedying the groundwater pollution are covered.").

[89] MINNESOTA POLLUTION CONTROL AGENCY, LAYING THE FOUNDATION, *supra* note 31, at 8.

ACTIVITIES	COSTS
MPCA Operational Costs	$ 60,000,000
Past Cleanup Costs	$ 49,300,000
Remedial Activities	$ 63,282,971
Post-Closure Care	$114,475,370
Contingency Activities	$ 44,596,050
TOTAL	**$331,654,391**

b. Litigation Costs

It becomes extremely difficult to estimate costs of the MPCA and the insurance industry if one assumes litigation under the Landfill Cleanup Act is necessary. Peat Marwick estimates litigation costs of $20 million for the insurance industry but, as stated previously, does not consider litigation costs expended by the MPCA.

It is likely that Peat Marwick's estimate of $20 million is too low even if only a minimal amount of litigation occurred under the Landfill Cleanup Act. Standard & Poor's has estimated that insurance industry litigation and administration costs currently represent approximately 36% of the insurance industry's costs per site. This would amount to approximately $39 - $80 million in litigation and administration costs based on the Attorney General's insurance indemnity exposure estimates of $108 - $211 million.[90]

Additionally, the insurance industry may also face exposure for MPCA's litigation costs. The State has not litigated any insurance claims at landfills; therefore there is no record on how expensive these claims might be for the MPCA -- and potentially the insurance industry.

Centralization of litigation with the State should save costs for the State.[91] Therefore, costs to the State should be less than those expended by insurance carriers. An estimate of $13 - $26 million, approximately one-third of carrier costs is therefore conservative but reasonable. This would amount to a total of $52 to $106 million in litigation transaction costs should a

[90] Insurance carriers provided information on transactions costs in response to the Attorney General's request for information. Those responses indicated that of the 29 of 30 individual insurance carriers to whom requests were sent, transaction costs approached approximately $10.9 million and indemnity costs $3.5 million at Minnesota landfills. These were based on 2778 insurance claims of which 56% are now closed. However, these estimates are questionable. The data from these requests indicate that a full 57% of the claims are related to two companies, neither of which has ranked high in terms of activity based on policies located by the Attorney General or based on premium volume in Minnesota during the late 1960s and 70s.

[91] *See* ERNST & YOUNG LLP, TECHNICAL ANALYSIS OF THE MINNESOTA VOLUNTARY INSURANCE BUY-OUT PROGRAM FOR THE 1994 LANDFILL CLEANUP ACT 6 (Oct. 27, 1995).

moderate amount of litigation become necessary.[92] However rough these estimates may be, they make clear the huge scale of costs that could be borne by the insurance industry should substantial litigation become necessary for insurance recovery under the Landfill Cleanup Act.

4. Natural Resource Damages

Under the Minnesota Environmental Response and Liability Act (MERLA), a potentially responsible person can be held liable for natural resource damages.[93] The Landfill Cleanup Act does not create a mechanism for the resolution of this liability. Any full settlement of insurance industry exposure should account for these costs. The Study Group does not here attempt to put a precise value on these damages.

5. Permanent Remedy/Risk Premium

Under MERLA, a responsible party is liable for the cost of achieving a "permanent remedy" at a Superfund site.[94] A permanent remedy is generally one that restores a given site to its previous use.

The Attorney General recognizes that achieving a permanent remedy at many of these landfills may be prohibitively expensive. However, in assuming the long term care of these facilities, the State is assuming an unknown and unquantifiable risk if it does not require a permanent remedy. Therefore, the price that the carriers pay to buy out their liability must reflect in some fashion the cost of assuming this risk. As with natural resource damages, the Study Group does not attempt to put a value on the assumption of this risk.

6. Summary of Costs for Which Insurance Carriers Have Exposure

Based on an analysis of the evidence gathered by the Insurance Study Group, the insurance industry faces exposure for the following costs identified in Table IV(d) on the next page:

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[92] The American Academy of Actuaries recently issued a report reviewing six different studies on federal Superfund costs including transaction costs. The American Academy of Actuaries found that those studies reached an average annual estimate for transaction costs of approximately 45% of cleanup costs for all three groups (i.e., PRPs, insurance carriers, and government). This amounts to $1 billion per year in estimated transaction costs compared to $2 billion in estimated cleanup costs. The Academy found this average estimate of transaction costs to be too high and backed it off to $900 million in transaction costs (or 45% of cleanup costs) for government, PRPs, and carriers. The Academy estimated that this percentage would decline as cleanups progressed. AMERICAN ACADEMY OF ACTUARIES, *supra* note 84.

[93] MINN. STAT. § 115B, subd. 1(c).

[94] MINN. STAT. § 115B.02, subd. 16.

ACTIVITIES	COSTS
MPCA Operational Costs	$ 60,000,000
Past Cleanup Costs	$ 49,300,000
Remedial Activities	$ 63,282,971
Post-Closure Care	$114,475,370
Contingency Activities	$ 44,596,050
State Litigation Costs - Avoidable	$ 13,000,000
TOTAL	**$348,654,391**

This estimate of overall costs includes only those costs for which a reasonable estimate now exists. Specifically, it does not take into account costs for natural resource damages or long term remediation, both of which raise the final figure as shown in Table IV(e):

ACTIVITIES	COSTS
Natural Resource Damages	$ -- undetermined
Long Term Remedy - Post 2024	$ -- undetermined
TOTAL	**Greater than $348,654,391**

C. Comparison of Exposure Estimates

This section evaluates the key assumptions in the Peat Marwick study concerning estimated cleanup costs at large landfills using Study Group findings based on hard data.

As stated previously, there are five primary reasons for the dramatic differences in the Attorney General's estimate of between $108 million and $211 million and Peat Marwick's estimate of $30 million of total indemnity exposure. First, the insurers' potential exposure would be greater than that estimated by Peat Marwick because large landfills, generally in the metropolitan area, will require substantially more to clean up than estimated by Peat Marwick. These sites also have the most potential coverage.

Second, coverage would be greater because far fewer policies implicated at the landfills contained "sudden and accidental pollution exclusions" than estimated by Peat Marwick. These exclusions limit coverage to sudden and accidental pollution events. The fact that fewer policies contained these exclusions means that potential coverage is greater than estimated by Peat Marwick.

Third, coverage would be greater because more parties with liability at the landfills have evidence of insurance coverage going back to the years when these landfills opened. Evidence of coverage is essential to making a claim. Strong evidence of coverage increases the exposure of insurance carriers.

Fourth, coverage would be greater because many more landfills than estimated by Peat Marwick have shown evidence of a release of contaminants into the environment. Releases of contaminants into the environment are one of the events that trigger coverage under insurance policies. Since more releases likely occurred at landfills, more coverage would be triggered and the recovery would be greater than estimated by Peat Marwick.

Fifth, the limits of insurance policies that could be potentially available at landfills far exceeds what Peat Marwick estimates. This is especially significant at medium-sized landfills.

Subsection 1 below briefly explains how Peat Marwick structured its study. The five key assumptions identified above are then analyzed in subsection 2. The estimates of the Attorney General based on data reviewed by the Study Group are summarized in subsection 3.

1. The Structure of Peat Marwick's Analysis

The structure of Peat Marwick's analysis of insurance carrier indemnity exposure is set forth in a table of that Report, reproduced here as Table IV(f).

In general the Peat Marwick Report divides PRPs into two groups: non-generators and generators. Non-generators include a) landfill owners, b) landfill operators, c) combined landfill owner/operators, and d) haulers of solid waste. Peat Marwick generally assumes that only a small percentage of insurance carrier exposure exists under policies issued to non-generators. The Peat Marwick report concludes the total estimated exposure for non-generators at all closed landfills is $567,000.

The other group of PRPs is waste generators -- those entities whose solid waste was brought to and disposed of at the landfills. Peat Marwick divides the generators into three groups: depending on the kind of landfill to which it was brought. For ease of designation, the Attorney General's Study Group will simply refer to these landfills as small, medium and large landfills and will base these designations on the cleanup and other related costs that can be allocated to the sites.[95]

[95] Peat Marwick's classifications for the landfills are a) small, rural landfills; b) non-metropolitan small landfills; and c) large, metropolitan landfills. The Study Group has changed these designations because, for example, not all large landfills are in metropolitan areas.

Peat Marwick estimated that policies of generators that brought waste to large landfills had the most total indemnity exposure -- $18,747,151.[96] Next, Peat Marwick estimated policies of generators that brought waste to medium-sized landfills had $11,812,500 of total indemnity exposure for carriers. Peat Marwick assumed that policies of generators that brought waste to small landfills would present carriers with no exposure. If the indemnity exposure for each of these groups is added up, it equals approximately $31 million.

Peat Marwick arrives at these estimates of exposure by making various assumptions about PRPs and their insurance and the ease with which that insurance can be located. Below the Study Group analyzes each of the key Peat Marwick assumptions and explains how the data gathered indicates that those assumptions should be modified.

2. Comparison of Peat Marwick Assumptions and Attorney General Findings

a. Costs at the Large Metropolitan Sites

Peat Marwick's Assumption: The average future cleanup costs at the 10 large landfills is $5.4 million. Peat Marwick did not include in its analysis consideration of insurance industry exposure for past cleanup costs, or State administrative and legal expenses, natural resource damages, or the costs of a long term remedy. This assumption is one of the most crucial in the Peat Marwick study because this assumption limits the recovery at large landfills where substantial insurance coverage for generators at large landfills exists.

Attorney General's Finding: At the 10 large landfills exposure for known costs per site is $17.0 million. This estimate includes average future cleanup costs, $9.1 million, past cleanup costs $4.9 million, and operational costs of the State $3.0 million that could be attributed to those 10 large landfills. A breakdown of the costs for each of these sites is identified in Table IV(g).

b. Likelihood of Sudden and Accidental Pollution Exclusions in Insurance Policies

Peat Marwick's Assumption: A substantial number of triggered policies have sudden and accidental pollution exclusions in them: 50% of the triggered policies of haulers and generators at large landfills; 25% of triggered policies of generators at medium-sized landfills. This is based on the assumption that two policy years of each PRP would be triggered. (Peat Marwick considered only policies issued before 1974, apparently on the assumption that policies issued

[96] This figure is arrived at by taking the number of sites at which carriers have any indemnity exposure according to Peat Marwick: 35 sites multiplied by the percentage of sites that are large sites: 30%; this equals 10.5 large sites. This figure is then multiplied by the (unweighted) expected exposure, $1,785,443 which equals $18,747,151.

after 1974 would not be triggered or on the assumption that all post 1974 policies would have pollution exclusions.)

Attorney General's Finding: A substantial number of triggered policies would be free of sudden and accidental pollution exclusions. This is true for two primary reasons. First, many policies were likely triggered in the 1960s and early 1970s before the sudden and accidental pollution exclusion was added to policies. These policies were likely triggered because many landfills, especially large ones, accepted waste in the 1960s and early 1970s. Since landfills have often been found to contaminate the environment shortly after opening,[97] one can reasonably assume that many of the large landfills under the Landfill Cleanup Act began to contaminate the environment shortly after opening.[98] Such latent contamination would trigger coverage.

Second, a substantial number of policies issued after 1973 did not contain sudden and accidental pollution exclusions. Table IV(h) shows the percentages of the 9780 policies reviewed with sudden and accidental pollution exclusions in the years from 1970 through 1985.

The Attorney General's estimates of potential indemnity exposure vary from $108 to $211 million primarily because of the question of how many years of coverage would be triggered. If one assumes, as Peat Marwick did, that only two years of policies would be triggered, far fewer policies, especially if the landfill opened in the 1960s or 1970s, would have sudden and accidental pollution exclusions in them. The higher estimate of $211 million is based on the assumption that only two years of insurance policies would be triggered.

The lower estimate of $108 million assumes that a larger span of policy years would be triggered -- from the opening date of the landfill to 1985. A recent Minnesota Supreme Court *NSP*,[99] issued after Peat Marwick's Report, raises the issue of whether a broader range of policy years would be triggered at a polluted site. Several insurers in their comments to the Attorney General have contended that more than two years of policies would be triggered at landfills covered by the Act. If policies in the latter 1970s and 80s were triggered, a larger number of triggered policies could have sudden and accidental pollution exclusions that could reduce coverage.

Three things should be noted about this argument. First, as stated in chapter III, there are public policy reasons why a court, applying equitable principles under the Landfill Cleanup Act

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[97] *See, e.g., Dakhue*, 508 N.W.2d 798; *New Castle County v. Continental Cas. Co.*, 725 F. Supp. 800, 812 (D. Del. 1989)

[98] Estimates of opening dates of landfills used in this study do not take into account additional information on opening dates of landfills recently reviewed by MPCA. This new information means that many opening dates should be pushed back farther. This would mean fewer policies would likely have pollution exclusions.

[99] 523 N.W.2d 657.

and under *NSP,* may choose either to limit the number of triggered policies or to allocate costs other than on an equal basis to all policies.

Second, even if a court did allocate costs on an equal basis over a substantial number of years, not all policies issued in 1974 and after had pollution exclusions in them. In reaching its estimate of $30 million Peat Marwick only analyzed policies that were in force before 1974. Because, as demonstrated in Table IV(h), many policies issued in 1973 or after did not have sudden and accidental pollution exclusions in them, recovery under triggered policies from 1973 through 1985 is still reasonably substantial.

Third, the presence of a sudden and accidental pollution exclusion in a policy does not foreclose potential recovery under that policy. As stated in Chapter III, factual circumstances may exist at landfills that evidence sudden and accidental releases or exclusions may be inapplicable for other reasons.

c. Evidence of Coverage and Likelihood of Insurance

Peat Marwick's Assumption: Many PRPs either would not have available insurance coverage[100] or could not produce evidence of that coverage. Peat Marwick therefore reduces available coverage based on what it calls "likelihood of insurance." and "evidence of coverage." Key assumptions include:

-- 50% of waste haulers would have insurance and evidence of only 5% of those insurance policies could be found;

-- 75% of generators at large landfills would have insurance and evidence of 90% of those policies could be found;

-- 75% of generators at medium-sized landfills would have insurance and evidence of 50% of those policies could be found;

Attorney General's Finding: More PRPs had insurance and evidence of that insurance is more accessible than Peat Marwick estimated. The Study Group's search for coverage is in reality at the initial stages. (Appendix B explains the process which the Study Group has used to locate the policies it has found.) Already, data indicates 84% of all PRPs have insurance and evidence

[100] By "Likelihood of Insurance" Peat Marwick apparently meant that the policyholder had a policy which would provide coverage. For example, in some instances, a PRP might have an insurance policy but that policy would have such high deductibles or "self-insured retentions" that the policy would effectively not provide coverage. Self-insured retentions or deductibles are similar in that under both, insurance proceeds are only paid to the policyholder once damages exceed a specified dollar amount.

of insurance in the years considered by Peat Marwick.[101] The Study Group estimates that this percentage or a higher one would hold at all medium and large landfills.

d. Number of Small-to-Medium-Sized Landfills with Factual Situations that Could Give Rise to Insurance Claims

Peat Marwick's Assumption: Only 24 small-to-medium-sized sites have factual situations that could give rise to insurance coverage. (This number appears to be based primarily on the assumption that only 24 small-to-medium-sized sites likely had releases of contaminants into the groundwater prior to 1974.)

Attorney General's Finding: The number of small-to-medium-sized landfills with possible claims is closer to 100. Evidence gathered by the MPCA for its Closed Landfill Assessment Report indicates that approximately 95% of the landfills considered had some evidence of groundwater contamination.[102] In addition, many of these landfills may have caused damage to natural resources other than groundwater. These damages would also give rise to insurance claims.

e. Total Policy Limits at Medium-Sized Landfills

Peat Marwick Assumption: The available insurance policy limits at medium-sized landfills would not be enough to cover the cleanup costs. Peat Marwick bases this assumption on the estimate that 10 PRPs at a medium-sized landfill would only have $200,000 of policy limits over a two year period.

Attorney General Finding: The available policy limits at medium-sized landfills would be enough to cover the cleanup costs. Many of the businesses who have responded to the Attorney General's request for information are small businesses, such as those that would likely be PRPs at small-to-medium sized landfills. Many of those businesses have sizable insurance policies, especially when umbrella and excess policies are considered and do not have significant self-insured retentions or deductibles in their policies. Finally many of the medium-sized landfills are near small metropolitan areas with fairly sizable companies in the area.

The next section explains how the Study Group uses the variables modified by the facts gathered by the Study Group to arrive at a new estimate of exposure.

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[101] *See* text *infra*.

[102] MINNESOTA POLLUTION CONTROL AGENCY, CLAR, *supra* note 81, at 13.

3. The Attorney General's Estimate of Exposure

The Study Group arrives at its estimate by changing the five Peat Marwick assumptions in the following ways:

a. The Study Group identifies additional costs, not considered by Peat Marwick, for which carriers may have exposure and includes them in the estimates. These costs, based on current estimates, total approximately $345 million, based on current estimates without considering natural resource damages, the cost of a long term remedy or legal expenses involved if significant litigation occurred.[103]

b. The Study Group estimates the percentages of sudden and accidental pollution exclusions and absolute pollution exclusions in policies of a given year identified in the database.[104]

c. The Study Group estimates that 84 % of PRPs that could be selected at a site will have both insurance and evidence of that insurance[105] between the opening date of the landfill and 1985.[106]

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[103] *See* Table IV(g).

[104] *See* Graph IV(a). These yearly percentages of policies without sudden and accidental or absolute pollution exclusions are based on a review of information of 9780 liability policies in the database at this time. MPCA, as stated previously, is gathering additional evidence on opening dates of landfills and that evidence suggests that waste was hauled to several landfills earlier than estimated in the MPCA's Closed Landfill Assessment Report. Earlier opening dates could reduce even further the number of policies with sudden and accidental pollution exclusions.

[105] To create a direct comparison with the results in the Peat Marwick study, the Study Group selected 35 PRPs at two of the large landfills, East Bethel and Freeway. (Such a selection of PRPs is precisely what could occur in litigation, although the number of PRPs selected could vary.) The Study Group then determined in how many years the selected PRPs had evidence of insurance coverage from the date the landfills opened through 1985. Evidence of Coverage would include a policy number, the name of an insurance carrier, an insurance certificate, or in many cases a policy. This percentage would then be comparable to percentage of policyholders with "evidence of coverage" in Peat Marwick's model. *See* Table IV(f). Next the Study Group determined the percentage of PRPs with insurance. This would exclude PRPs who simply did not have insurance or had self-insured retentions or deductibles that were so high that coverage would likely not be implicated. This percentage is comparable to the percentage of PRPs with a "likelihood of insurance" as identified in Peat Marwick's model. *See* Table IV(f). Of the selected 35 PRPs at the two landfills an average of 88% had insurance. Of that 88% of PRPs with insurance, 96% also had evidence of coverage. Thus a total of 84% had insurance and evidence of that insurance (88% x 96% = 84%).

d. The Study Group identifies all sites with a potential release of contaminants that could trigger coverage. This includes 95% or 100 of the sites.[107]

e. The Study Group assumes based on the tremendous amount of insurance discovered so far that PRPs identified at all landfills, including small and medium-sized ones, will have sufficient insurance policy limits to cover any potential damage at a landfill.

Based on these changes in the variables identified above, two simulations have been run.[108] One run assumes two years of triggered coverage shortly after the landfill opened; the other assumes triggered coverage from the time the landfill opened until 1985.[109] The equation for these two simulations is set forth in Table IV(i).

These two simulations produce estimates of $108 and $211 million in expected exposure in present, non-discounted dollars. These estimates do not take into account recovery under policies with sudden and accidental pollution exclusions or recovery for natural resource damages or long term remediation costs. Changes in costs estimates would change these recovery estimates.

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[106] 1985 is picked as an end date for determining which policies will be considered or "triggered." Footnote 105 explains why 1985 is chosen.

[107] The landfills that do not now appear to have evidence of a release are Bueckers No. 2 SLF, Lake County SLF, Orr SLF, Portage Modified SLF, and Vermillion Dam SLF. MINNESOTA POLLUTION CONTROL AGENCY, CLAR, *supra,* note 81, at C25-26, C117-18, C161-62, C171-72, C193-94. Total future cleanup costs at these sites are $2,221,000. Exclusion of these sites would reduce the overall likely recovery by approximately $510,000.

[108] *See* Table IV(h); Graph IV(b); Graph IV(c).

[109] As explained in Chapter IV, section C(2)(a), two different simulation periods -- a longer and a shorter one -- are chosen because of the discretion a trial court has in determining the period of years over which policies would be triggered under *NSP*. The end date, 1985, is picked for the first run for several reasons. First, contamination of groundwater was detected in the groundwater at most sites at least by 1985; for numerous landfills this may have occurred even earlier. MINNESOTA POLLUTION CONTROL AGENCY, CLAR, *supra* note 81, at 4. Second, remediation or cleanup may have begun at many of these landfills with the reissuance of landfill permits in 1983. *Id.* at 4-5. Discovery of contamination and remediation or cleanup are two of the possible end-dates for the triggering of policies under *NSP*. 523 N.W.2d at 664. Finally, by 1985 pollution coverage was generally becoming unavailable with the arrival of the absolute pollution exclusion. (This unavailability may have occurred even under the sudden and accidental pollution exclusions if those are interpreted to provide no coverage at landfills.) Unavailability of coverage is an event that could prevent the triggering of additional policies. In short, the end date may vary from site to site, but 1985 is a conservative estimate of that date.

Finally, these estimates of recovery are much lower than estimates of insurance industry exposure nationwide. Standard & Poor's in its report on environmental liability and insurance carrier exposure, estimated that insurers would finance 75% of the cleanup of federal superfund sites.[110] This compares to 31% and 61% in the two simulations conducted in this study. Changes in Minnesota case law or the development of new legal theories could change these percentages and bring them more in line with national trends. If that were the case, insurance carrier exposure could climb above $258 million.

Conclusion

As this chapter shows, revisions to the Peat Marwick study suggested by the data uncovered by the Attorney General lead to significantly higher estimates of insurer liability. Incorporation of other more variable factors would likely drive this estimate even higher. The mechanism for recovering these insurance policy proceeds is the focus of the next chapter, which evaluates the Act's Voluntary Buy-Out Program.

[110] *Environmental Liability Strains P/C Insurers*, *supra* note 69, at 3.

CHAPTER FIVE

EVALUATING THE VOLUNTARY BUY-OUT FORMULA

Introduction

This chapter examines the Landfill Cleanup Act's Voluntary Buy-Out Program, which is intended to facilitate the voluntary recovery of insurance policy proceeds. Although the Attorney General firmly supports some sort of voluntary settlement of insurers' liabilities, the Attorney General is concerned whether the Buy-Out Program as currently formulated can deliver such a settlement.

This chapter presents an overview of the Buy-Out Program and Formula and estimates the amounts insurance carriers would likely pay under the Formula as set forth in the Act and under variations of the Formula. Based on this analysis, this chapter then explains why the Formula may not generate sufficient payments to cover industry exposure, regardless of the estimate of insurance carrier exposure used. Technical difficulties in the Formula make it unlikely that a sufficient number of individual carriers will accept their buyout offer. To remedy this situation, the Attorney General recommends changes to the Buy-Out Program in the final chapter of this report.

A. Overview of the Voluntary Buy-Out Program

The Voluntary Buy-Out Program determines the amount each carrier should pay pursuant to a formula set forth in Minnesota Statute, section, 115B.46. The Buy-out Formula was designed to allow insurance companies to buy-out their share of the overall potential exposure for environmental response costs at the 106 landfills covered by the Act.

The Formula specifies a maximum cap of $90 million for the total insurance industry exposure and apportions that figure among the insurance carriers based on each carrier's share of the Minnesota market for general liability premiums from 1970-73. It also grants various discounts to carriers; for example a discount is provided for the presence of a pollution exclusion. Finally the Formula sets a minimum threshold of $30 million in aggregate insurer buy-out contributions for the Buy-Out Program to take effect.

Under the Act, each insurance carrier must decide whether to participate in this program by paying its buy-out price (as determined by the Formula) by January 1, 1998; insurers deciding not to participate will then be subject to litigation by the Attorney General for environmental response costs at those sites.

B. Details of the Voluntary Buy-Out Formula

This section explains the details of the Buy-out Formula and illustrates it by applying the Formula to a hypothetical insurance company. The Buy-out Formula, when written as an equation, reads as follows:

Voluntary Buy-Out Share	=	Adjusted share	x	$90 million	x	(100% minus the Qualified Pollution Exclusion Credit)

The following steps show how the Legislation currently requires the two variables in the Formula -- labeled above as the Adjusted Share and the Qualified Pollution Exclusion Credits -- to be determined:

1. Adjusted Share

a. Add together all premiums collected by an insurer in the following lines of insurance for the following years:

- liability lines other than auto coverage for the years of 1970 and 1971;
- miscellaneous liability lines for the years 1972 and 1973; and
- commercial multiperil lines for the years 1970 through 1973.

b. Subtract from this amount professional or medical malpractice insurance premium for calendar years 1970 through 1973. This total is what we call the "adjusted total premium" for an individual insurer.

c. Add together the "adjusted total premium" for each insurer to determine the aggregate total premium for all insurers.

d. Divide the adjusted total premium for the individual insurer by the aggregate total premium for all insurers to arrive at the Adjusted Share.

2. Qualified Pollution Exclusion Credit

a. For each year from 1970 through 1973 (four years) an insurer receives a 25% credit if that insurer has a qualified pollution exclusion in all its comprehensive general liability policies issued in the three lines of insurance identified in (a) above.

b. Total the number of credits issued for each year (meaning a total of 0 to 100%) to arrive at the Qualified Pollution Exclusion Credit.

3. Voluntary Buy-Out Share

The amounts for the Adjusted Share and the Qualified Pollution Exclusion Credit are plugged into the Formula to arrive at the "Voluntary Buy-Out Share" for each insurer.

An example using a hypothetical insurer should clarify this process:

Acme Fidelity & Casualty has been selling multiple lines of insurance in Minnesota since the 1960s. The following steps show how Acme's Buy-Out Share would be calculated:

Step 1 – Determining the Relevant Lines:

Acme's premiums for the relevant lines and years under the Buy-out Formula are as follows:

Liability lines other than auto coverage for the years 1970 and 1971= $3,000,000
Miscellaneous liability for the years 1972 and 1973 = $4,000,000
Commercial multiperil lines for the years 1970 through 1973 = $5,000,000.

The total of all of Acme's relevant lines is $12,000,000.

Step 2 – Determining Adjusted Total Premium:

The next step is determining the adjusted total premium by subtracting the professional and medical malpractice insurance premiums collected from 1970 through 1973. Acme had $500,000 of professional or medical malpractice insurance issued as part of the liability line other than auto coverage for the years 1970 and 1971, and had $1,500,000 for malpractice insurance issued as part of miscellaneous liability lines for the years 1972 and 1973, for a total of $2,000,000 in professional or medical malpractice premiums.

Therefore, the adjusted total premium would be $12,000,000 minus $2,000,000 or $10,000,000.

Step 3 –Determining Adjusted Share:

Next, assume the adjusted total premium for insurers is added together and equals $100,000,000. Acme's "adjusted share" is determined by dividing the

adjusted total premium for the individual policyholder by the aggregate total premium for all insurers:

Acme's share of $10,000,000 divided by 100,000,000 or .10 or 10%.

Step 4 – Determining the Qualified Pollution Exclusion Credit:

Acme had the qualified pollution exclusion in all of the relevant lines in 1972 and 1973, but not in 1970 or 1971.

Therefore, Acme would have a 50% credit.

Step 5 – Running the Calculation:

These numbers in the voluntary Buy-out Formula produce the following calculation:

Adjusted share (.10 x $90 million) x (100% - 50%) = $9 million x 50% or $4.5 million.

Thus Acme's voluntary buy-out share is $4.5 million.

C. Simulations of the Formula

The Study Group ran simulations of the formula with various assumptions and results. These simulations are attached as Table V(a) and Table V(b). Each of these simulations uses premium data set forth in A.M. Best *Executive Data*.[111] That premium data is then modified as required in the formula by:

- Professional liability & medical malpractice premium information supplied by four carriers which submitted such information to the Attorney General.

- Information on the qualified pollution exclusion. Two different simulations were run assuming 50% and then 75% of the policies contained qualified pollution exclusions during the years in question. These percentages were chosen based on the Peat Marwick study results and based on the information submitted by carriers in response to the requests for information (only 17 out of 24 had complete information for all 4 years). These assumptions are <u>not</u> based on the policy data gathered by the Study Group in requests sent to PRPs.[112]

[111] A.M. BEST, BEST'S EXECUTIVE DATA SERVICE: REPORT A2, EXPERIENCE BY STATE (1968-1974) (published yearly).

[112] *See* Table IV(h).

One run used the statutory formula for the years 1970-1973, the $90 million as the maximum for insurance industry exposure, and the assumption that 75% of the policies contained a qualified pollution exclusion. This simulation produces a maximum recovery of $22.5 million. Since this would fail to reach the statutory minimum of $30 million, the "buyout" would not happen under this scenario.

If the percentage of policies with qualified pollution exclusions is changed to 50%, and the $90 million figure and the years remain the same, the Formula produces a maximum recovery of $45 million. In fact, given the nature of the Formula, the maximum recovery will always be reduced by the assumed exclusion, so that a 50% pollution exclusion will always produce one-half of $90 million, and a 75% exclusion will always produce a maximum recovery of $22.5 million. Thus the last simulation, which expands the date range to 1967-1974 with an assumption that 50% of policies contained a qualified pollution exclusion, produces a recovery that rises to $45 million.

Many of the Formula's technical shortcomings are identified in a report for the American Insurance Association by Ernst & Young.[113] Simulations run by Ernst & Young for the American Insurance Association confirm that the buy-out minimums will be difficult to reach under the current Formula. Ernst & Young ran 25 simulations assuming a $90 million maximum but based on different levels of expected exposure. Ernst & Young first eliminated the $200,000 minimum for carrier participation and arrived at an average of predicted revenue of $21.2 million. With the $200,000 minimum, the revenues would be reduced to an average of $20.6 million.[114]

All of these simulations assume full participation by carriers. Both Ernst & Young and the Attorney General conclude that there are many reasons certain carriers will not want to participate in the existing buy-out program. Reduced participation will further reduce revenues below the potential maximum amounts.

D. Problems with the Formula

1. Adverse Selection Due to Inaccurate Measurement of Individual Insurer Exposure

A key problem with the buy-out program, identified by carriers themselves, is that premium volume, even with discounts for pollution exclusions, will not necessarily reflect actual carrier exposure. Measurement of individual carrier exposure requires specific information concerning a number of factors including the type of insurance, insurance policy limits, insurance policy years and the wording of the any pollution or professional liability exclusions. Moreover, complex factors such as the identification of PRPs will greatly affect a carrier's

[113] ERNST & YOUNG, *supra* note 91.
[114] *Id.* at 2.

exposure. Finally, the formula ignores whole categories of insurance policies--such as excess, umbrella, auto, and surplus lines--in determining exposure.

This potential inaccuracy leads to the phenomena known as "adverse selection." This means that under the Buy-out Formula a carrier with a relatively low buy-out price compared to its liability exposure will accept the buy-out offer. In other words, this carrier will get "too good a deal." The State could then lose revenue equal to the difference between the carrier's expected exposure and its buy-out price. Another carrier with a relatively high buy-out price compared to its expected exposure will get a bad deal and will not buy out. The fact that the Buy-Out Formula relies on a limited number of factors, i.e., premiums during a finite period, pollution exclusions, and professional malpractice insurance, heightens the chance that adverse selection will skew the results.

In this respect, the Study Group agrees with the objections raised in the Peat Marwick report. Peat Marwick argued that the primary drawback of the market share approach was the use of a predetermined pool based on premium volume as opposed to actual insurance company exposure. Peat Marwick also pointed out that even if an insurance company wrote most of its policies to lower risk businesses, they would still face the same exposure per premium dollar under the Formula as an insurance company which had written applicable lines of insurance with a concentration in the heavy manufacturing companies.[115] In their conclusions Peat Marwick stated, "A market share approach is not a true estimate of individual company exposure because it fails to take into account the differences in company procedures for selecting policyholders and for including pollution exclusionary language."[116]

The impact of these potential inaccuracies can be reduced in part by requiring higher minimum participation requirements for individual carriers -- which are now set at $200,000 for each insurer and $30 million for the aggregate of all participating insurers. Such minimums can control problems with adverse selection to a certain extent by encouraging those carriers who want to buy out to pay "a little extra" to ensure that the minimum is reached. Unfortunately, the current formula does not really give a carrier the means by which to make the judgment of how much extra is needed to meet the minimum threshold, and a higher minimum would not eliminate revenue loss to the State.

2. Precise Information is Not Readily Available

This points to the next problem. A formula requires firm numbers and supporting documentation to be readily verifiable. However, even the information necessary to complete the formula as presently stated in the Act may be difficult to obtain and confirm. Many of the carriers have stated they cannot supply accurate information from the early 1970s. Publications

[115] KPMG PEAT MARWICK, *supra* note 2, at 80.

[116] *Id.* at 82. For a ranking of insurance carriers by number of policies written for PRPs identified at the landfills examined by the Study Group, *see* Graph V(a).

such as those from A.M. Best do not contain all the necessary information, such as information on pollution exclusions. Moreover, if the formula is fine-tuned with additional factors to limit the problem of adverse selection, the problem of verifying this data will increase. Ernst & Young also recognizes this problem in its Report.[117]

3. Inequity of the Exclusion Credit

The formula requires all policies of a carrier in a given year to contain the pollution exclusion in order to obtain the exclusion credit. Thus, a carrier may have had a qualified pollution exclusion in place for 90% of its policies in a certain year, but the carrier would receive no credit under the formula for that year. This could result, as Ernst & Young recognizes, in inequitable results for certain carriers.[118]

4. Formula Years Lead to Inequitable Allocation

The need for fairness and accuracy suggests that the dates covered by the formula should not begin uniformly in 1970, but should more closely reflect actual opening dates of the landfills in question. This would have to be determined on a case-by-case basis. There are 31 landfills that are known to have accepted waste before 1970, and 9 more that were opened in 1970, with 14 landfills opening in 1971, 20 in 1972, 12 in 1973 and 5 in 1974. As mentioned previously, the qualified pollution exclusion was not written in liability policies as a common practice before 1971 and only in certain cases between 1970-1971. This could mean a greater recovery based on policies issued in the years prior to 1971. The existing Buy-out Formula does not allow for this possibility.

5. Uncertainties in the Formula

Unlike most other settlement schemes, the Buy-Out Program's success depends not on the decision of an individual carrier but on those of an entire industry. This introduces considerable uncertainty for potential bidders. The Ernst & Young report identified this problem as one which makes it difficult for individual carriers to decide whether to accept a buy-out offer.[119]

This uncertainty is heightened by the Formula's minimum threshold amounts. A carrier may be reluctant to give a definitive offer of what it thinks a reasonable buy-out amount would be if the acceptance of that offer largely depends on the actions of other carriers.

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[117] ERNST & YOUNG, *supra* note 91, at 17.
[118] *Id.* at 15.
[119] *Id.* at 11.

In short, the sheer complexity of the buyout, including the impact of the release offered, as well as determining the actual liability costs, transaction costs, etc., could result in some companies deciding not to participate in the program.

6. Scope of Release of Liability

Many carriers have indicated that the release of liability offered in the Voluntary Buyout Program to the Insurance carriers is not sufficiently attractive for carriers to buy out their liability. The present release of liability only releases carriers from liability for indemnity payments related to environmental response costs; other uncertainties such as contribution and reinsurance claims must be resolved.

The Attorney General agrees that the Buy-Out program should have a broader release if the State in turn is adequately compensated for the additional claims surrendered by the State of Minnesota.

Conclusion

The main point of this rather technical chapter is that the Voluntary Buy Out Program in its present form may not maximize revenues as intended by the Legislature. The Program will probably fail in this respect for two reasons. First, independent simulations run by the Attorney General and Ernst & Young indicate the formula will not produce revenue to cover the Attorney General's estimates of overall industry exposure. Second, technical shortcomings in the buy out formula's structure make it unlikely that a premium-based buy-out program could succeed. The final chapter of this study presents the Attorney General's recommendations for remedying these problems and for improving other aspects of the Landfill Cleanup Act.

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

This report has considered: how the Landfill Cleanup Act revolutionizes Superfund cost recovery (Chapter 2), insurers' contractual obligations to pay (Chapter 3), estimates of the extent of their obligation (Chapter 4), and problems with the current scheme for recovering a fair insurance contribution (Chapter 5). This concluding chapter summarizes the major conclusions of the Attorney General's Insurance Study and the three principal recommendations for improving the Landfill Cleanup Act.

A. Major Conclusions

The Attorney General has reached three major conclusions regarding the insurance recovery aspects of the Act:

1. Previous Estimates of the Potential Insurance Recovery Must Be Revised

In 1993, the consulting firm of KPMG Peat Marwick estimated that approximately $30 million of the landfill cleanup costs expended by the State could be recovered under insurance policies providing coverage at these landfills. Research conducted by the Attorney General for this report concludes that substantially more than $30 million could be recovered. The Attorney General estimates that from $108 to $211 million could be recovered from insurers based on current cost estimates. This range exists because the application of legal principles is highly dependent on the facts involved at each landfill. Several factors account for the difference between Peat Marwick's estimates and those of the Attorney General:

- Peat Marwick's estimates do not capture all the costs for which the State will have claims (such as natural resource damages and operational costs). These costs add to the potential recovery. Table I(a) summarizes the costs.

- Cleanup and associated costs at large metropolitan sites are higher than Peat Marwick predicted. Thus, insurance exposure is greater.

- Fewer policies contain pollution exclusions which limit coverage than estimated by Peat Marwick.

- More parties have retained evidence of insurance coverage than estimated by Peat Marwick.

- Many more landfills have shown evidence of a release.

- Available insurance limits under policies issued to responsible persons far exceed Peat Marwick's estimates.

If Minnesota law changes or the facts surrounding these landfills differ from what is anticipated here, these estimates would also change.

2. Greater Incentives are Needed to Maximize Insurer Participation in a Voluntary Recovery

Whether to voluntarily resolve liability is ultimately a business decision for insurers. This report concludes that a reasonable settlement with the State of Minnesota could save the insurance industry a substantial amount of money that would otherwise be expended on litigation and administration of claims. Such a settlement should also be attractive to insurance carriers. The federal government recently ceded cleanup control at all 106 sites to the MPCA. Because of the large number of sites involved, the MPCA has an advantage over private parties in terms of economies of scale. Moreover, MPCA has been more efficient than the U.S. EPA cleaning up Superfund sites.. In short, by reaching a reasonable settlement insurance carriers can establish a national precedent that complex Superfund sites can be cleaned up efficiently without the expense of seemingly unending litigation.

The Attorney General recommends additional incentives to further encourage insurer participation, including a broader liability release than is currently in the Act. For example, the State may have claims at these sites for natural resource damages; these claims can be turned into an incentive for settlement by negotiating a fair recovery for these costs in exchange for a release from future natural resource liability at these sites.

3. The Current Voluntary Buy-Out Mechanism Requires Modification to be Fully Successful

The legal mechanism for voluntary resolution of insurers' liabilities currently in the Act -- the Voluntary Buy-Out Formula -- will likely fail to accurately assess carriers' actual exposure and as a result may not draw the minimum level of insurer participation required by the Act for the buy-out to succeed. This potential inaccuracy results from the formula's reliance on sales of general liability policies during critical years as the basis for insurers' buy-out shares. Sales may not accurately reflect an insurance carrier's exposure. Because of this inaccuracy, some carriers could get an offer of settlement that underestimates their exposure; these carriers will likely "buy-out." The State will lose money on these buy-outs. Other carriers could get an offer of settlement that overestimates their exposure. These carriers will not settle, and the State would be forced to make new offers or litigate these claims. In the end, the Voluntary Buy-Out Program would not likely "maximize the net revenue to the State" as is the stated legislative intent.

Therefore, the Attorney General recommends an exposure-based insurance recovery mechanism in place of the current sales-based mechanism. Such a mechanism would base each insurer's share on a rough approximation of the insurer's actual liability exposure and is far more likely to draw insurer participation.

B. Major Recommendations

In light of these findings the Attorney General has three major recommendations intended to raise the chances of a successful voluntary resolution of insurers' fair share of cleanup costs.

1. Exposure-Based Settlement Mechanism

The Attorney General recommends replacing the premium-based settlement mechanism in the Voluntary Buy-Out Program with one which is based on exposure. Under this kind of mechanism, a carrier's "buy-out" share will more accurately reflect that carrier's indemnity exposure at the landfills covered by the Landfill Cleanup Act. Any exposure-based settlement mechanism must be (a) flexible, to deal with new information; (b) expeditious, to avoid high transaction costs for the State and carriers; and (c) sufficiently accurate, to avoid potential unfairness.

2. Direct Resolution

The Attorney General recommends that the Legislature amend the Landfill Cleanup Act to make more explicit the State's ability to resolve its claims for costs related to landfill cleanup. The Act currently provides for the assignment of claims from policyholders to the State. However, the assignment process may require the State to expend considerable time and resources dealing with both the carrier and policyholder on each claim. In contrast, a direct resolution provision would save transaction costs by allowing the State to deal directly with carriers in the settlement of claims instead of going through the more involved assignment process.[120]

3. Settlement of All the State's Claims

The Attorney General recommends that the Act provide for the settlement of all the State's environmental claims associated with pollution at the landfills in the program in order to

[120] The Insurance Federation of Minnesota has stated its opposition to a direct resolution provision. According to the Insurance Federation "the *sole* reason for such a provision is to allow the State to claim greater damages from insurers than it can claim against the policyholder." Letter from Robert Johnson, *supra* note 47, at 11. This simply is not the case. All damages identified in this study for which insurers may have exposure arise out of claims that the State of Minnesota would have against policyholders under Minnesota law.

ensure a complete and certain settlement and to encourage carrier participation. As currently worded, the Landfill Cleanup Act explicitly provides only for the resolution of claims for environmental response costs. As noted above, there are other claims the State could make related to these landfills, such as claims for natural resource damages and reimbursement of the MPCA's operational costs. Offering carriers a release from these potential liabilities will encourage them to participate in the voluntary buy-out.

APPENDIX A:

TABLES AND GRAPHS

Table I(a)

Landfill Name	Past reimbursable cleanup costs	Total future costs	Operational costs	Total Costs
Waste Disposal Engineering Sanitary Landfill (WDE)	$13,800,000.00	$10,788,000.00	$3,541,990.44	$28,129,990.44
Freeway Sanitary Landfill	$0.00	$23,956,700.00	$7,865,628.69	$31,822,328.69
Anoka Municipal (WMI-Ramsey) Sanitary Landfill	$7,900,000.00	$8,093,500.00	$2,657,313.64	$18,650,813.64
Washington County Sanitary Landfill	$4,000,000.00	$11,688,170.00	$3,837,540.45	$19,525,710.45
East Bethel Sanitary Landfill	$4,400,000.00	$10,515,500.00	$3,452,521.36	$18,368,021.36
Oak Grove Sanitary Landfill	$10,100,000.00	$4,184,800.00	$1,373,982.35	$15,658,782.35
Flying Cloud Sanitary Landfill	$2,800,000.00	$8,730,000.00	$2,866,293.71	$14,396,293.71
Olmsted County Sanitary Landfill	$2,500,000.00	$5,003,800.00	$1,642,882.07	$9,146,682.07
Kummer Sanitary Landfill	$3,300,000.00	$4,039,500.00	$1,326,276.45	$8,665,776.45
St Augusta Landfill	$500,000.00	$4,870,000.00	$1,598,951.93	$6,968,951.93
1940	$0.00	$1,744,500.00	$572,766.25	$2,317,266.25
1950	$0.00	$5,522,600.00	$1,813,218.06	$7,335,818.06
all 1960s	$0.00	$31,292,270.00	$10,274,093.54	$41,566,363.54
all 1970s	$0.00	$89,934,068.00	$29,527,772.41	$119,461,840.41
all 1980s	$0.00	$1,975,984.00	$648,768.67	$2,624,752.67
TOTALS	$49,300,000.00	$222,339,392.00	$73,000,000.00	$344,639,392.00

Table IV(f)

Exhibit 3-1

Estimate of Indemnity Exposure -- Based on Currently Applicable Case Law

	Percent of Total	Total Policy Limits (Includes 2 Years Limits)	Likelihood of Insurance	Likelihood of Exclusion	Potential Exposure	Evidence of Coverage	Expected Exposure
NON-GENERATOR PRPS							
Owners	12%						
Small Private	35%	$100.000	50%	0%	$50.000	5%	$2.500
Corporate	10%	$200.000	75%	50%	$75.000	50%	$37.500
Municipal	55%	$200.000	75%	25%	$112.500	15%	$16.875
		Weighted Contribution to Total Exposure:			$10.425		$1.669
Operators	12%						
Small Private	35%	$100.000	50%	0%	$50.000	5%	$2.500
Corporate	10%	$200.000	75%	50%	$75.000	50%	$37.500
Municipal	55%	$200.000	75%	25%	$112.500	15%	$16.875
		Weighted Contribution to Total Exposure:			$10.425		$1.669
Combined Owner/Operator	88%						
Small Private	35%	$100.000	50%	0%	$50.000	5%	$2.500
Corporate	10%	$200.000	75%	50%	$75.000	50%	$37.500
Municipal	55%	$200.000	75%	25%	$112.500	15%	$16.875
		Weighted Contribution to Total Exposure:			$76.450		$12.238
Hauler	50%						
Small Private		$100.000	50%	50%	$25.000	5%	$1.250
		Weighted Contribution to Total Exposure:			$12.500		$625
		SUBTOTAL NON-GENERATOR EXPOSURE:			**$109.800**		**$16.200**
GENERATORS							
Small, Rural Sites (Assumes no Industrial PRPs)	10%						
		Weighted Contribution to Total Exposure:			$0		$0
Non-metro/Small Sites	60%	$200.000	75%	25%	$1.125.000	50%	$562.500
(Avg. # of PRPs per site)	10						
		Weighted Contribution to Total Exposure:			$675.000		$337.500
Large, Metro. Sites	30%	$10.000.000	75%	50%	$131.250.000	90%	$118.125.000
(Avg. # of PRPs per site)	35	Average Total Clean-up Costs:			$5.400.000		
		Un-allocated Share, not Covered by non-Generators:			$1.983.825		$1.785.443
		Weighted Contribution to Total Exposure:			$595.148		$535.633
		AVERAGE TOTAL EXPOSURE PER SITE:			**$1,379.948**		**$889.333**
		TOTAL EXPOSURE AT:	**35**	**SITES**	**$48.298.163**		**$31.126.**

Table IV(g)

Landfill Name	Date opened	Years (through 1985)	Past reimbursable cleanup costs	Total future costs	% of total costs of all landfills	Operational costs	Total Costs	Cost per year
Waste Disposal Engineering Sanitary Landfill (WDE)	1962	24	$13,800,000.00	$10,788,000.00	4.85%	$3,541,990.44	$28,129,990.44	$1,172,082.93
Freeway Sanitary Landfill	1969	17	$0.00	$23,956,700.00	10.77%	$7,865,628.69	$31,822,328.69	$1,871,901.69
Anoka Municipal (WMI-Ramsey) Sanitary Landfill	1967	19	$7,900,000.00	$8,093,500.00	3.64%	$2,657,313.64	$18,650,813.64	$981,621.77
Washington County Sanitary Landfill	1969	17	$4,000,000.00	$11,688,170.00	5.26%	$3,837,540.45	$19,525,710.45	$1,148,571.20
East Bethel Sanitary Landfill	1969	17	$4,400,000.00	$10,515,500.00	4.73%	$3,452,521.36	$18,368,021.36	$1,080,471.84
Oak Grove Sanitary Landfill	1967	19	$10,100,000.00	$4,184,800.00	1.88%	$1,373,982.35	$15,658,782.35	$824,146.44
Flying Cloud Sanitary Landfill	1970	16	$2,800,000.00	$8,730,000.00	3.93%	$2,866,293.71	$14,396,293.71	$899,768.36
Olmsted County Sanitary Landfill	1970	16	$2,500,000.00	$5,003,800.00	2.25%	$1,642,882.07	$9,146,682.07	$571,667.63
Kummer Sanitary Landfill	1971	15	$3,300,000.00	$4,039,500.00	1.82%	$1,326,276.45	$8,665,776.45	$577,718.43
St Augusta Landfill	1966	20	$500,000.00	$4,870,000.00	2.19%	$1,598,951.93	$6,968,951.93	$348,447.60
1940	1940	46	$0.00	$1,744,500.00	0.78%	$572,766.25	$2,317,266.25	$50,375.35
1950	1958	28	$0.00	$5,522,600.00	2.48%	$1,813,218.06	$7,335,818.06	$261,993.50
all 1960s	1960	26	$0.00	$31,292,270.00	14.07%	$10,274,093.54	$41,566,363.54	$1,598,706.29
all 1970s	1970	16	$0.00	$89,934,068.00	40.45%	$29,527,772.41	$119,461,840.41	$7,466,365.03
all 1980s	1980	6	$0.00	$1,975,984.00	0.89%	$648,768.67	$2,624,752.67	$437,458.78
TOTALS			$49,300,000.00	$222,339,392.00	100.00%	$73,000,000.00	$344,639,392.00	$19,291,296.84

Table IV(h)					
	Actual period open			Spread over 2 years	
Landfill Name	Actual Period Estimated Non-Recoverable	Actual Period Estimated Recoverable		Two Year Estimated Non-Recoverable	Two Year Estimated Recoverable
Freeway	$19,917,033.96	$11,905,294.74		$2,227,863.01	$29,594,765.69
WDE	$12,470,962.43	$15,659,028.05		$0.00	$28,129,990.44
Anoka WMI	$10,444,455.64	$8,206,358.00		$0.00	$18,650,813.64
Washington	$12,220,797.60	$7,304,912.85		$1,464,428.28	$18,061,282.17
East Bethel	$11,658,291.20	$6,709,730.15		$1,377,601.60	$16,990,419.76
Oak Grove	$8,768,918.12	$6,889,864.24		$0.00	$15,658,782.36
Flying Cloud	$9,573,535.32	$4,822,758.39		$3,599,073.43	$10,797,220.28
Olmsted	$6,082,543.58	$3,064,138.49		$2,286,670.52	$6,860,011.55
Kummer	$6,066,043.52	$2,599,732.94		$3,726,283.87	$4,939,492.58
St. Augusta	$3,707,482.43	$3,261,469.52		$0.00	$6,968,951.94
1940	$535,993.76	$1,781,272.39		$0.00	$2,317,266.25
1950	$2,787,610.86	$4,548,207.17		$0.00	$7,335,818.06
1960s	$22,113,305.46	$19,453,057.95		$0.00	$41,566,363.54
1970s	$88,585,549.33	$30,876,291.05		$78,247,505.45	$41,214,334.93
1980s	$1,935,755.10	$688,997.58		$1,692,965.48	$931,787.20
TOTAL	$216,868,278.31	$127,771,113.51		$94,622,391.64	$250,017,300.39

Table IV(i)

Simulation Type: [illegible]

Total Potentially Recoverable Costs	x	Percentage of Sudden and Accidental Pollution Exclusions over Two Year Period beginning on date Landfill Opened	x	Percentage of PRPs with Insurance or Evidence of Coverage	-	Sites without Sufficient Evidence of a Release	=	TOTAL POTENTIAL RECOVERY
344.6 million	x	73.00%	x	84%	-	$.05 million	=	$210.8 million

Simulation Type: [illegible]

Total Potentially Recoverable Costs	x	Average Percentage of Sudden and Accidental Pollution Exclusions from Date Landfill opened to 1985	x	Percentage of PRPs with Insurance or Evidence of Coverage	-	Sites without Sufficient Evidence of a Release	=	TOTAL POTENTIAL RECOVERY
344.6 million	x	37.30%	x	84%	-	$0.5 million	=	$107.5 million

Chapter 639 Buy-out Formula: Table V (a)

Individual Liability = (Market Share) x $90,000,000 x (1 - Pollution Exclusion)

Commercial Multiple Peril - 1970 - 1973 (Aggregate)

Rank	ID#	Company	Premium	Total Premium	Market Share	75% Credit Liability	50% Credit Liability
1	54	Ins. Co. of N. America	$14,123	$179,161	7.88%	$1,773,642	$3,547,284
2	53	Home Ins. Group	$12,198	$179,161	6.81%	$1,531,890	$3,063,781
3	40	Firemans Fund	$12,010	$179,161	6.70%	$1,508,280	$3,016,561
4	104	Travelers Ins. Group	$11,562	$179,161	6.45%	$1,452,018	$2,904,036
5	32	Crum & Forster	$9,367	$179,161	5.23%	$1,176,358	$2,352,716
6	31	Continental Corp.	$9,023	$179,161	5.04%	$1,133,157	$2,266,314
7	29	CNA Ins. Group	$6,523	$179,161	3.64%	$819,193	$1,638,387
8	51	Hartford Fire Group	$6,357	$179,161	3.55%	$798,346	$1,596,692
9	201	American Hardware	$5,776	$179,161	3.22%	$725,381	$1,450,762
10	3	Aetna Life & Cas. Group	$5,151	$179,161	2.88%	$646,890	$1,293,780
11	168	Federated Mutual	$4,947	$179,161	2.76%	$621,271	$1,242,542
12	26	Chubb Group	$4,782	$179,161	2.67%	$600,549	$1,201,098
13	151	Reliance Insurance	$4,781	$179,161	2.67%	$600,424	$1,200,847
14	91	Royal Globe Insurance	$4,696	$179,161	2.62%	$589,749	$1,179,498
15	108	USF&G	$4,231	$179,161	2.36%	$531,352	$1,062,703
16	27	Conn. General Group	$3,686	$179,161	2.06%	$462,908	$925,815
17	96	State Farm	$3,143	$179,161	1.75%	$394,715	$789,430
18	95	St. Paul Cos.	$3,090	$179,161	1.72%	$388,059	$776,118
19	603	Church Mutual	$2,964	$179,161	1.65%	$372,235	$744,470
20	17	Atlantic Mutual	$2,647	$179,161	1.48%	$332,424	$664,849
21	146	Great Central Insurance	$2,460	$179,161	1.37%	$308,940	$617,880
22	48	Great American	$2,425	$179,161	1.35%	$304,545	$609,089
23	99	Transamerica Insurance	$2,326	$179,161	1.30%	$292,112	$584,223
24	232	Comm. Union	$2,244	$179,161	1.25%	$281,814	$563,627
25	83	Auto-Owners Group	$2,199	$179,161	1.23%	$276,162	$552,324
26	612	American General	$2,087	$179,161	1.16%	$262,097	$524,193
27	61	Kemper Insurance	$1,764	$179,161	0.98%	$221,533	$443,065
28	605	Tri-State Mutual	$1,676	$179,161	0.94%	$210,481	$420,962
29	6	American Empire	$1,545	$179,161	0.86%	$194,029	$388,059
30	609	Statesman Insurance	$1,463	$179,161	0.82%	$183,731	$367,463
31	4	AID Ins. Services	$1,439	$179,161	0.80%	$180,717	$361,435
32	195	Agricultural Insurance	$1,392	$179,161	0.78%	$174,815	$349,630
33	613	Amer. Home National	$1,330	$179,161	0.74%	$167,029	$334,057
34	608	Iowa National	$1,297	$179,161	0.72%	$162,884	$325,768
35	112	Employers Wausau	$1,207	$179,161	0.67%	$151,582	$303,163
36	92	Safeco Insurance	$1,153	$179,161	0.64%	$144,800	$289,600
33	606	NN Corp.	$1,093	$179,161	0.61%	$137,265	$274,530
38	163	Druggists Mutual	$1,089	$179,161	0.61%	$136,762	$273,525
39	604	Affiliated Insurance	$928	$179,161	0.52%	$116,543	$233,086
40	35	Employers Mutual Cas.	$531	$179,161	0.30%	$66,686	$133,372
41	64	Liberty Mutual	$513	$179,161	0.29%	$64,425	$128,851
42	610	National Farmers	$511	$179,161	0.29%	$64,174	$128,348
43	620	Iowa Mutual	$339	$179,161	0.19%	$42,573	$85,147
44	621	Mutual Service	$336	$179,161	0.19%	$42,197	$84,393
45	21	Bituminous Ins. Group	$302	$179,161	0.17%	$37,927	$75,854
46	123	Zurich Insurance	$266	$179,161	0.15%	$33,406	$66,811
47	76	New Hampshire Group	$261	$179,161	0.15%	$32,778	$65,556
48	28	Citizens Security	$256	$179,161	0.14%	$32,150	$64,300
49	81	Ohio Casualty	$253	$179,161	0.14%	$31,773	$63,546
50	607	Sequoia Insurance	$183	$179,161	0.10%	$22,982	$45,964
51	12	American States Group	$144	$179,161	0.08%	$18,084	$36,169
52	707	Minn. Farmers Group	$137	$179,161	0.08%	$17,205	$34,410
53	706	Shelby Mutual	$134	$179,161	0.07%	$16,828	$33,657
54	121	Westfield Cos.	$117	$179,161	0.07%	$14,693	$29,387
55	705	Security Corp.	$114	$179,161	0.06%	$14,317	$28,633
56	701	Allied Insurance Iowa	$0	$179,161	0.00%	$0	$0
57	702	Employers Group Mass.	$0	$179,161	0.00%	$0	$0
58	703	Glens Falls Group	$0	$179,161	0.00%	$0	$0
59	66	Maryland American	$0	$179,161	0.00%	$0	$0
60	704	Ohio Farmers	$0	$179,161	0.00%	$0	$0
61	615	Prov. Washington Group	$0	$179,161	0.00%	$0	$0
	901	Other National Cos.	$2,605	$179,161	1.45%	$327,150	$654,300
	902	Other State Leaders	$7,713	$179,161	4.31%	$968,640	$1,937,280
	903	Other Direct Writers	$2,272	$179,161	1.27%	$285,330	$570,660
		TOTAL	**$179,161**		**100%**	**$22,500,000**	**$45,000,000**

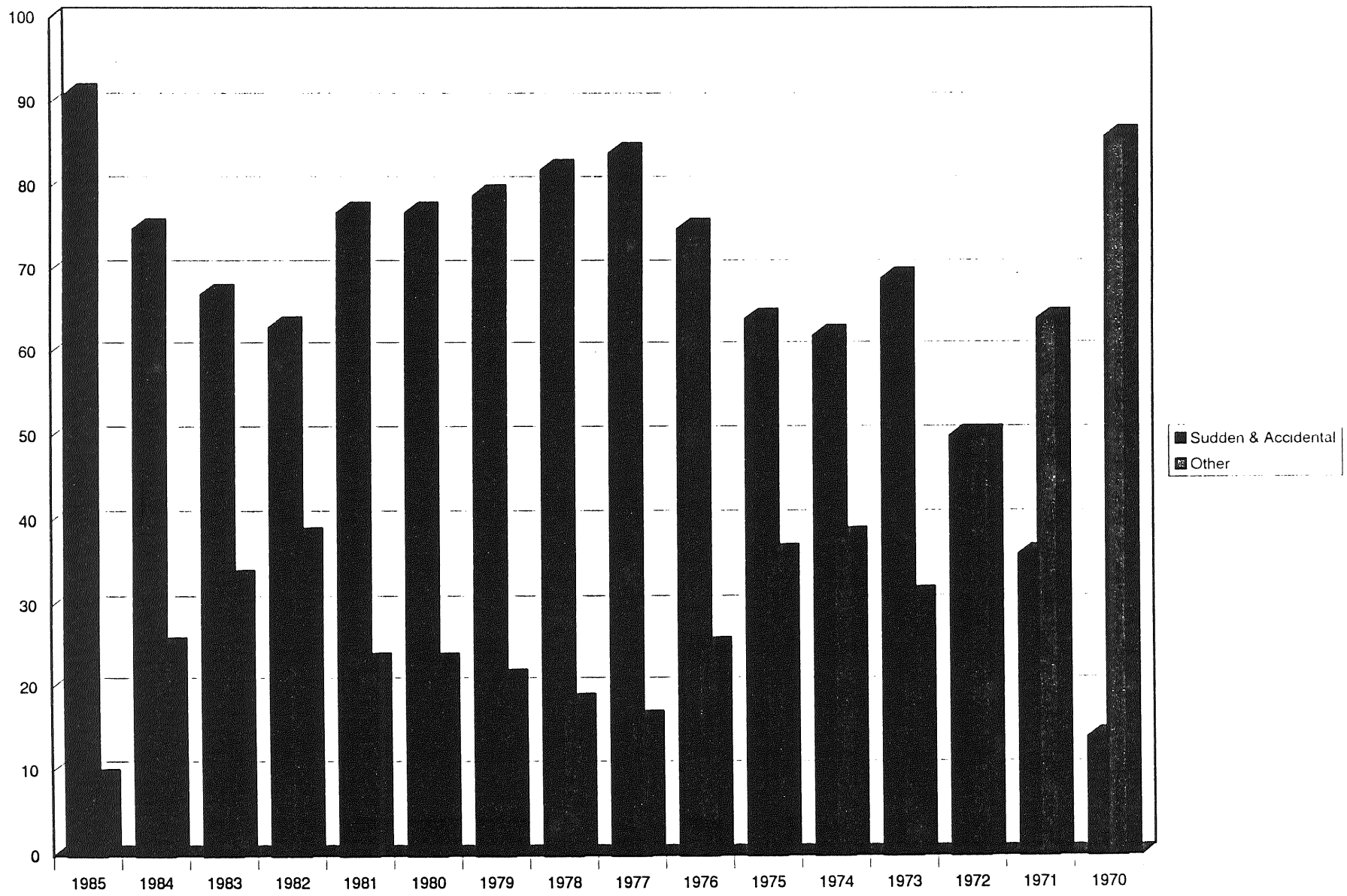
Chapter 639 Buy-out Formula: Table V (b)

Individual Liability = (Market Share) x $90,000,000 x (1 - Pollution Exclusion)

Commercial Multiple Peril - 1967 - 1974 (Aggregate)

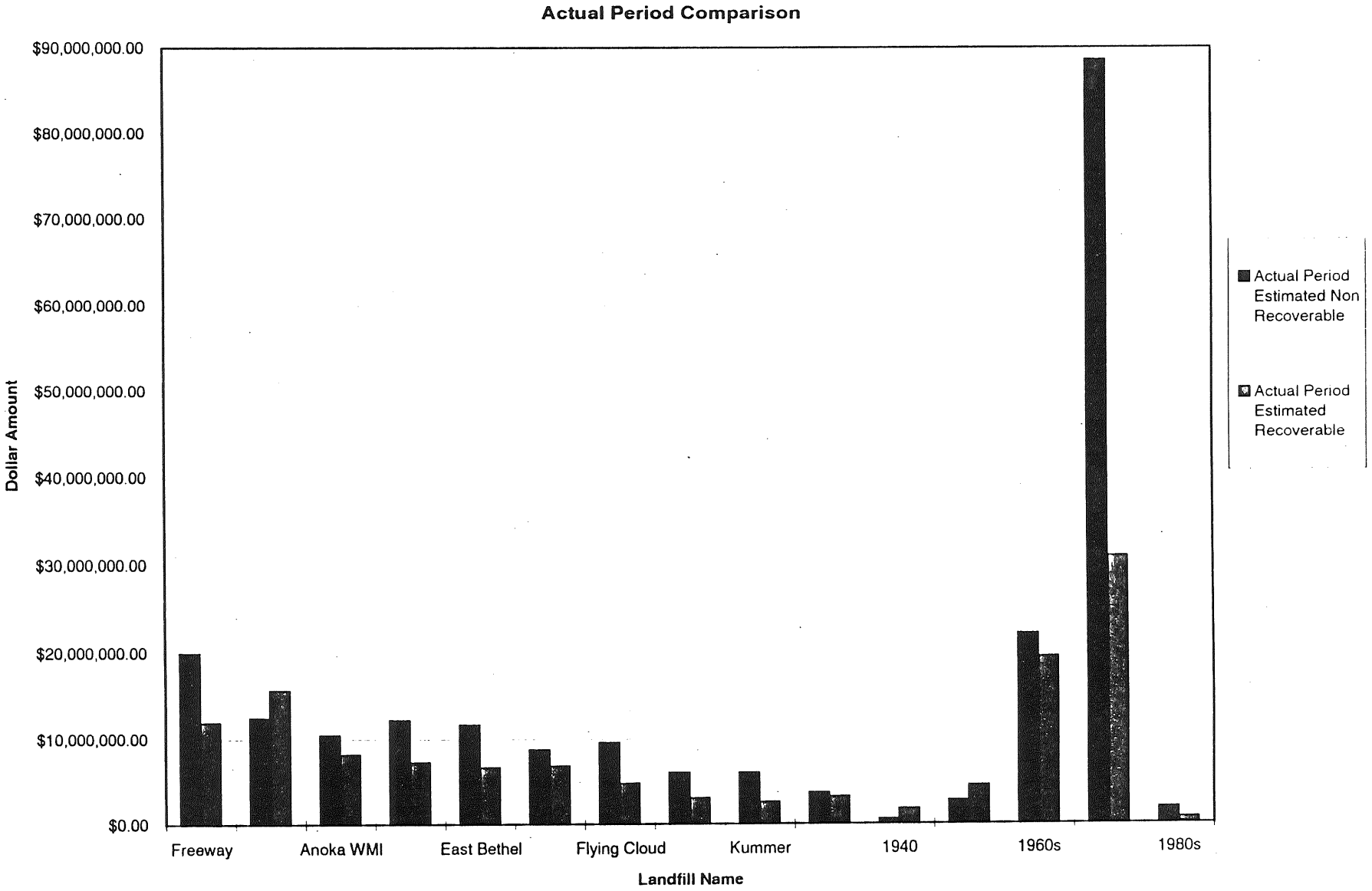
Rank	Company	Premium	Total Premium	Market Share	75% Credit Liability	50% Credit Liability
1	Ins. Co. of N. America	$23,679	$307,640	7.70%	$1,731,821	$3,463,643
2	Home Ins. Group	$21,920	$307,640	7.13%	$1,603,173	$3,206,345
3	Firemans Fund	$21,030	$307,640	6.84%	$1,538,080	$3,076,160
4	Travelers Ins. Group	$19,859	$307,640	6.46%	$1,452,436	$2,904,873
5	Crum & Forster	$16,636	$307,640	5.41%	$1,216,714	$2,433,429
6	Continental Corp.	$16,526	$307,640	5.37%	$1,208,669	$2,417,338
7	CNA Ins. Group	$10,249	$307,640	3.33%	$749,586	$1,499,171
8	Hartford Fire Group	$10,201	$307,640	3.32%	$746,075	$1,492,150
9	Aetna Life & Cas. Group	$9,212	$307,640	2.99%	$673,742	$1,347,484
10	Reliance Insurance	$8,518	$307,640	2.77%	$622,985	$1,245,969
11	Chubb Group	$8,400	$307,640	2.73%	$614,354	$1,228,709
12	Federated Mutual	$8,278	$307,640	2.69%	$605,432	$1,210,863
13	American Hardware	$7,688	$307,640	2.50%	$562,281	$1,124,561
14	Royal Globe Insurance	$7,531	$307,640	2.45%	$550,798	$1,101,596
15	USF&G	$6,903	$307,640	2.24%	$504,868	$1,009,735
16	Conn. General Group	$6,481	$307,640	2.11%	$474,004	$948,007
17	St. Paul Cos.	$5,222	$307,640	1.70%	$381,924	$763,847
18	State Farm	$4,907	$307,640	1.60%	$358,885	$717,771
19	Church Mutual	$4,593	$307,640	1.49%	$335,920	$671,840
20	Great Central Insurance	$4,229	$307,640	1.37%	$309,298	$618,596
21	Atlantic Mutual	$4,090	$307,640	1.33%	$299,132	$598,264
22	Auto-Owners Group	$3,633	$307,640	1.18%	$265,708	$531,417
23	Transamerica Insurance	$3,582	$307,640	1.16%	$261,978	$523,957
24	Comm. Union	$3,353	$307,640	1.09%	$245,230	$490,460
25	Great American	$3,237	$307,640	1.05%	$236,746	$473,492
26	American General	$3,181	$307,640	1.03%	$232,650	$465,300
27	Agricultural Insurance	$2,891	$307,640	0.94%	$211,440	$422,881
28	Kemper Insurance	$2,787	$307,640	0.91%	$203,834	$407,668
29	Tri-State Mutual	$2,779	$307,640	0.90%	$203,249	$406,498
30	Statesman Insurance	$2,537	$307,640	0.82%	$185,550	$371,099
31	Employers Wausau	$2,470	$307,640	0.80%	$180,649	$361,299
32	AID Ins. Services	$2,455	$307,640	0.80%	$179,552	$359,105
33	Affiliated Insurance	$2,303	$307,640	0.75%	$168,436	$336,871
34	Amer. Home National	$2,120	$307,640	0.69%	$155,051	$310,103
35	Safeco Insurance	$1,990	$307,640	0.65%	$145,543	$291,087
36	Iowa National	$1,958	$307,640	0.64%	$143,203	$286,406
33	Druggists Mutual	$1,906	$307,640	0.62%	$139,400	$278,800
38	American Financial	$1,880	$307,640	0.61%	$137,498	$274,997
39	NN Corp.	$1,790	$307,640	0.58%	$130,916	$261,832
40	American Empire	$1,545	$307,640	0.50%	$112,997	$225,995
41	National Farmers	$1,115	$307,640	0.36%	$81,548	$163,096
42	Liberty Mutual	$958	$307,640	0.31%	$70,066	$140,131
43	Sequoia Insurance	$832	$307,640	0.27%	$60,850	$121,701
44	Employers Mutual Cas.	$808	$307,640	0.26%	$59,095	$118,190
45	Zurich Insurance	$710	$307,640	0.23%	$51,928	$103,855
46	Prov. Washington Group	$591	$307,640	0.19%	$43,224	$86,448
47	Iowa Mutual	$583	$307,640	0.19%	$42,639	$85,278
48	New Hampshire Group	$511	$307,640	0.17%	$37,373	$74,746
49	Employers Group Mass.	$490	$307,640	0.16%	$35,837	$71,675
50	Citizens Security	$445	$307,640	0.14%	$32,546	$65,092
51	Bituminous Ins. Group	$435	$307,640	0.14%	$31,815	$63,630
52	American States Group	$364	$307,640	0.12%	$26,622	$53,244
53	Mutual Service	$336	$307,640	0.11%	$24,574	$49,148
54	Midland Insurance	$327	$307,640	0.11%	$23,916	$47,832
55	Maryland American	$277	$307,640	0.09%	$20,259	$40,518
56	Ohio Casualty	$253	$307,640	0.08%	$18,504	$37,008
57	Security Corp.	$235	$307,640	0.08%	$17,187	$34,375
58	Shelby Mutual	$221	$307,640	0.07%	$16,163	$32,327
59	Continental Western	$199	$307,640	0.06%	$14,554	$29,109
60	Glens Falls Group	$169	$307,640	0.05%	$12,360	$24,720
61	Allied Insurance Iowa	$167	$307,640	0.05%	$12,214	$24,428
62	Proprietors Insurance	$159	$307,640	0.05%	$11,629	$23,258
63	Minn. Farmers Group	$137	$307,640	0.04%	$10,020	$20,040
64	Westfield Cos.	$117	$307,640	0.04%	$8,557	$17,114
65	Comm. Credit Group	$107	$307,640	0.03%	$7,826	$15,651
66	Ohio Farmers	$86	$307,640	0.03%	$6,290	$12,580
67	Other National Cos.	$4,776	$307,640	1.55%	$349,304	$698,609
68	Other State Leaders	$14,117	$307,640	4.59%	$1,032,481	$2,064,962
69	Other Direct Writers	$3,566	$307,640	1.16%	$260,808	$521,616
	TOTAL	$307,640		100%	$22,500,000	$45,000,000

Pollution Exclusion P ntages 1970 - 1985



Graph IV(a)

Grap (b)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$80,000,000.00
$70,000,000.00
$60,000,000.00
$50,000,000.00
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$30,000,000.00
$20,000,000.00
$10,000,000.00
$0.00
Dollar Amount
Freeway
Anoka WMI
East Bethel
Flying Cloud
Kummer
1940
1960s
1980s
Landfill Name
Actual Period Estimated Non Recoverable
Actual Period Estimated Recoverable

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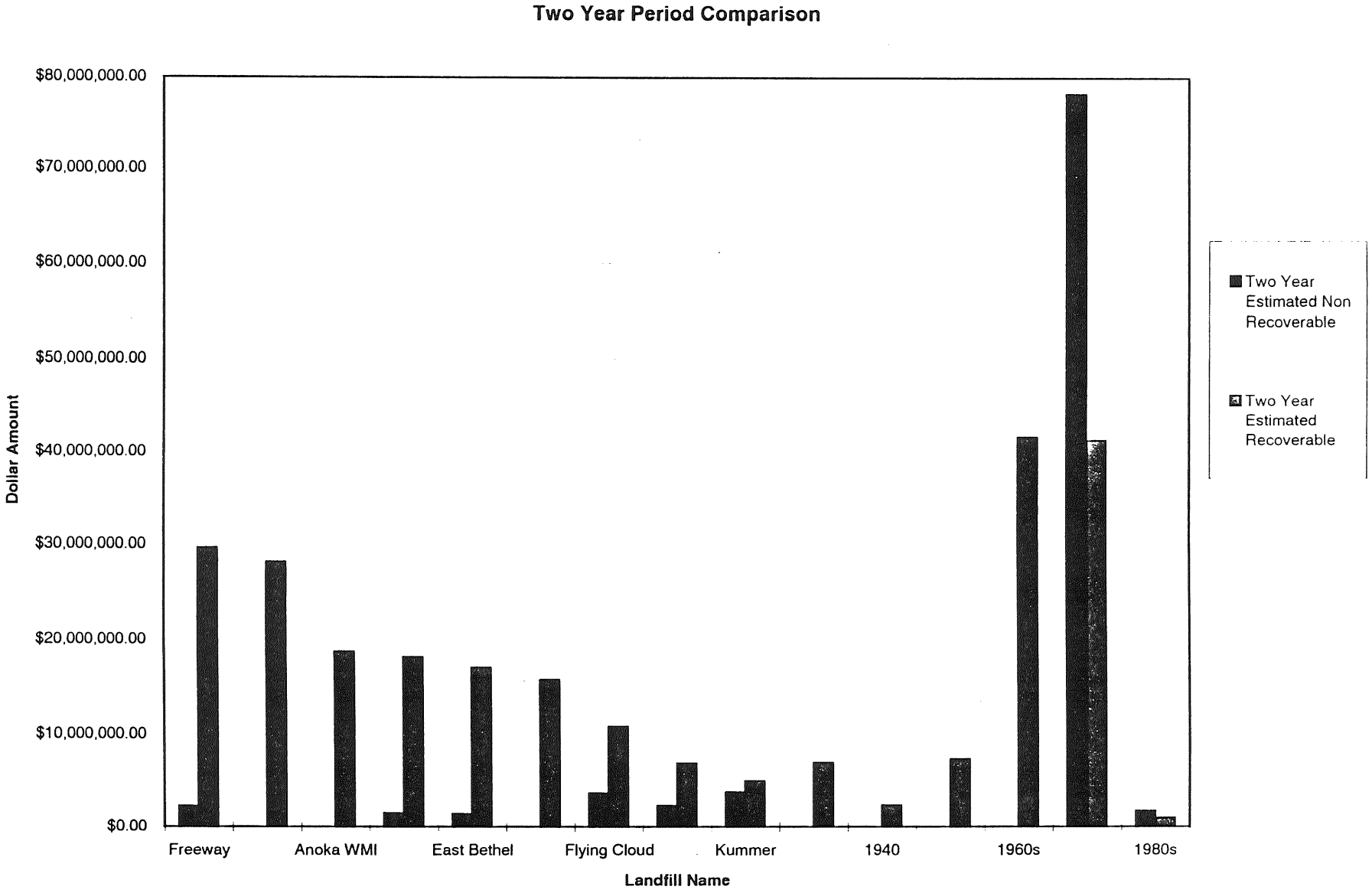
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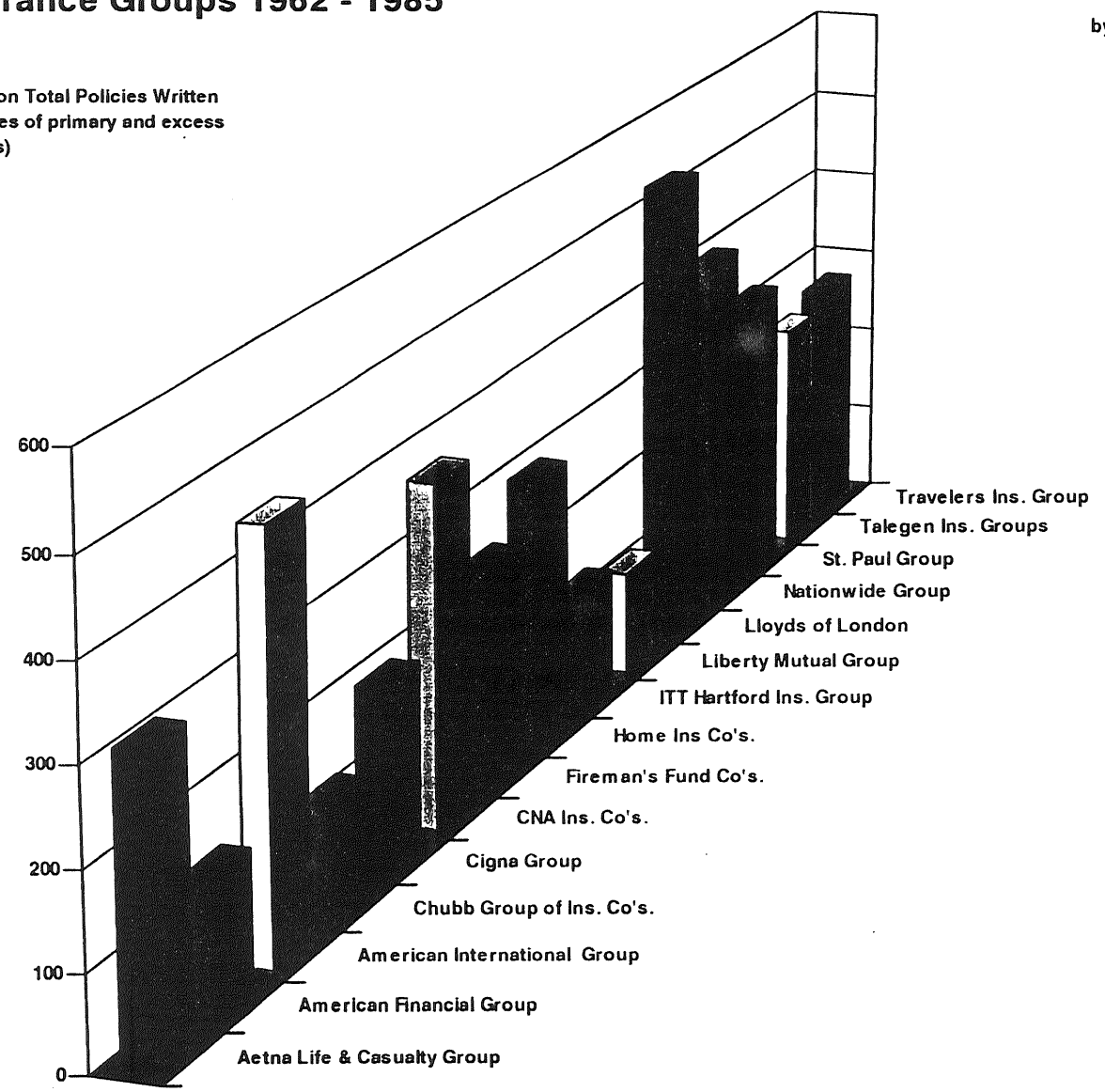
$60,000,000.00
$50,000,000.00
$40,000,000.00
$30,000,000.00
$20,000,000.00
$10,000,000.00
$0.00
Dollar Amount
Two Year Estimated Non Recoverable
Two Year Estimated Recoverable
Freeway
Anoka WMI
East Bethel
Flying Cloud
Kummer
1940
1960s
1980s
Landfill Name

Data Identifying 15 Top Insurance Groups 1962 - 1985

Based on Information Compiled
by the Minnesota Attorney General's Office

Based on Total Policies Written
(All types of primary and excess policies)



Graph V(a)

APPENDIX B:

LIST OF REPRESENTATIVE CASES THAT CONSTRUED PRE-1966 CGL POLICES TO COVER POLLUTION AND OTHER GRADUALLY OCCURRING INJURIES AND DAMAGE

Aldrich v. Dole, 249 P. 87 (Idaho 1926)

American Mut. Liab. Ins. Co. v. Agricola Furnace Co., 183 So. 677 (Ala. 1938)

Anchor Cas. Co. v. McCaleb, 178 F.2d 322 (5th Cir. 1949)

Beryllium Corp. v. American Mut. Liab. Ins. Co., 223 F.2d 71 (3rd Cir. 1955)

Canadian Radium & Uranium Corp. v. Indemnity Ins. Co. of N. Am., 104 N.E.2d 250 (Ill. 1952)

Ciocca v. National Sugar Refining Co., 12 A.2d 130 (N.J. 1940)

City of Kimball v. St. Paul Fire & Marine Ins. Co., 206 N.W.2d 632 (Neb. 1973)

Czepial v. Krohne Roofing Co., 93 So.2d 84 (Fla. 1957)

Employers Ins. Co. of Ala. v. Rives, 87 So.2d 653 (Ala. 1955), *cert. denied*, 87 So.2d 658 (Ala. 1956)

Farnow, Inc. v. Aetna Ins. Co., 33 Misc. 2d 480, 227 N.Y.S.2d 634 (1962)

Globe Indem. Co. of N.Y. v. Banner Grain Co., 90 F.2d 774 (8th Cir. 1937)

Hauenstein v. St. Paul-Mercury Indem. Co., 65 N.W.2d 122 (Minn. 1955)

King v. Travelers Ins. Co., 192 A. 311 (Conn. 1937)

Lancaster Area Refuse Auth. v. Transamerica Ins. Co., 263 A.2d 368 (Pa. 1970)

Maryland Cas. Co. v. Pioneer Seafoods Co., 116 F.2d 38 (9th Cir. 1940)

Massachusetts Bonding & Ins. Co. v. Orkin Exterminating Co., 416 S.W.2d 396 (Tex. 1967)

McGroarty v. Great Am. Ins. Co., 36 N.Y.2d 358, 329 N.E.2d 172, 368 N.Y.S.2d 485 (1975)

McNeely v. Carolina Asbestos Co., 174 S.E. 509 (N.C. 1934)

Moffat v. Metropolitan Cas. Ins. Co., 238 F.Supp. 165 (M.D. Pa. 1964)

Moore v. Fidelity & Cas. Co., 140 Cal. App. 2d Supp. 967, 295 P.2d 154 (1956)

Murphy v. Travelers Ins., 2 N.W.2d 576 (Neb. 1942)

Myrtle Point v. Pacific Indem. Co., 233 F.Supp. 193 (D. Or. 1963)

Rex Roofing Co. v. Lumber Mut. Cas. of N.Y., 116 N.Y.S.2d 876 (1952)

Taylor v. Imperial Cas. & Indem. Co., 144 N.W.2d 856 (S.D. 1966)

Tomnitz v. Employers Liab. Assur. Corp., 121 S.W.2d 745 (Mo. 1938)

Travelers v. Humming Bird Coal Co., 371 S.W.2d 35 (Ky. 1963)

Twork v. Munising Paper Co., 266 N.W. 311 (Mich. 1936)

Webb. v. New Mexico Pub. Co., 141 P.2d 333 (N.M. 1943)

White v. Smith, 440 S.W.2d 497 (Mo. Ct. App. 1969)

Wolk v. Royal Indem. Co., 27 Misc. 2d 478, 210 N.Y.S.2d 677 (App. Term 1961)

APPENDIX C:

SUMMARY OF COMPILATION OF DATA AND RELATIONAL DATABASE

The Attorney General Insurance Study Group gathered a great deal of information on insurance policies and carriers, and is still in the process of collection and tabulation of the data. The following sets forth the types of data the Group was searching for; the method of collection; and information on how the database utilized this data. The database allowed the Group to organize the information in a fashion that would be easily retrievable and could give the Group the ability to manage the data.

1. THE TYPE OF DATA REQUESTED

The first step was to identify certain landfills . Twelve landfills were chosen, utilizing certain criteria such as the ranking given by the Minnesota Pollution Control Agency, the location (to include both metropolitan and "outstate" sites), the size of the landfill (which included the number of PRPs), the highest cleanup costs, and, very importantly, the availability of information concerning the site.

The Study Group searched for evidence of policies relating to each PRP. This included finding the following information:

1. carrier
2. policy number
3. coverage amounts
4. policy type
5. policy dates
6. exclusions
7. deductibles
8. if excess, any underlying policies
9. if nothing else, name of agency/agent

A "Request for Information" (RFI) was sent to approximately 1600 PRPs, who had previously been identified as being linked to these sites. (see attached RFI).

2. OTHER INFORMATION SOURCES

Government Agencies

The Group found evidence of insurance in various files on record. The information, while specifically identifying other types of policies, also included policy information showing these policies were portions of commercial general liability policies, with the same carrier and policy number (or a derivative of the master policy number).

We also found responses to previous information requests which linked the PRP to the specific landfill (in some cases to more than one), what type of waste was deposited, their hauler, also any ties to other corporations (acquisitions, takeovers, name changes, parent

companies, division names), and some information on insurance. Other agencies assisted in obtaining updated company names, acquisitions, bankrupty and related information.

Municipalities

Records at municipalities identified the key PRPS, many of which had been culled from sign-in sheets at the landfill itself. Some PRPs had been put on notice by the these municipalities that they had been identified as such.

EPA

Certain of the landfills were placed on the National Priorities List and the EPA requested and retained the information gathered, which they sent to us.

A.M.Best

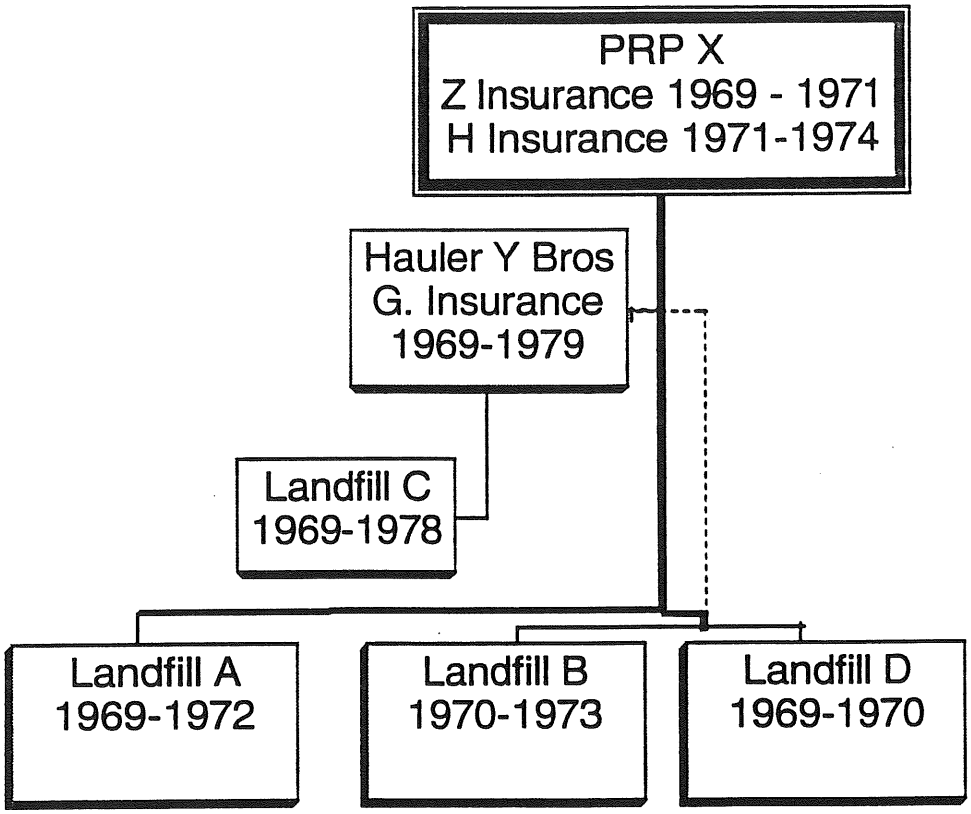
Information concerning premium data was obtained from the publications of A.M.Best, as well as ascertaining which carriers were part of which groups.

Insurance Carriers

Certain carriers and insurance groups have assisted with information regarding standard deductibles, liability numbers and pollution exclusions. The study group also sent a Request for Information to certain carriers, (see attached) who had been identified as having written a high percentage of the insurance policies during certain years. Their input is discussed further in Chapter V of this report.

3. ORGANIZATION AND ANALYSIS OF INFORMATION

The information has been organized and analyzed in a relational database utilizing Access software. A flowchart illustrating this relational database follows:



PRP X is identified as having sent waste to Landfill A and is sent an RFI. Their response provides some, if not all, of the information listed above, as well as their hauler, other Landfills their waste may have been sent to and addresses of the company officers, past and present.

Hauler Y Bros. has previously provided information concerning their insurance coverage in an RFI sent for Landfill C, B & D, which also shows that PRP X's waste was deposited at Landfill B&D. The insurance information obtained for Landfill A, if coverage years are matched, establishes that this coverage is pertinent to Landfills B&D.

QUESTIONS AND REQUEST FOR DOCUMENTS
CONCERNING LANDFILL

Minnesota law requires you to provide the information and to supply the documents requested in this questionnaire. Minn. Stat. §§ 115B.17, subd. 3, 115B.40, subd. 4(a)(5), and 115B.44. Please answer each question based upon on all information and documents in your possession. Identify any documents that have been transferred or otherwise disposed of.

If you consider any of the information you submit a trade secret or confidential, you must certify it as such and the Commissioner will determine if it is under Minn. Stat. § 115B. 17, subd. 5 (1994).

1. Provide the full legal name of the business, its current address and telephone number.

2. Provide the names, current addresses and telephone numbers of all current and former owners of the business.

3. What date did the business start operating?

4. Have you answered any previous requests for information from the Minnesota Pollution Control Agency or from the United States Environmental Protection Agency? If so, when?

5. For the years 1962 to 1983, provide a copy of each comprehensive general liability, umbrella, and excess insurance policy (including coverage issued as part of a package policy) issued to you, including any occurrence endorsements, broad form endorsements, and personal injury liability endorsements, that may provide coverage for property liability, personal injury liability, or environmental liability associated with the

6. If you are unable to provide copies of the insurance policies requested in Question # 5, please provide, for the years indicated, the following information pertaining to those policies:

   a. the type of policy -- i.e., general liability, excess, public liability, etc.;

   b. the name of the insurance carrier;

   c. the policy period:

   d. the policy numbers;

   e. the amount of annual premiums you or any other person paid with respect to these policy(s);

   f. the amount of coverage limits for property damage;

(over)

g. the amount of any deductible:

h. a description of any policy exclusions relating to environmental response costs, such as pollution exclusions, and the date such exclusions were added to the policy.

i. evidence of the policies, including documents such as certificates of insurance, payment of premiums, etc.:

j. any declaration pages, schedules, endorsements and riders, or evidence of same:

k. any binders, or evidence of same:

l. the identity of the person responsible for purchasing such insurance policies.

7. Please indicate the amount and date of any claims related to environmental response costs you or any named insured made under any of these policies.

8. If you have entered into any settlement agreements with your insurers that affect the availability of insurance coverage for your actual or potential liabilities associated with the , please identify each policy to which each settlement agreement pertains, and provide a brief summary of the terms of settlement. If the settlement is confidential, please indicate so here:

_____ YES _____ NO.

CERTIFICATION

This response was prepared to the best of my knowledge, based on a diligent search of records and, where appropriate, interviews with present and former employees.

Signature: _____

Name: _____ Title: _____

Address: _____

Phone Number: _____ Date: _____

PLEASE HAVE THIS DOCUMENT NOTARIZED BELOW:

State of _____

County of _____

Signed and attested before me on _____, 1995, by _____

_____

_____

Notary Public

My commission expires: _____

Appendix D:

Formula in the Landfill Cleanup Act Written as an Equation

The formula set forth in the Landfill Cleanup Act, when written as an equation, looks like this:

Adjusted Share	x	**$90 million**	x	**100% minus the Qualified Pollution Exclusion Credit**

The **Adjusted Share** amount for each insurer is calculated by adding together the total premium volume collected by an insurer for liability other than auto coverage (1970-1971), + miscellaneous liability lines (1972-1973) + commercial multiperil (CMP) (1970-1973). From this amount subtract all "Professional malpractice" insurance premiums for liability other than auto (1970-1971) and as part of the miscellaneous lines (1972-1973). The total is the "adjusted total premium". The aggregate total premium of ALL the insurers is found by adding together all the "adjusted total premiums". This sum is divided into by the adjusted total premium for each individual insurers.

maximum potential aggregate industry exposure under formula

The **Qualified Pollution Credit** is found as follows: For each of the four years (from 1970 through 1973), an insurer is given a 25% credit if the insurer had a qualified pollution exclusion in **all** the policies for that year written for liability lines other than auto coverage (1970-1971), + miscellaneous liability lines (1972-1973) + commercial multiperil (CMP) (1970-1973). The total number of credits for each year are added together to establish the Total Credits.

APPENDIX E:

LIST OF INDIVIDUALS AND ORGANIZATIONS PROVIDING COMMENTS AT VARIOUS TIMES THROUGHOUT THE STUDY

In addition to staff of the Minnesota Pollution Control Agency and the Minnesota Department of Commerce, the Attorney General thanks the following people and organizations for providing comments at various times throughout the course of this study:

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Appendix F:

Comments from Individuals and Organizations Regarding a Draft of the Report on Insurance Recovery Under the Landfill Cleanup Act

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January 19, 1996

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Assistant Attorney General
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Office of the Attorney General
Public and Human Resources
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Re: Minnesota Attorney General's Report on Insurance Recovery Under the Landfill Clean-Up Act

Dear Mr. Lampe:

Please accept the following comments of the Insurance Federation of Minnesota ("Federation") concerning the draft of the Minnesota Attorney General's Report on the Voluntary Buy-Out Program of the Minnesota Landfill Clean-Up Act ("Draft Report"). You may recall that it was the Federation which originally proposed a Voluntary Insurance Buy-Out Program as a means of achieving the savings, certainty and fairness promised by the Landfill Clean-Up Act ("Act"). The Federation represents approximately 122 insurance companies, agent organizations, service bureaus and individual members. The objective of the Federation is to work with government in the development of public policy. The Federation monitors legislative and regulatory activities which impacts the insurance industry and develops policy positions that are communicated to legislators, state agencies and the courts of Minnesota.

We received our copy of the Draft Report on January 8, 1996. As your cover letter of that date indicates, the Draft Report did not contain Chapter 6, describing recommended changes to the Landfill Clean-Up Act in the area of insurance recovery. We appreciate your extending the deadline for the submission of these comments, as even with the extension, the time for comment is extremely short.

We are extremely disappointed and greatly troubled by the Draft Report. The Draft Report does not reliably describe the extent of the insurance industry's contractual obligations regarding the funding of landfill clean-up in Minnesota. As such, its issuance does a grave disservice to the Legislature which commissioned it. It imposes upon the insurance industry obligations not contained in their insurance contracts, and thus rewrites the very terms of those contracts. The Legislature will be asked to make important decisions concerning the role of the insurance industry in the funding of the Landfill Clean-Up Act. It would be a failure of the legislative process if those decisions were based upon the misstatements and omissions contained in the Draft Report. Were the Legislature to transform the erroneous conclusions of the Draft Report into law, it would unconstitutionally rewrite private insurance contracts into providing coverage where none exists. The Legislature is entitled to receive the complete and unbiased information which it requested; and which the Draft Report fails to provide.

We believe the Minnesota Attorney General's Office's failure to provide complete, objective and unbiased information in its Draft Report is indicative of its adversarial attitude displayed toward the insurance industry while representing either *amicus curiae* or proposed intervenor in matters of private civil litigation concerning insurance coverage for environmental liabilities. In various actions before the Minnesota trial and appellate courts, the Minnesota Attorney General's Office has attempted to influence the courts to find insurance coverage for environmental liability. As you know, not all of those attempts have been successful. *See, e.g.*, ***Anderson v. Minnesota Insurance Guaranty Association, et al***, 534 N.W.2d 706 (Minn. 1995), *reh'g denied* (Sept. 20, 1995)[1], ***Sylvester Brothers Development Co. v. Great Central Insurance Co.***, 480 N.W.2d 368 (Minn. App. 1992), *rev. denied* (March 26, 1992) and ***MacGillis & Gibbs v. Employers Ins. of Wausau***, No. C5-94-11548, (Ramsey Cty. Dist. Ct., Aug. 9, 1995). The positions set forth in the Draft Report simply repeats the arguments previously advocated by the Attorney General, but rejected by the courts in those private actions.

Unfortunately, the timing of the issuance of the Draft Report makes it impossible to fully comment on it at this time. What follows, however, is illustrative of its deficiencies.

I. THE DRAFT REPORT

The following illustrates the shortcomings of the Draft Report:

[1] Interestingly, the Minnesota Attorney General's Office also appeared in *Anderson* as counsel for *amicus curiae*, the Minnesota Commissioner of Commerce, arguing in favor of the insurers' position in that case. The insurers prevailed in that action.

A. The Draft Report Rests Upon a False Premise - Insurers Did Not Contemplate the Costs Now Being Imposed upon Them in the Underwriting and Pricing of Their Insurance Contracts, Nor Are They Society's Risk Managers.

The Draft Report announces two central themes - that insurers are society's risk managers, and that failure to impose a substantial liability on insurers for the cost of landfill cleanup would grant to insurers a "massive windfall." It then repeats those themes often. For example, the Report declares:

> The premium benefit insurers derive from their function as society's risk managers also suggests insurers should bear some responsibility for landfill cleanup costs.

Draft Report, at pp. 13-14. Likewise, the Draft Report later states:

> To ignore these contractual obligations and leave taxpayers and businesses bearing the entire cost of cleanup would be to grant insurers a massive windfall - in the form of decades worth of premium and investment income - at the taxpayers' and business community's expense.

Id. at p. 21.

First and foremost, the insurance industry did not contemplate - either implicitly or explicitly - in the original underwriting design and pricing of its general liability insurance policies the costs which the Draft Report now seeks to transfer to it. Moreover, this is not an unsubstantiated statement of insurance industry opinion. It is a conclusion which has been shared by the office of the Minnesota Commissioner of Commerce and by the Minnesota Supreme Court. As to the former, in 1984, at the direction of the Legislature, the Minnesota Commissioner of Commerce reported on the effect of the enactment of Minnesota's "Superfund" statute - the Minnesota Environmental Response and Liability Act, or MERLA - on the pollution liability insurance market in Minnesota. That report demonstrated a clear understanding on the part of Minnesota's insurance regulator of the risks contemplated in the underwriting and pricing of the insurance industry's general liability insurance product. In pertinent part, the report stated:

> In the early 1970s, comprehensive general liability ("CGL") insurance policies were amended to exclude from coverage liabilities resulting from the non-sudden release of hazardous substances to the environment (an example of a non-sudden release is a slow leak from a toxic waste disposal site). Insurers took this action for two reasons. First, non-sudden releases and the potential liabilities associated

> with those releases, had not been contemplated in the original underwriting design *and pricing* of the CGL insurance coverage. Second, CGL policies were viewed as inappropriate vehicles for insuring non-sudden risks, due primarily to the long latency period and the extraordinarily catastrophic losses associated with those risks.

Minnesota Department of Commerce, *Environmental Impairment Liability Insurance and the Insurability of Minnesota Risks Under the Minnesota Environmental Response and Liability Act*, at 7 (1984) (emphasis added). Interestingly, no mention of this report is made in the Draft Report. Its conclusion, however, is inescapable.

As to the position of the Minnesota Supreme Court, that was made clear in its opinion in *Northern States Power Co. v. Fidelity and Casualty Co.*, 523 N.W.2d 657 (Minn. 1994), in which the court stated:

> Environmental liability insurance cases creates special problems for litigants and courts. The stakes in these cases can be extremely high. . . . While several commentators argue that the insurance industry expected to be held liable for damages to property due to pollution, it seems unlikely that the parties to these actions anticipated the extent of the liability they now face as the result of CERCLA and its state equivalents.

Id. at 660-61. As was the case with the Department of Commerce report cited above, this holding of the Minnesota Supreme Court is, curiously, not referenced in the Draft Report.

As to the Draft Report's attempts to label the insurance industry as "society's risk managers", the insurance industry is not an insurer of "society as a whole", nor does it collect a premium from "society as a whole." While insurance most certainly rests upon the concept of risk spreading, this does not transform insurers into a "societal savings bank" for problems which result from society's collective actions. *An insurer's obligation must correspond to specific liabilities incurred by its policyholder and be covered by a specific policy issued by the insurer.*

Furthermore, if the Act is the first step in recognizing that pollution at municipal landfills is the result of businesses previously acting in a responsible manner when making their waste disposal decisions, there is no reason why the insurers of those businesses should now be held accountable for liabilities which the Act implies the businesses themselves should not bear. This internal contradiction is an inherent flaw in the Act. Acceptance of broad societal responsibility for this type of contamination should decrease businesses' responsibility, not transfer it to businesses' insurers based upon some flawed characterization of the role of insurance.

B. The Report's Mischaracterizes the History of Insurance for Environmental Liabilities.

A distressingly significant portion of the Draft Report's discussion of insurers' contractual responsibility for environmental claims under Minnesota law is erroneous and inaccurate. The discussions contained in the Draft Report under the heading "Qualified Liability: 1970-1986," commencing on page 17 of the Draft Report, are quite illustrative of the Draft Report's inaccuracies which require correction. Here the Draft Report represents that in the 1970s the insurance industry developed what the Draft Report labels a "Contamination or Pollution Endorsement"; that when presented to "consumers and state regulators" it was described as a "clarification"; and that only years later did the insurance industry call the "endorsement" an "exclusion", and begin arguing that it eliminated any coverage for unintentional, gradual leaks. It then creates the impression that the Minnesota Supreme Court was either in error, or in the minority, when it upheld the validity of this contract language ("Although rejected elsewhere, this temporal interpretation . . . was affirmed by the Minnesota Supreme Court in 1985, ..." Draft Report, at 19).

In fact, what was developed in the 1970s, submitted to state insurance regulators and appended to consumers' policies was clearly labeled "CONTAMINATION OR POLLUTION EXCLUSION ENDORSEMENT", not a "CONTAMINATION OR POLLUTION ENDORSEMENT" as quoted in the Draft Report. *See Anderson v. Minnesota Insurance Guaranty Association, et al*, 534 N.W.2d 706, 710 (Minn. 1995), *reh'g denied* (Sept. 20, 1995) (emphasis added).

In its standard form this "CONTAMINATION OR POLLUTION EXCLUSION ENDORSEMENT" provided:

> This insurance does not apply to:
>
> (f) To bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Id. at 708. This language was found by the Minnesota Court of Appeals, in its 1992 decision in *Sylvester Brothers Development Co. v. Great Central Insurance Co.*, 480 N.W. 368, 375 (Minn. App. 1992), to be *unambiguous*, with the term "sudden" containing a temporal connotation of "abruptness." In so holding, the Minnesota Court of Appeals rejected the contention of the

Attorney General, appearing on behalf of *amicus curiae*, that the term "sudden" in the exception to this exclusion was ambiguous, and that the exclusion, in fact, did not apply to unintended *gradual* pollution. The Minnesota Supreme Court subsequently affirmed the holding of *Sylvester Brothers* in ***Board of Regents v. Royal Ins. Co. of America*** 517 N.W.2d 888 (Minn. 1995), holding that the "sudden and accidental" pollution exclusion was unambiguous as a matter of law, and that "sudden" meant quick, not gradual. Moreover, the Minnesota Supreme Court has clearly held that it would be unreasonable, *as a matter of law*, for anyone receiving a copy of this exclusion to believe it did not affect coverage. In ***Anderson v. Minnesota Insurance Guaranty Association, et al***, 534 N.W.2d 706 (Minn. 1995), *reh'g denied* (Sept. 20, 1995), the Minnesota Supreme Court held:

> A regulator or insured who reads only the endorsement heading "CONTAMINATION OR POLLUTION EXCLUSION ENDORSEMENT" and later claims to have been induced to conclude that the endorsement would not actually exclude coverage, has, as a matter of law, acted unreasonably.

Id. at 709 (emphasis added).

Not only would it have been unreasonable as a matter of law for anyone to have believed this exclusion did not affect coverage, the Minnesota Department of Commerce (the regulatory agency to which this exclusion was submitted for regulatory approval) has indicated it clearly understood the purpose, meaning and affect of the policy language. In its previously discussed 1984 Report to the Legislature, the Minnesota Department of Commerce stated:

> In the early 1970s, comprehensive general liability ("CGL") insurance policies were amended to exclude from coverage liabilities resulting from the non-sudden release of hazardous substances to the environment (an example of a non-sudden release is a slow leak from a toxic waste disposal site). Insurers took this action for two reasons. First, non-sudden releases and the potential liabilities associated with those releases, had not been contemplated in the original underwriting design *and pricing* of the CGL insurance coverage. Second, CGL policies were viewed as inappropriate vehicles for insuring non-sudden risks, due primarily to the long latency period and the extraordinary catastrophic losses associated with those risks.
>
> Coverage for sudden releases (for example, a massive pipeline break) continued to be provided under most CGL policies after the exclusion of non-sudden coverage; however, insurance for non-sudden occurrences was largely unavailable until 1980 when a handful of insurers began marketing products exclusively

> designed to provide non-sudden coverage. These products are commonly termed environmental impairment liability (EIL) insurance.
>
> . . .
>
> Environmental impairment liability (EIL) insurance is a relatively new product that grew out of the emergence of **non-sudden** pollution incidents as a major environmental problem. When non-sudden pollution problems emerged as a major potential source of liability in the early 1970s, insurers amended their widely-used comprehensive general liability (CGL) policies to exclude from coverage **liabilities resulting from the non-sudden releases of hazardous substances. Sudden releases continued to be covered.**

Minnesota Department of Commerce, *Environmental Impairment Liability Insurance and the Insurability of Minnesota Risks Under the Minnesota Environmental Response and Liability Act*, at 7, 57 (1984) (emphasis added).

Finally, the record of the case law is clear. Those states - including Minnesota - which have upheld the validity of the pollution exclusion represent the clear majority position. Those cases which hold otherwise stand in isolated minority. The inference that the Minnesota courts have ruled unwisely, or are in the minority in their holdings, is wrong.[2]

It is unfortunate the Draft Report labels the policy form which was developed in the 1970s was simply an "endorsement" to coverage when it was, in fact, clearly labeled an "exclusion." It is regrettable the Draft Report intimates the policy language "later" became known as an exclusion, when it was *always* identified as such. It is curious the Draft Report resurrects the argument that regulators and consumers were misled into believing the exclusion did not affect coverage when the reasonableness of that contention has been rejected, as a matter of law, by the Minnesota Supreme Court in an action in which the Attorney General's Office participated. Likewise, the Draft Report makes no reference whatsoever to the Minnesota Department of Commerce's 1984 Report to the Legislature. That report refutes the inference in the Draft Report that the exclusionary language was represented to be something which it was not, and that the insurance industry's position concerning the affect of that language was an argument of

. . .

[2] *See, e.g.*, Victor C. Harwood, III, Brian J. Coyle & Edward Zampino, *The "Frivolity" of Policyholder Gradual Pollution Discharge Claims*, 5 Mealey's Litigation Reports - Insurance No. 40 (Aug. 27, 1991); Edward Zampino, Richard C. Cavo and Victor C. Harwood, III, *Morton International: The Fiction of Regulatory Estoppel*, 24 Seton Hall L. Rev. 847 (1993); and Edward Zampino and Victor C. Harwood, III, *The Pollution Exclusion - Debunking the Policyholders' Regulatory Estoppel Myth*, For the Defense, at 2 (July 1995).

convenience, developed a decade after the language's introduction. The Draft Report either misstates information which would point to a conclusion contrary to that contained in the Draft Report, or omits that information altogether.[3]

C. The Report's Discussion of Applicable Case Law Is Wrong - The "Sudden And Accidental" Pollution Exclusion Bars Coverage For Losses at Landfills And The *NSP* Decision Does Not Allow an Insurer to Be Held Liable For Damages Not in Its Policy Period.

The Draft Report's conclusion that the insurance industry's alleged financial responsibility greatly exceeds that estimated by the KPMG Peat Marwick Report to the Department of Commerce[4] rests, in large measure, upon the erroneous contention that the issues of whether the "sudden and accidental" pollution exclusion bars coverage in the landfill context, and how damages between triggered policies will be allocated in the landfill context, are open to argument in the landfill context. The Draft Report states:

> Thus, although the existence of a "sudden and accidental" exclusion in an insurance policy restricts the range of polluting events that are covered under that insurance policy, insurance recovery remains available for liability stemming from episodic pollution and must be considered in any determination of insurers' fair share.

---

[3] This may explain why the Draft Report cites in support of its erroneous contentions legal treatises authored by counsel who routinely represent policyholders in insurance coverage litigation, and fails to cite to the treatises which refute the listed authorities, and thereby provide the Legislature with "the rest of the story." *Compare* Robert N. Sayler, *The Emperor's Newest Clothes: Revisionism and Retreat - The Insurers' Last Word on the Pollution Exclusion*, Mealey's Litigation Reports Insurance, Oct. 8, 1991 (cited at footnote 53 of the Draft Report) *with* Victor C. Harwood, III, Bryan J. Coyle and Edward Zampino "*The Emperor's Illusionist: Policyholders Retreat from Pollution Exclusion Extrinsic Evidence*," (Part Two) 6 Mealey's Litigation Reports - Insurance No. 26 (May 12, 1992).

[4] In its attack upon the KPMG Peat Marwick Report, the Draft Report states that KPMG Peat Marwick provided two figures for insurance industry exposure, a high figure if the pollution exclusion was invalidated in *Anderson* and a low figure if it were not. In fact, KPMG Peat Marwick provided a third figure which the Draft Report fails to mention. According to KPMG Peat Marwick, its *low* figure would be reduced by as much as *90 percent* if the decision of the Court of Appeals in *NSP* was affirmed by the Minnesota Supreme Court. KPMG Peat Marwick Report, at B-2 ("For example, a holding that site costs must be allocated between multiple policies based on the damages that occurred during each policy period could reduce insurance company exposures by as much as 90 percent from the figure presented in the main body [the low figure] of this report."). The Minnesota Supreme Court did, in fact, affirm the decision of the Court of Appeals in *NSP*, holding that site costs must be allocated between multiple policies based on the damages that occurred during each policy period.

* * * * *

> Finally, the Minnesota Supreme Court has held that the allocation of liability where multiple insurance policies may be "on the risk" over a period of time is governed by principles of equity. ... [T]here are strong equitable arguments to be made for allocating a larger share of liability to pre-exclusion policies.

Draft Report at 19, 20 (footnote omitted).

Both of these position are directly opposite to the Minnesota Supreme Court's holdings on these issues.

(1) The "Sudden and Accidental" Pollution Exclusion Bars Coverage as a Matter of Law for Landfill Cases.

In ***Board of Regents v. Royal Ins. Co. of America*** 517 N.W.2d 888 (Minn. 1995), the Court examined the "classic" types of cases where coverage is excluded by the pollution exclusion. The Court *specifically identified* pollution from waste disposal sites as an example of a claim to which the "sudden and accidental" pollution exclusion would apply:

> It would appear that if an insured deposits toxic waste in a contained place and it escapes, such as by seeping into the surrounding soil and underground water, the exclusion applies; ***thus the policy would afford no coverage for the classic case of a waste disposal site which gradually pollutes the area.***

Id. at 890 (emphasis added).

In earlier cases involving environmental contamination resulting from landfill operations, the Minnesota Court of Appeals similarly interpreted the term "sudden" to contain a temporal connotation of "abruptness", holding that the insurance policies at issue provided no coverage for the clean-up claims. ***Sylvester Brothers Development Co. v. Great Central Insurance Co.***, 480 N.W.2d 368, 375 (Minn. App. 1992), *rev. denied* (March 26, 1992). In this regard, the court held that where pollutants travel from a landfill to the groundwater over one to thirteen years, the release cannot, *as a matter of law*, be considered sudden - thus, no coverage exists. ***Krawczewski v. Western Cas. & Sur. Co.***, 506 N.W.2d 656 (Minn. App. 1993). Similarly, the court held that groundwater contamination resulting from multiple, sporadic, or continuous discharges of leachate from a landfill over decades could not, *as a matter of law*, reasonably be considered "sudden" and, thus, again no coverage exists. ***Dakhue Landfill v. Employers Ins. of Wausau***, 508 N.W.2d 798, 804 (Minn. App. 1993).

Rather than discussing these cases, however, the Draft Report cites to *SCSC Corp. v. Allied Mutual Ins. Co.* 536 N.W.2d 305 (Minn. 1994), where a jury had found that there was one "sudden and accidental" spill at a dry-cleaning facility, triggering one insurance policy. *Id.* at 315. In fact, the *SCSC* Court of Appeals decision, when confronted with the *Dakhue* and *Krawczewski* decisions, wrote that those decisions were distinguishable. The Court commented that they were distinguishable because they involved a landfill and **"[t]his case [*SCSC*] does not involve a landfill[.]"** *SCSC Corp. v. Allied Mut. Ins. Co.*, 515 N.W.2d 588, 599 (Minn. App. 1994) (emphasis added). Thus, according to the *SCSC* court itself, because the decision in *SCSC* does not arise from a landfill, it should not impact the landfill discussion - especially where the courts have previously held that the "sudden and accidental" pollution exclusion bars coverage as a matter of law in the landfill context.

It is unfortunate the Draft Report does not disclose the limitations placed upon the broad application of the *SCSC* decision by the *SCSC* court itself. Rather than advising that the *SCSC* court specifically distinguished its holding from those cases involving the landfill context, the Draft Report cites *SCSC* as unqualified authority for the proposition that the application of the pollution exclusion to the landfill context remains unsettled.

(2) *NSP* Specifically Holds That Minnesota Follows an "Actual Injury" Trigger Theory - Thus, an Insurer Cannot Be Held Liable for Damages Outside its Policy Period.

Minnesota courts look to whether there was an "actual injury" or "injury-in-fact" to the groundwater (or other third party property) during the policy period to determine whether a policy is triggered. *Northern States Power Co. v. Fidelity and Casualty Co.*, 523 N.W.2d 657, 662 (Minn. 1994) The essence of the "actual injury" trigger is that each insurer is held liable for only those damages which occur during its policy period and that no insurer is held liable for damages outside its policy period. "Equity" cannot operate to defeat this allocation scheme.

The *NSP* case involved groundwater contamination that had occurred undetected over a long period of time. Multiple insurance companies were on the risk over the many years. Recognizing the complexity and cost burdens associated with having to prove "actual injury" within a certain policy period, the *NSP* court adopted a presumptive "pro rata by time on the risk" allocation scheme in continuous contamination damage cases.

The court held that the insured must show *some damage* arose during the policy period at issue. According to the court, the insured meets this burden by showing that damage began at a

particular time, and then ended, or was discovered, on a subsequent date. Once these dates are determined, the court will presume that the cost of remedying the damage will be evenly distributed over the period of the damage (not just the *insured* period of damage, as the Draft Report suggests), with an insurer providing coverage during the period of damage bearing only a pro rata share of the cost proportional to the period of time it was on the risk. This, by definition and by explicit court holding, means that if the period of damage includes times for which there is no insurance, that portion of the costs attributable to those time periods is ***uninsured***.

The Court *did not* hold that equitable concerns could alter which policies were triggered. Nor did the Court hold that equitable concerns would allow an insurance company to be held liable for damages that occurred before its policy was issued or after its policy expired, as the Draft Report intimates. Insurers in Minnesota can only be held responsible for that portion of the total damage which occur during the period they provide coverage. They cannot be held responsible for damage that occurs before their policies begin or after they terminate. The Draft Report has, quite simply, misstated the Supreme Court's holding in *NSP*.

D. Adoption of a Direct Action Provision Allows the State to Claim Greater Damages from Insurers than it Can from Policyholders.

The Draft Report urges the Legislature to amend the Landfill Cleanup Act with a provision allowing "direct actions" against insurers. The Draft Report purportedly requests this ability in order to "save transaction costs by allowing the State to deal directly with carriers in the settlement of claims[.]" Draft Report at 6. The Act, however, provides that the MPCA can request an assignment of insurance policies by any party who requests benefits under the Act and pursue claims thereunder. Minn Stat 115B.44. Thus, a mechanism already exists for the State to assume a policyholder's position in order to assert coverage claims. The State is, however, limited to asserting only the claims the insured would have against its insurer. Because the Act does not provide for the assessment of natural resource damage awards, reimbursement for the State's litigation expenses or long-term monitoring costs against an insured, it cannot pursue such claims under an assignment. The authors of the Draft Report clearly believe, however, that such costs must be included in any calculus of potential recovery. The solution to their dilemma is to allow the MPCA to pursue insurers directly, irrespective of the claims that can be made under the Act against a policyholder. Thus, the *sole* reason for such a provision is to allow the State to claim greater damages from insurers than it can claim against the policyholder. The Federation opposes any such legislation because it would grant rights to the State that the policyholder does not have.

II. CONCLUSION

The Draft Report seriously misstates insurers' obligations under their contracts for the cost of landfill cleanup in the State of Minnesota. Its interpretation of what those contracts provide is nothing less than a rewriting of those contracts in an attempt to compel payment where contractually no obligation to pay exists.

The Federation remains steadfast in its willingness to continue to work with the Attorney General. The Draft Report's positions and conclusions, however, are an impediment to this effort.

Very truly yours,

Bob Johnson

ROBERT JOHNSON
Executive Vice President
Insurance Federation of Minnesota

RJ/up/334436

Risk International

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VIA FACSIMILE AND OVER-NIGHT DELIVERY

January 16, 1996

Mr. John K. Lampe
Assistant Attorney General
State of Minnesota
Office of Attorney General
Public and Human Resources
Suite 900
445 Minnesota Street
St. Paul, MN 55101-2127

Re: Comments on Attorney General's Report

Dear Mr. Lampe:

In response to the invitation in your letter of January 8, 1996, we are forwarding our comments to the Attorney General's Report on the Buy-Out Program. We were impressed by the thoroughness and soundness of the Report. We have a great many ideas about implementation of the Program, but for the moment have focused our few comments on the task at hand, which is the Attorney General's evaluation of the concepts and assumptions underlying the design of the Program. Hopefully, you will find our comments useful. Should you have any questions, please feel free to contact us.

Sincerely,

RISK INTERNATIONAL SERVICES, INC.

DL Talley

Douglas L. Talley
Vice President and Counsel

1054/ris/d
Enclosure

COMMENTS ON
THE MINNESOTA ATTORNEY GENERAL'S REPORT
ON THE VOLUNTARY BUY-OUT PROGRAM
OF THE MINNESOTA LANDFILL CLEANUP ACT

Risk International

Risk International Services, Inc. is pleased to provide comments to the Minnesota Attorney General's Report on the Voluntary Buy-Out Program of the Minnesota Landfill Cleanup Act. We found the Report to be comprehensive, well-reasoned and persuasive. All the principal weaknesses in the Buy-Out Program, as originally conceived, were identified and addressed. Specifically, the weakness of a buy-out formula based on premium volume instead of actual policy exposure was thoroughly covered. We have several comments to further embellish this point, as well as several other comments on miscellaneous issues.

(1) Exposure Based Buy-Out Formula

We agree with the Attorney General's recommendation that the Buy-Out Formula should be based upon an insurer's actual policy exposure rather than upon the insurer's premium volume. In our previous comments we identified that individual insurers could have different exposure levels at different landfills. We stated that exposure could depend on a number of factors including the amount of limits an insurer may have written for its insured at a site and whether or not aggregate limits were written in its policies.

There are additional factors to consider which can become quite critical. One of the principal factors is whether the insurer wrote primary coverage or excess coverage or both. The insurers will be unlikely to participate in the Buy-Out Program, if the distinction between primary coverage and excess coverage is not accomodated.

Some insurers may have written a greater number of excess policies as opposed to primary policies. Such insurers will insist that all underlying insurers pay first. They will resist payment themselves until they are assured that the "attachment point" of their own policies has been reached. Primary insurers will insist, on the other hand, that exposure at the landfills should be spread not only "horizontally" among primary insurers, but also "vertically" among excess insurers.

While primary insurers may have a greater exposure initially, it was common for primary policies to have aggregate limits and for excess policies not to have aggregate limits. Accordingly, after a primary insurer has exhausted limits (usually a small amount ranging from $100,000 to $500,000)the excess insurer may then "drop down" and become exposed to unlimited liability because of a lack of aggregate limits.

Some insurers specialized in writing coverage for a high level excess exposure, such as excess of $20 million. Such insurers will insist that their liability be based upon their high level attachment point and not upon the amount of premium they wrote.

Another important factor supporting an exposure based

formula is the fact that insurers have differing underwriting selection practices. It could well be that an insurer with a high premium volume in the state does not have a high exposure at the various landfills because the insurer was cautious in selecting the risks it would underwrite. Such an insurer would resist a buy-out program that is premium based. Other insurers may have been loose in their underwriting selection practices and may have a significant liability exposure in comparison to premium volume. Such insurers would receive a windfall if the buy-out program were simply premium based.

Insurer exposure will also vary by the number of PRPs at a given landfill. An insurer with lower premium volume may nonetheless have a great exposure at a major landfill because it insured one of a few high volume PRPs at the site.

Insurers also varied in the policy language they utilized and some were more careful and others less careful in defining risks they would or would not accept, including pollution risks. This point was made on page 20 of the Report regarding the "sudden and accidental" pollution exclusion. As a further embellishment of this, at least one major insurer identified on Table V of the Report routinely did not include the "sudden" element in its standard exclusion. Another major insurer identified on Table V frequently replaced the standard exclusion with an endorsement providing broader pollution coverage. Insurers will insist that a buy-out formula be equipped to deal with such variations of the pollution exclusions at issue.

For the reasons above, in addition to the reasons cited in the Report, the Buy-Out Program should adopt an exposure based formula instead of a premium volume formula. Such a formula may be a little more difficult to manage, but the equity inherent in the formula should assure a great payout by affected insurers.

(2) Minimum Buy-Out Amount

The Report correctly assesses that the minimum buy-out provision of the Act requiring at least $30 million in collective payment from insurers before the Program takes effect could produce a chilling effect on settlement. Experience indicates that it is extremely difficult in practice to achieve a "global" settlement. The Buy-Out Program, as now conceived, essentially requires a "global" settlement up front and does not allow the flexibility of approach always required in a high dollar environmental insurance negotiation.

The concept of a collective minimum buy-out amount does not take into account perhaps the single most important factor in settling environmental insurance claims, and that is the propensity of individual insurers to settle or to litigate. Experience indicates that some insurers (and it is important to know which ones)have a high interest in settling early and will

usually pay a relatively liberal settlement amount in order to limit transaction costs associated with negotiating and settling a claim. Settling with these insurers first can often create a high floor amount which then can serve as a benchmark for assessing settlement from other insurers. Every complex claim recovery will manifest certain "low-hanging fruit" which the current buy-out scheme does not account for and take advantage of.

On the other hand, the insurance industry has its share of recalcitrants (and again it's important to know who they are). In theory, the current proposed buy-out scheme could fail in its entirety because one such recalcitrant may refuse to make the contribution necessary to reach the collective buy-out level of $30 million.

As a practical matter, what may be as important as anything in the Program is an adequate cash flow. We have attached a sample graph we typically use to monitor the cash flow of an insurance recovery project. By eliminating a global buy-out minimum, the Program would be in a position to take advantage of early settlements and thereby adequately fund the management of the Program over time from virtually the first day of implementation. Every dollar captured early has additional time value over the life of the Program.

The Program can achieve the functional equivalent of a global minimum buy-out amount, by simply requiring the right level of an individual insurer's buy-out minimum already designed into the Program. It would be wise to assure that each insurer's buy-out minimum is not based upon some per capita formula, but on an actual exposure formula.

(3) Litigation Costs

On page 29 of the Report the following assumption is made:

> Additionally, the insurance industry may also face exposure for MPCA's litigation costs. The State has not litigated any insurance claims at landfills; therefore there is no record on how expensive these claims might be for the MPCA -- and potentially the insurance industry.

The Report identifies an estimate of $13 million as the insurance industry's exposure for litigation costs.

We believe that the insurance industry probably does not have exposure for the MPCA's litigation costs in enforcing its insurance claims. Typically, an insured can recover its litigation costs from its insurer when pursuing an insurance claim only if the insurer has acted in bad faith. Establishing bad faith requires a higher standard of proof than required in

proving breach of an insurance contract. It has occurred in some cases. One insurer, for example, was recently found liable for bad faith at a site in New Jersey. But bad faith victories are the exception rather than the rule. We do not believe the insurance industry will seriously consider any element of the MPCA's litigation costs as a part of the insured claims brought against it under the Program.

This is not to say that litigation costs, or more precisely, the savings of litigation costs, are an insignificant factor in the Program. The importance of litigation costs is the incentive factor they provide for insurers to buy out under the Program and save their own litigation costs against the MPCA. Such costs, however, do not typically factor into the damage element of an insurable claim.

(4) Scope of Release

We agree with the conclusion on page 6 of the Report that expanding the State's release of insurers to include natural resource damages and operational costs will encourage insurers to participate in the Program. It is not clear from the Report, however, if the release extends to an insurer's liability for the 106 scheduled landfills,or whether it releases the insurer once and for all for any liability in the state of Minnesota, including liability for any additional landfills or sites which may fold into the Program in the future.

This issue is critical and could well become a "make or break" item for the Program. Typically, we encourage clients to settle only liabilities associated with scheduled, identified sites. Unknown sites are not released under such a settlement scheme. Insurers, on the other hand, typically request that a complete buy-out include a release from unknown sites and will purport not to settle if such a release is not offered.

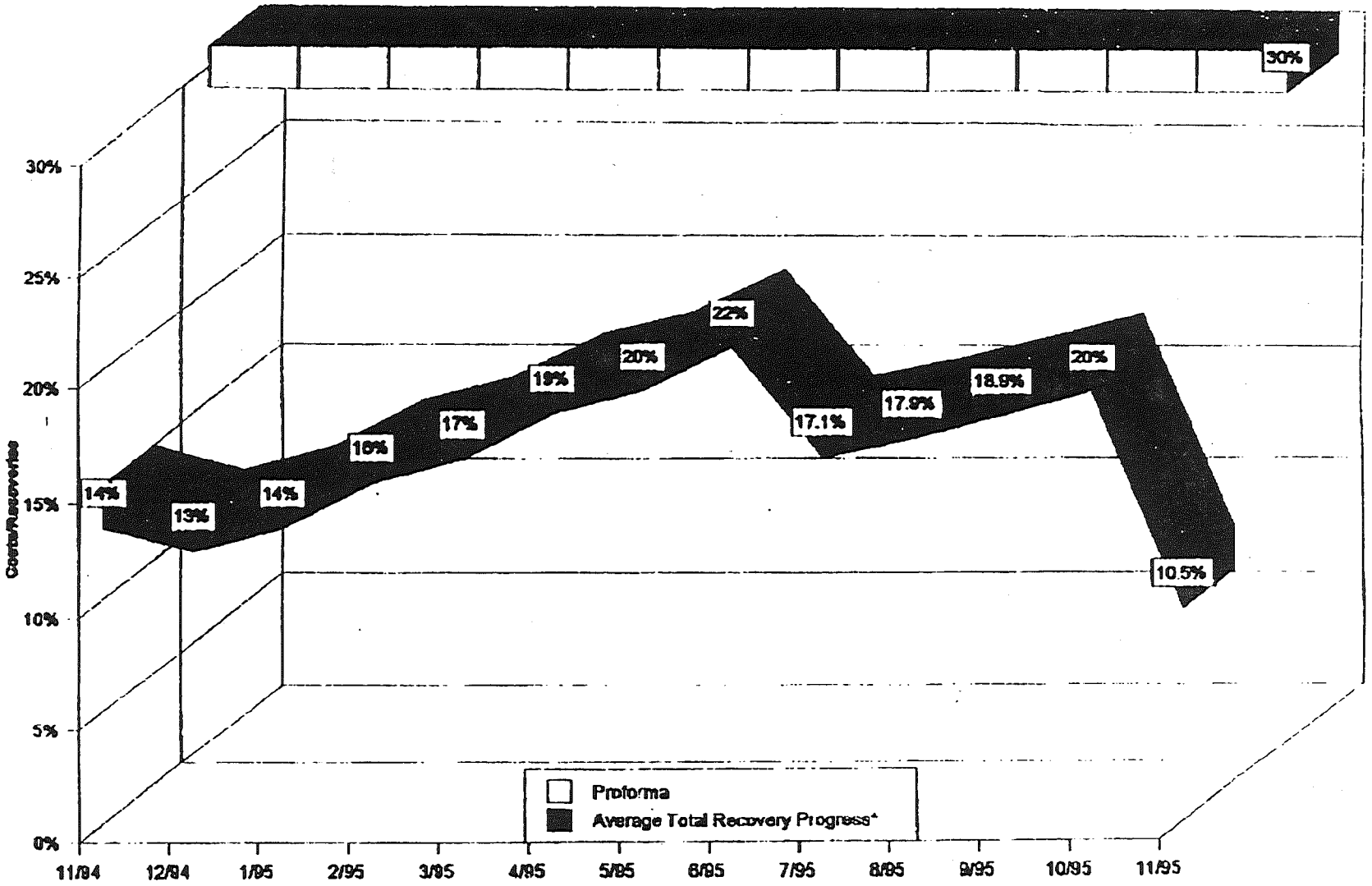
This point may not be important if the State has a good grasp of all of its sites. However, there is always the risk that an unknown "midnight dumping" landfill exists somewhere which would fall into the Program. If the risk does exist, the State should offer full releases only for the scheduled 106 landfills.

The preceding represents our written comments to the Attorney General's Report. As always, should anyone in the Attorney General's office have questions, we would be happy to try and answer them.

XYZ COMPANY ENVIRONMENTAL INSURANCE CLAIMS

Client Recovery Costs vs. Total Recovery Progress*

Efficiency Ratio



* Total recovery progress includes actual recoveries, settlements-in-principle and pending offers from insurers. The percentages represent the ratio of costs to secure recovery to the total recovery progress.

Mlnn1.wpg

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24th RIMS Annual Conference
Toronto, Ontario Canada
April 21-26, 1996

IFRIMA

BY FACSIMILE AND OVERNIGHT MAIL

January 19, 1996

Mr. John K. Lampe
Assistant Attorney General
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445 Minnesota Street, Suite 900
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Dear Mr. Lampe:

Thank you for including RIMS in the distribution of the latest draft of the Minnesota Attorney General's Report on Insurance Recovery Under the Minnesota Landfill Cleanup Act (MLCA). We welcome the opportunity to comment on the provisions of the MLCA that affect policyholders. We understand that legislation will be introduced shortly which will refine the operations of the MLCA and we will take the opportunity to address that legislation separately, at a later date.

As an association of commercial policyholders, we believe that our members have a significant interest in this program as well as a great deal of insight to offer. Risk managers have identified potential problems in the MLCA, some of which are not fully addressed in this report. Their concerns fall mainly into three categories: (1) document production; (2) assignment of rights; and (3) future liability.

(1) Document production. The questionnaire accompanying the MPCA's Request for Information and Cooperation asks for copies of all CGL, excess and umbrella policies and endorsements. Our members have indicated that production of these documents would result in hundreds of thousands of pages being sent to the state from individual policyholders. The state should also be aware of potential problems with the raw information contained in the policies; interpretation, aggregate limits of policies and confidentiality of Settlement Agreements. One of the most time-consuming and expensive aspects of the litigation process for the policyholder is the interpretation of the policy's terms and conditions. Additionally the releases in confidential settlements will not be available for the state to consider in determining the amount of an insurer's liability. As the state will now stand in the policyholders' shoes, it should factor in the time and cost of accurately interpreting the information its receives.

The state will also have to determine whether the aggregate limits of policies submitted to it are available to be used. Policies with aggregate limits may have had their coverage exhausted or severely reduced by prior claims. Such a determination will require the state to request and analyze historical claims for each aggregate policy received.

Lastly, policyholders are precluded from releasing prior Settlement Agreements to the state because of strict confidentiality provisions. Without the information contained in these agreements, the state will not be able to accurately determine what elements of coverage are still available for each policy affected by the Settlement Agreement.

A high volume of document production for one state would be difficult enough to process properly, but consider the situation the policyholder would face if other states adopted similar laws. Add to this the burden the state would face in interpreting the policies and in determining how much coverage is still available under the policies. Consider that the State of Minnesota is already in possession of some 16,000 policies, and by all admissions, this program is in a preliminary stage. It also appears that the state requires a separate complete set of documents for each site project. The state has set itself a goal that may be unachievable.

(2) Assignment of Rights. Most, if not all, of the insurance policies state that their contractual rights are not assignable. It is our belief that the state's mandate to policyholders to assign their rights under the insurance contract is a violation of contract law, and compliance may subject the policyholders to liability from the insurers. Has the state considered holding the policyholders harmless against any future contract actions by insurers? How will the state gain the authority to go against the insurer if the assignments are not achieved?

There is a definite lack of contractual relationship between the state and the insurer. For example, page 20 of the report contains the following language :

> It is these CGL policies written prior to the absolute pollution exclusion which are the source of insurers' contractual obligation to pay for environmental cleanup costs, and it is these policies the Attorney General is charged by law with pursuing in the event a voluntary settlement is not achieved.

As previously pointed out, the state has no contractual relationship with the insurers. However, the state's actions imply that public policy requires the state to pursue the claim. The state must consider whether the action contemplated by this legislation would supersede any legal prohibition against a unilateral assignment of rights, as well as what position the policyholder is left in if the state pursues a direct action against an insurer.

(3) Future liability. The exact terms of the transfer of authority between the EPA and the MPCA are not apparent. Despite the agreement between the EPA and MPCA, it may be possible that the federal government will come back later and reassess the costs or change the application of the states rules. Alternatively, if the MCLA program ceases to exist for some unforeseen reason, it is possible that the federal government would attempt to resume its authority over the sites.

After voluntary settlements are reached with the insurers, they are released from liability. The report leaves open the responsibility for payment in the eventuality of future costs, such as any future damages resulting from the landfills, future cleanup costs, transaction costs and natural resource damages. It is not clear if these issues are resolved before settlement. Specifically in the area of natural resource damages (p.31), it is unclear whether this will remain within the state's purview or whether the federal government may impose its own program at a later date. The report states that the amounts of natural resource damage are undetermined; therefore, it seems reasonable that trying to assess this type of damage would be, at best, a guess. This leaves policyholders wondering whether they will be a "deep pocket" target down the road should cleanup money run out. Again, policyholders would need some form of hold harmless agreement with the state to reach the level of cooperation needed to further this program. However, it is questionable if the

state is in a position to provide a release from natural resource liability since the law in this area has not been formulated.

(4) Other issues. It was our understanding that the program is now in its compliance phase, which requires policyholders to submit copies of their insurance policies to the MPCA. Actual assignment of rights, apportionment and payment of cleanup costs would follow in later phases. However, the report indicates that nine reimbursement requests have been processed (p. 12). This seems to indicate that cleanup costs have already been committed by insurers to offset the reimbursement. On the same page of the report is the statement, "Parties have entered into 42 agreements that set the stage for MPCA's assumption of responsibility for future cleanup at qualified landfills." It is unclear if this statement refers to 42 policyholders, insurers, assignments or payments. We suggest that a clearer timeline be developed and released to interested parties.

Also, we are not confident that the transactional costs associated with the MLCA are a savings over the current system. Policyholders will spend a lot of time and money producing the information required by the MLCA, and the MLCA will spend a lot of time and money interpreting the documents received. Also, it seems that the program shifts the litigation from policyholders and insurers to the state and insurers, resulting in no net savings. Policyholders may benefit from this in the short term, but the system will have to absorb these costs in the long term, and that will not ultimately benefit anyone.

In addition, the state may wish to consider the problem posed by the reliance on "reasonable values" in the Exposure Based Settlement Model formula. A more precise measure should be used for determining apportionment.

Finally, we ask you to consider the consequences if only a few insurers participate in the voluntary buyout (p. 44). Policyholders could be left to deal with a hybrid system; producing information for some claims being handled by the state and still pursuing actions against insurers in the courts for others. If policyholders are faced with the reality of dealing with a combination of systems, their costs will increase dramatically.

Again, thank you for the opportunity to voice our concerns. We look forward to working with you toward resolution of these issues. We will be glad to offer any assistance possible in crafting language which will better define the policyholders' status in any legislation that is offered this year.

Sincerely,

Anne B. Allen

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State Legislative Counsel

Alliance of American Insurers

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January 17, 1996

Mr. John K. Lampe
Assistant Attorney General
State of Minnesota
Office of the Attorney General
Public and Human Resources
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127

Via Facimile
Original by Mail

COMMENTS ON DRAFT REPORT

Dear Mr. Lampe:

The Alliance of American Insurers appreciates receiving the draft of the Attorney General's Report on the Voluntary Buy-Out Program of the Minnesota Landfill Cleanup Act and having the opportunity to submit our comments. We are concerned about the direction and approach pursued in executing the study design; the validity of information presented and conclusions drawn; and, as a result, the usefulness of the study in helping to increase the likelihood of a successful Voluntary Buy-Out Program.

The December 6, 1994 draft of the Minnesota Attorney General's Preliminary Description of Insurance Buy-Out Study claimed that the insurance buy-out program was created to avoid the lengthy and costly litigation of insurance claims on behalf of the Minnesota Pollution Control Agency. That description stated that "in theory at least, there is a buy out price that benefits both the state and the insurance industry. That price exists because litigating these claims will inevitably be more costly as a whole than resolving them through the buy-out program." Clearly, the buy-out formula created in the Landfill Cleanup Act raised a number of questions for both insurers and the Minnesota Pollution Control Agency. The focus of the current draft study has shifted from aiming to address these difficulties, subject to the Legislature's intent to maximize the net revenue of the State under the program, to only aiming to maximize the net revenue to the State under the program. The current draft has lost sight of the earlier recognition that the buy-out price needs to benefit both the state and the insurance industry.

The draft study's conclusion that justification exists to increase the cost of nonparticipation to create additional financial incentive for voluntary participation is based on incorrect information and misinterpretation of existing information. In this regard, we refer you to the comments of the Insurance Federation of Minnesota in describing insurers' role and intentions in dealing with environmental claims arising under liability policies; insurers' contractual liabilities for environmental claims and applicable case law. We fully concur with the Federation's conclusion that "the draft report seriously misstates insurers' obligations under their contract for the cost of landfill cleanup in the state of Minnesota. Its interpretation of what those contracts provide is nothing less than a rewriting of those contracts in an attempt to compel payment where no contractual obligation to pay exists...The Constitution of the United States of America prohibits states from enacting legislation that impairs existing contracts."

When Minnesota enacted the Landfill Cleanup act, the buy-out plan was frequently described as a unique and new experiment in environmental cleanup funding. Several issues, problems and difficulties became apparent as the buy-out plan was more fully considered. We encourage the Attorney General to recall that the program aimed to reduce, not increase, litigation costs, and, to explore issues arising under the current statute from the earlier recognized perspective that a successful voluntary program needs to benefit both the state and insurer.

The Alliance and its member companies are committed to continuing a dialogue on environmental issues in Minnesota. We hope that this dialogue can return to the letter and spirit of the law enacted in 1994, rather than the unfortunate approach contained in the draft report. Please contact me if you have any questions regarding our position.

Sincerely,

Keith D. Lessner

Keith D. Lessner

cc: Mike Stinziano
Rey Becker
Carl Norberg

Mnags.wpd