PUBLIC HEARING

before

ENVIRONMENTAL IMPAIRMENT LIABILITY INSURANCE STUDY COMMISSION

on

"The Extent of the Environmental Impairment Liability Insurance Crisis"

VOLUME II

October 2, 1985
Room 438
State House Annex
Trenton, New Jersey

MEMBERS OF COMMISSION PRESENT:

Senator Raymond Lesniak, Chairman
Senator Lee B. Laskin
Senator Daniel J. Dalton
Senator S. Thomas Gagliano
Assemblywoman Marlene Lynch Ford
Assemblyman Thomas J. Deverin
Assemblyman Robert C. Shinn, Jr.
Assemblyman Robert J. Martin

ALSO PRESENT:

Denise Drace
Office of Legislative Services
Aide, Environmental Impairment
Liability Insurance Study Commission

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APPENDIX

TOWNSHIP OF JACKSON

OFFICE OF THE TOWNSHIP ATTORNEY
MUNICIPAL BUILDING - R. D. 4, BOX 82
JACKSON, NEW JERSEY 08527

TOWNSHIP ATTORNEY
JOSEPH F. MARTONE

(201) 928-1200

March 26,1982

Paschon,Feurey & Kotzas
1005 Hooper Avenue
Toms River, New Jersey 08753

Att: Steven B. Kotzas,Esq.

Re: Township of Jackson v. American Home Assurance Co.

Dear Steve:

In accordance with your request, I hand delivered to your office this morning photocopies of the records of the Township Treasurer's office indicating amounts paid in connection with the defense of the Legler litigation.

According to my calculations, the Township has incurred legal expenses of $306,506.63 and engineering and other expert expenses in connection with the defense of this matter in the amount of $412.682.64.

In addition to the above amounts, there is an outstanding voucher for legal expenses dated February 26,1982 in the amount of $14,578.92 which has not been paid, and an outstanding voucher for engineering services dated March 1,1982 in the amount of $12,426.53 which has not yet been paid. According to my calculations, the total amount expended by the Township in defense of this matter is $746,194.72.

According to Township records, checks totaling $50,000.00 were received by the Township in December,1981 to defray a portion of the total amount expended.

Kindly advise me if you have any questions regarding the above or whether you require any additional information.

Very truly yours,

Joseph F. Martone

JOSEPH F. MARTONE
Township Attorney

JFM:js
cc: Township Committee
Township Clerk
Business Administrator
Treasurer

Legler

PASCHON, FEUREY & KOTZAS
Attorney at Law

ROBERT V. PASCHON
EDWARD T. FEUREY *
STEPHEN B. KOTZAS

GARRETT L. JOEST, III
CARL F. BOOK, JR.
JEANNETTE C. KELLINGTON

* MEMBER N.J. AND D.C. BARS

(201) 341-3800
1005 HOOPER AVENUE
TOMS RIVER, NEW JERSEY 08753-8381

July 14, 1982

OUR FILE NO. _____

Superior Court of New Jersey
Office of the Clerk
Law Division
CN 971
Trenton, NJ 08625

RE: Township of Jackson and Theodore Beekman, et als. v
Docket No. American Home Assurance Co., et als.
L-29236-80

tlemen:

With reference to the above-captioned matter, enclosed herewith please find the following:

___Acknowledgement of Service
___Affidavit
___Answer
___Answer to Interrogatories
___Check # for $
___Complaint
___Consent Judgement
___Counterclaim
___Envelope for return
___Interrogatories
___Judgement
_____Notice of Motion
_____Notice to take Depositions
XXX Order compelling payment of defense costs
_____Pretrial Memorandum
_____Proof of Mailing
_____Release
_____Request to Enter Default
_____Stipulation Extending Time
_____Stipulation of Dismissal
_____Summons
_____
_____

arding said matter, would you kindly:

___Certify for trial
___Charge fee to our account
___File
___File and return copy marked "Filed"
___Sign and return
___Sign, file original and return copy marked "Filed"

RECEIVED
JUL 15 1982
OFFICE OF TOWNSHIP ATTORNEY

OFFICE OF TOWNSHIP ATTORNEY

Copies to:	File #
Twp. Committee ✓	Treasurer
Clerk ✓	Tax Collector
Tax Assessor	Zoning Office
Engineer	Code Enforcer
Police	Other:
Public Works	
Administrator ✓	
Building Inspector	
Board of Health	

Very truly yours,

Paschon, Feurey & Kotzas

By: STEPHEN B. KOTZAS

losure

15X

PASCHON, FEUREY & KOTZAS, ESQS.
1005 Hooper Avenue
Toms River, New Jersey. 08753
(201) 341-3900
Attorneys for Plaintiff

THE TOWNSHIP OF JACKSON, et al., Plaintiff	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: OCEAN COUNTY
and	DOCKET NO. L-29236-80
THEODORE R. BEEKMAN, et al., Plaintiff-Intervenors	CIVIL ACTION ORDER
vs	
AMERICAN HOME ASSURANCE COMPANY, et al., Defendants	

THIS MATTER being opened to the Court by Paschon, Feurey & Kotzas, Robert V. Paschon and Stephen B. Kotzas appearing as counsel for the plaintiff; Donald Marlin, Ivan Rubi and Arnold Lakind appearing as counsel for plaintiff-intervenors Jeffrey Kadish appearing on behalf of defendant Insurance Compan

of North America; Francis Wolff appearing on behalf of defendant United States Fidelity and Guaranty Company; Harry Osborne appearing on behalf of defendant Continental Insurance Company; John Petras appearing on behalf of defendant National Indemnity Company; Robert F. Novins appearing on behalf of defendant St. Paul Fire and Marine Insurance Company; James P. Richardson appearing on behalf of defendant American Motorists Insurance Company; and George Connell appearing on behalf of defendant Continental Casualty Company on motion by the plaintiff, Township of Jackson, to enforce litigant's rights and the Court having considered the motion, certification, exhibits and arguments of counsel, and for good cause shown;

IT IS on this 9th day of July, 1982;

ORDERED that the defendants shown hereafter pay the plaintiff, Township of Jackson their applicable percentages, of the costs of defense incurred by the Township of Jackson for the defense of the actions captioned Adelung, et als. vs Township of Jackson, et als. vs ABC, Inc., et als., Civil Action No. 79-2613 and Ayers, et als., vs Township of Jackson, et als., vs ABC, Inc., et als., Civil Action No. L-5808-80, in accordance with the Courts Order of September 1, 1981, with credit being given for all monies previously paid by United States Fidelity and Guaranty Company

and Insurance Company of North America.

IT IS FURTHER ORDERED that the defendants indicated herein pay the indicated percentages of defense costs, which is based on the periods of coverage by each, commencing February 11, 1972 and ending October 7, 1980:

CARRIER	PERIOD OF COVERAGE	DAYS OF COVERAGE	PERCENTAGE OF DEFENSE COSTS
Continental Insurance Company	3/15/72 - 3/14/73	365	11.543%
United States Fidelity and Guaranty Company	3/15/73 - 3/15/79 & 3/14/80 - 10/7/80	2,399	75.869%
Jackson Township	2/11/72- 3/14/72	33	1.045%
Insurance Company of North America	3/15/79 - 3/14/80	365	11.543%
TOTALS		3,162	100%

IT IS FURTHER ORDERED that the issue of payment of the costs of defense of the Township of Jackson by the primary carriers in the action captioned The State of New Jersey, Department of Environmental Protection vs The Township of Jackson, et als., Civil Action No. C-2149-79 and the costs and fees incurred in the prosecution of the instant action, together with interest on defense costs incurred by The Township in all actions, are reserved pending further order of the Court; and

IT IS FURTHER ORDERED, the vouchers submitted by The

19X

Township of Jackson in the Ayers, et als., vs Township of Jackson, et als., vs ABC, Inc., et als., and Adelung, et als., vs Township of Jackson, et als., vs ABC, Inc., et als., actions shall be paid by the Continental Insurance Company, United States Fidelity and Guaranty Company and the Insurance Company of North America, in the percentages set forth above, within thirty (30) days of receipt, unless otherwise ordered by this Court.

JAMES M. HAVEY, J.S.C.

HOFFMANN-LA ROCHE INC.

NUTLEY • NEW JERSEY • 07110

LAW DEPARTMENT
JOHN D. ALEXANDER
SENIOR ATTORNEY
(201) 235-3447

October 1, 1985

Ms. Denise Drace
New Jersey Office of Legislative Services
State House Annex
Room 305
Trenton, NJ 08625

Re: Environmental Impairment Liability Insurance

Dear Ms. Drace:

Following our recent conversation on the activities of the Special Legislative Committee, I recalled that Roche had previously submitted written comments on the same topic to the United States Environmental Protection Agency through the offices of the Pharmaceutical Manufacturers Association (PMA). The PMA is an industry trade group representing most pharmaceutical companies, including many of the largest corporations in this state, such as Ciba Geigy, Merck, Sandoz, Schering and Beecham. In response to a Federal Register notice of August 21, 1985 on the availability of environmental impairment liability insurance, PMA solicited comments from its membership and then presented a summary to EPA. Rather than further burden what appears to be a fairly complete docket of speakers, I would like to enter the PMA letter in the record in this matter, and I request that the Committee consider this as Roche's position.

I understand there will be a second hearing on this topic in the future, and I hereby request that you notify me of same in the event Roche desires to submit additional comments at that time.

Thank you for your consideration.

Very truly yours,

John D. Alexander
Senior Attorney

JDA/al
enclosure
cc: R. Harney
M. Harris
B. Walker, Esq. (PMA)

PHARMACEUTICAL MANUFACTURERS Association

1100 FIFTEENTH STREET, N. W.
WASHINGTON, D. C. 20005
AREA CODE 202 835-3510
CABLE-PHARM/WASHINGTON, D. C.
TWX-710822948-PMA-WSH

BRUCE J. BRENNAN
VICE PRESIDENT AND GENERAL COUNSEL

September 20, 1985

Docket Clerk
Office of Solid Waste (WH-562)
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Re: Comments on Proposal Entitled "Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; Liability Coverage" Which Appeared in the August 21, 1985 Federal Register (50 Fed. Reg. 33902).

Dear Sir or Madam:

The Pharmaceutical Manufacturers Association is a voluntary nonprofit association composed of 120 firms engaged in the discovery, development, manufacturer and marketing of prescription drugs and diagnostic products. As owners and operators of hazardous waste treatment, storage and disposal facilities our members welcome the opportunity to comment on the availability of insurance necessary to satisfy the requirements of the Resource Conservation and Recovery Act ("RCRA").

RCRA regulations require that owners and operators demonstrate liability coverage during the operating life of the facility for bodily injury and property damage to third parties which results from operation of the facility. Owners or operators of hazardous waste treatment, storage or disposal facilities must maintain liability coverage for sudden accidental occurrences in the amount of at least $1 million per occurrence with an annual aggregate of at least $2 million. Owners or operators of surface impoundments, landfills, or land treatment facilities used to manage hazardous wastes must maintain liability coverage for nonsudden accidental occurrences in the amount of at least $3 million per occurrence with an annual aggregate of at least $6 million. 40 CFR §264.147 (a) and (b).

PMA members have found that insurance coverage to satisfy the RCRA regulatory requirements is increasingly difficult to obtain. When such insurance is available, high premiums make the coverage prohibitively expensive, and high deductibles and limitations on coverage make it almost valueless. At the time the financial responsibility requirements were established coverage for sudden and accidental occurrences was standard in comprehensive general liability policies. Supplemental environmental impairment liability policies could be obtained at moderate cost to cover non-sudden occurrences.

Since that time many insurers have excluded coverage for sudden and accidental occurrences from comprehensive general liability policies. Such coverage can now be located only with great difficulty, and costs are becoming prohibitive. Supplemental environmental impairment liability coverage is now virtually nonexistent. When available, the policies offer little protection due to limits on coverage and restrictive and limiting endorsements. For example, one PMA member obtained EIL insurance in 1984 with limits of $20 million per claim and an annual aggregate of $40 million. The insurance company refused to renew the policy in 1985 due to loss of reinsurance for EIL coverage. Our member has identified only one market that could entertain the underwriting of its account. If accepted, limits on coverage will be $10 million per claim and $10 million aggregate. A number of restricting and limiting endorsements will probably be included, thereby limiting the protection offered by the policy. Despite the reduced coverage, premiums are projected to be 200% to 250% higher. More significantly, our member is doubtful that coverage will be offered even under these conditions.

This example is typical of the situations our members face in attempting to comply with the RCRA insurance requirements. Such difficulties in obtaining liability coverage are not limited to poorly designed or improperly managed facilities. The contraction of the pollution insurance market is having an impact across the board.

Several factors appear to be responsible for the current market situation. Most important is the recent liberalization of statutory and common law liability standards. Such changes in the law have made recovery easier, thus leading to a proliferation of environmental lawsuits. Consequently, insurors and reinsurors are unable to measure their risks and are reluctant to offer coverage. This situation is unlikely to change until a relatively extended period of high premiums and low loss levels persuades insurors to reenter the market. Given the current judicial, legislative and regulatory climate, it is difficult to predict when this will happen.

Clearly, alternative regulatory approaches are required. We believe that a range of options should be offered which would demonstrate financial responsibility. In lieu of the current insurance requirements, EPA could accept letters of credit or performance bonds. In addition, intercorporate guarantees could be used to demonstrate financial responsibility where a parent or affiliated corporation possesses significant assets within the U.S. Finally, a federal reinsurance mechanism should be considered as a way of assuring the availability of environmental insurance coverage.

Respectfully submitted,

Bruce G. Brennan

Bruce G. Brennan

TOWNSHIP Of DOVER
Toms River, New Jersey 08753

Reply to: Township Comptroller *Telephone (201) 341-1000*

October 2, 1985

State of New Jersey
Legislative Environmental Impact Liability
Study Commission
Room 438
State House Annex
Trenton, NJ 08625

Re: Municipal Insurance Crisis

Honorable Commission Members:

The Township Committee of the Township of Dover has asked me to appear before your Commission as Township Comptroller and Secretary to the Insurance Fund Commission.

More specifically, the Township of Dover has been unable to obtain pollution liability insurance after contacting approximately fifty insurance companies. The one company that did respond favorably indicated that the Township would have to sustain approximately $8,000 in engineering fees before an insurance application could be processed and would not cover any closed landfill sites.

If the Township received a favorable report from the engineering company, the policy would take a minimum of six months to effect coverage. Although the total premium was not known, the Township's insurance agent indicated that the policy would cost in excess of $100,000 per annum.

Based on the above experience, the Township of Dover feels that it is encumbent upon the Commission to suggest legislation that would enable the Township to secure the necessary insurance coverages in order to operate the day-to-day activities of the Township government.

I have attached for your review other insurance data with regard to the Township's renewal of its total insurance package which indicates an approximate increase of 140% with premiums increasing from $502,000 to $1,203,000 with considerably less coverage in many areas.

If you will require any additional information to assist you in your study, I will be happy to provide the information.

Very truly yours,

DENNIS F. O'NEILL
Township Comptroller
Secretary, Insurance Fund
Commission

DFO:mab
Attachments

Quantex™ CORPORATION
1107 CONVERY BLVD., PERTH AMBOY, N.J. 08861 (201) 826-8600 TWX 710 998-087

July 19, 1985

Mr. Dennis O'Neill, Comptroller
Township of Dover
33 Washington Street
P. O. Box 728
Toms River, NJ 08753

Dear Dennis,

Just to bring you up to date on where the Insurance Program stands so far.

We are attempting to secure higher limits for the Police Professional Liability. We are not comfortable at the one (1) million dollar level, but that is all I was able to get at the time. We recommend a limit of at least $5 Million. The Umbrella carriers were unwilling to provide coverage at any price. Your insuror, City Ins. Co., cannot offer more than $1 Million -- a lack of reinsurance. I am trying to find an excess layer at this time.

The carrier for Public Officials, National Union, is willing to provide an additional $1 Million at a cost of $18,995.

A.I.G., your primary carrier, will consider a Catastrophe Policy for the Township's automobiles. I am following up on that.

Insofar as Pollution Liability is concerned, there are only three carriers currently underwriting the exposure. They are: A.I.G.; St. Paul Ins. Co.; and Pollution Liability Ins. Assoc., a group of 42 member companies.

A.I.G. will provide specific site coverage only and will not cover Sudden and Accidental. They will not cover any closed landfill sites and nothing near CIBA-GEIGY. They would possibly cover such sites as sewage treatment plants, maintenance garages, etc., but only after extensive engineering and at a cost of approximately $8,000. in fees. It would take six (6) months to effect coverage.

Buckelew & Associates is following up with St. Paul.

Pollution Liability Ins. Assoc. will only offer coverage if the General Liability coverage is with one of their member companies, which is not the case with Dover. They do not differ much from A.I.G.'s coverage. No one offers Blanket coverage. Sudden and Accidental is available from A.I.G., but at about twice the premium as gradual.

INSURANCE BID ANALYSIS

July 1, 1985 to July 1, 1986

	84/85 Premiums	85/86 Premiums	Dollar Increase	Percent Increase
SMP Property & Gen'l Liab.	$ 82,075.00	$261,120.00	$179,045.00	218%
Auto Liab. & Damage	100,000.00	296,000.00	196,000.00	196%
Police Bus	Included	3,486.00	3,486.00	100%
TOTAL AUTO	$100,000.00	$299,486.00	$199,486.00	199%
Umbrella Liability				
1st 1984 $5 Mil-1985 $3Mil.	$ 17,500.00	$ 58,900.00	$ 41,400.00	237%
2nd $5 Million	2,500.00	194,000.00	191,500.00	7660%
TOTAL - 1984 $10M 1985 $8M	$ 20,000.00	$252,900.00	$232,900.00	1165%
Police Professional	$ 20,700.00	$ 49,680.00	$ 28,980.00	140%
Boiler & Machinery	$ 4,000.00	$ 5,000.00	$ 1,000.00	25%
Public Officials Liability	$ 4,120.00	$ 24,200.00	$ 20,080.00	487%
Workers Compensation				
A) Fixed Cost Plan (Note 1)	$271,364.00	$309,694.00	$ 38,330.00	14%
B) Self-Insurance Salerno Plan	$271,364.00	$293,000.00	$ 21,636.00	8%
Flood & Earthquake	$ 7,200.00	No Quote		
New Coverages				
EDP Equip. ($505,000)	0	$ 1,771.00	$ 1,771.00	100%
Judicial Liability	0	No Quote		
TOTAL	$502,259.00	$1,203,851.00	$701,592.00	140%

(Note 1) Fixed Cost Workers Compensation Plan Reduced From 25% Up-Front Dividend Plan to 10% Dividend Plan With $39,147.00 Dividend Payable After Policy Expiration Audit. Premium Shown At Net Cost.

TOWNSHIP Of DOVER
Toms River, New Jersey 08753

Reply to: *Telephone (201) 341-1000*

TOWNSHIP OF DOVER

Ocean County

Buckelew Associates - Agent

Companies that refused outright:

1. Aetna Casualty
2. Firemen's Fund
3. Continental
4. INA
5. Ohio Casualty
6. Selected Risks
7. St. Paul
8. USF&G
9. Crum & Foster

Follow-up requests that were refused:

1. Hartford
2. Home Ins. Co.

Follow-up request with approval based on restrictions in letter you have:

1. National Union

Coverage Finally Obtained Through A.I.G. With Absolute Polution Exclusion.

QUANTEX
43 outright refusals

CARUSO & BAXTER
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW
CRYSTAL BROOK PROFESSIONAL BUILDING
ROUTE 35
EATONTOWN, N.J. 07724

RAYMOND E. CARUSO
(LIC. U.S. TAX CT. & U.S. CT. CLAIMS)
GREGORY S. BAXTER

(201) 542-2236

MAILING ADDRESS
P.O. DRAWER S
EATONTOWN, NEW JERSEY 07724

October 1, 1985

New Jersey State League of Municipalities
407 West State Street
Trenton, New Jersey 08618

Attention: William G. Dressel, Jr., Assistant Executive Director

Re: Municipal Insurance Crisis

Dear Mr. Dressel:

I am the Borough Attorney for West Long Branch in Monmouth County, New Jersey. We received your communication of September 12 advising of a meeting to be held on October 2 at the State House Annex for the purpose of taking testimony on the issue of the alarming increase in municipal insurance. Although we will not be sending a representative to that meeting, the Borough of West Long Branch wants the League to know, as well as the study commission, that we have had similar difficulties.

This past August 1, our liability policies terminated and we were placed in the most difficult position of locating insurance for the next 12 months. There were two major problems. Firstly, our existing carrier refused to write much of the insurance line that we previously had, causing us to look for new carriers to cover our Borough. This task alone was difficult enough.

The second, and equally important problem, was that of cost. Although I do not have all of the figures at my disposal for the prior 12 month period and the 12 months period which is coming, I can tell you that the increase was more than just substantial. It caused us to seek an emergency temporary appropriation and was many thousands of dollars more than we had reasonably anticipated, even with slight increases.

Like most municipalities, we will soon find ourselves in a position where we simply will not be able to puchase liability insurance even in the event the same is offered for sale. As you may also know, we were unable to obtain any toxic waste coverage since our insurance adviser told us that no one is writing such insurance in the United States.

For your reference, I am enclosing a copy of our form letter which was sent out this past August to our elected representatives advising of our problems and requesting their assistance in this most critical matter.

Very truly yours,

GREGORY S. BAXTER

GSB/wr

cc: Mayor & Council
Ann Clarke, Borough Clerk

TESTIMONY OF JOHN HENNINGSON, P.E.
VICE PRESIDENT, MALCOLM PIRNIE, INC.
PARAMUS, NEW JERSEY

BEFORE THE
ENVIRONMENTAL IMPAIRMENT
LIABILITY STUDY COMMISSION

OCTOBER 2, 1985

ON BEHALF OF
CONSULTING ENGINEERS COUNCIL
OF NEW JERSEY

TESTIMONY OF JOHN HENNINGSON, P.E.
VICE PRESIDENT, MALCOLM PIRNIE, INC.
PARAMUS, NEW JERSEY

MY NAME IS JOHN HENNINGSON. I AM LICENSED BY THE STATE OF NEW JERSEY AS A PROFESSIONAL ENGINEER. I AM ALSO A VICE PRESIDENT OF MALCOLM PIRNIE, INC. OF PARAMUS, NEW JERSEY. MALCOLM PIRNIE, INC. AND ITS PREDECESSOR FIRMS HAVE BEEN PROVIDING PROFESSIONAL ENGINEERING SERVICES FOR OVER 75 YEARS. WE HAVE HAD AN OFFICE IN NEW JERSEY SINCE THE 1960'S. SINCE THAT TIME THE PARAMUS OFFICE HAS GROWN TO ALMOST 80 STAFF SUPPORTED BY OVERALL CORPORATE RESOURCES OF OVER 500. THE STAFF IS MULTIDISCIPLINARY INCLUDING ENGINEERS, SCIENTISTS, ARCHITECTS AND PLANNERS.

MALCOLM PIRNIE, INC. SPECIALIZES IN SOLVING ENVIRONMENTAL PROBLEMS. IN THE EARLY YEARS WE FOCUSED ON THE PUBLIC HEALTH ISSUES OF PROVIDING A CLEAN WATER SUPPLY. LATER THE BUSINESS BEGAN TREATING WASTEWATER BEFORE IT WAS DISCHARGED TO THE ENVIRONMENT. MORE RECENTLY OUR EFFORTS HAVE EXPANDED INTO SOLVING PROBLEMS ASSOCIATED WITH SOLID WASTES AND INDUSTRIAL/HAZARDOUS WASTES.

TODAY I AM SPEAKING ON BEHALF OF THE CONSULTING ENGINEERS COUNCIL OF NEW JERSEY.

THE PROFESSIONAL ENGINEER FORMS A CRITICAL BRIDGE BETWEEN A PUBLIC OR PRIVATE SECTOR CLIENT WHO NEEDS A PROBLEM SOLVED AND THE CONTRACTOR WHO ACTUALLY BUILDS OR IMPLEMENTS THE SOLUTION. IN MANY CASES, LAWS MANDATE THAT THE DESIGN OR MORE SPECIFICALLY THE PLANS AND SPECIFICATIONS BE PREPARED BY A LICENSED PROFESSIONAL ENGINEER. EXAMPLES ARE THE FEDERAL CLEAN WATER ACT, RCRA, AND ECRA. THE INTENT IS TO ASSURE THAT THE PUBLIC IS PROTECTED FROM CATASTROPHIC FAILURES WHICH WOULD CAUSE DAMAGE TO PROPERTY, INJURIES, UNNECESSARY FINANCIAL COSTS OR ENVIRONMENTAL IMPACTS. IN ADDITION, THE PE ACTS AS THE CLIENTS AGENT MONITORING CONSTRUCTION TO ASSURE THAT THE PROJECT IS COMPLETED AS PLANNED.

CURRENTLY, ENGINEERS ARE SUFFERING AN IMAGE PROBLEM. THE HIGH FEDERALLY FUNDED WORK LEVELS OF THE 1970'S SPAWNED A GREAT INCREASE IN THE NUMBER OF FIRMS. THE SLOWDOWN IN THE EARLY 80'S CREATED A VERY COMPETITIVE CLIMATE. MANY CLIENTS ARE NOW USING THIS SITUATION TO FORCE PRICE COMPETITION BETWEEN PROFESSIONAL ENGINEERS ON PROJECTS. CAN YOU IMAGINE SHOPPING AROUND FOR THE LOWEST PRICE ON OPEN HEART SURGERY FOR YOUR SON OR FOR A LAWYER TO DEFEND YOU AGAINST A VEHICULAR HOMICIDE CHARGE? DOES IT MAKE SENSE TO SHOP FOR SOMEONE TO DESIGN A BUILDING OR A BRIDGE OR A POLLUTION CONTROL FACILITY WHERE HUNDREDS OF PERSONS MAY BE AFFECTED. ENGINEERS FIND THEMSELVES FORCED TO REDUCE THE SCOPE OF SERVICES TO THE BARE MINIMUM IN ORDER TO BE COMPETITIVE. THIS PRESSURE TO REDUCE THE FACTOR OF SAFETY IS CLEARLY NOT IN THE PUBLIC'S INTEREST AND INCREASES THE POTENTIAL FOR FUTURE LIABILITY.

MOST CONSULTING ENGINEERING FIRMS ARE SERVICE ORGANIZATIONS AND DO NOT HAVE SIGNIFICANT FINANCIAL OR OTHER ASSETS. THEREFORE, THE MAJOR BASIS FOR SATISFYING CLAIMS INVOLVING

PROFESSIONAL ENGINEERS ARE ERRORS AND OMISSIONS INSURANCE POLICIES WHICH ARE SIMILAR TO THE SO-CALLED "MALPRACTICE" POLICIES FOR OTHER PROFESSIONALS SUCH AS MEDICAL DOCTORS. SINCE LAST YEAR OUR PREMIUMS FOR PROFESSIONAL LIABILITY INSURANCE HAVE DOUBLED.

THE PROPOSED POLLUTION EXCLUSIONS WILL PRECLUDE COVERAGE FOR CLAIMS RESULTING FROM POLLUTION EVEN WHERE THE INCIDENT IS ANCILLARY TO THE SPECIFIC PROJECT (I.E., HIGHWAY OR BUILDING CONSTRUCTION). WITHOUT COMPLETE COVERAGE MANY, IF NOT MOST, PROFESSIONAL ENGINEERS WILL AVOID PROJECTS WHERE THERE IS EVEN A REMOTE POSSIBILITY OF CLAIMS RESULTING FROM POLLUTION. AS A MINIMUM, MANY IMPORTANT ENVIRONMENTAL PROGRAMS IN NEW JERSEY WILL BE SUBSTANTIALLY CURTAILED IF NOT STOPPED.

THE PROBLEM IS NATIONAL IN SCOPE. SEVERAL WEEKS AGO I MET WITH A GROUP OF 50 ENGINEERS IN WASHINGTON TO DISCUSS FEDERAL LEGISLATION, SELF-INSURANCE AND OTHER POSSIBLE ACTIONS. HOWEVER, STATE TORT LAW CANNOT BE OVERCOME BY FEDERAL LEGISLATION. EACH STATE MUST TAKE ACTION ON ITS OWN BEHALF.

GOVERNOR KEAN'S EMERGENCY ORDER MAY PROVIDE A SHORT-TERM STABILIZATION FOR SOME ENGINEERS BUT WON'T HELP THOSE FIRMS WHO HAVE NOT BEEN ABLE TO RENEW THEIR POLICIES BEFORE HIS ACTION. CLEARLY LEGISLATION IS THE ONLY LONG-TERM SOLUTION.

IT IS ESSENTIAL THAT THE CURRENT, BROAD APPLICABILITY OF STRICT JOINT AND SEVERAL LIABILITY RESULTING FROM COURT DECISIONS BE LIMITED THROUGH LEGISLATION ON BOTH THE FEDERAL AND STATE LEVEL. THE INSURANCE CRISIS ALSO MAY BE MITIGATED THROUGH INDEMNIFICATION, ESTABLISHMENT OF A "GOOD SAMARITAN"

DEFENSE, CAPS ON THE EXTENT OF LIABILITY, OR A COMBINATION OF THESE ACTIONS. ONE THING IS CRYSTAL CLEAR, IF THE CURRENT MOMENTUM OF ENVIRONMENTAL ACTION IN NEW JERSEY IS TO BE MAINTAINED, IMMEDIATE ACTION ON THE PART OF THE STATE LEGISLATURE IS IMPERATIVE.

ON BEHALF OF THE CECNJ, I THANK YOU FOR THIS OPPORTUNITY TO TESTIFY BEFORE YOU. I STRONGLY URGE YOU PASS LEGISLATION THAT WILL MITIGATE THIS CRISIS.

XXX. SUBCONTRACTS. The names, qualifications, and references of all proposed subcontractors not specified under this contract shall be submitted in writing by Contractor to the State's Authorized Agent as part of the RI/FS Work Plan Scope of Work. Following issuance of a work order, the Contractor must receive written approval from the State's Authorized Agent for any additional subcontractors not named in the work order. Contractor shall not subcontract any portion of the work to be performed under a work order without the prior written approval of the State's Authorized Agent. Approval by the State's Authorized Agent allowing Contractor to subcontract any work shall not relieve Contractor from responsibility for any and all work performed under this contract. Contractor shall ensure and require that any subcontractor agrees to and compiies with the terms of this contract.

A list must be provided that describes the prime Contractor's and each subcontractor's major equipment to be used on the site, whether it is owned or rented, and where it is located. The list is to include mobilization equipment also such as flat-bed trailers. No equipment shall be removed from a site without the express permission of the State. This condition is not intended to prevent a Contractor from moving any equipment, but only to assure that equipment which has been obligated or committed by a contract is used for the specified purpose.

For the purposes of this contract, Leggette, Brashears, & Graham, Compuchem, Pace Laboratories, Environmental Research Group (ERG), Bay West, Braun Engineering, Martinez Mapping, and Stevens Well Drilling are subcontractors approved by the State. The Contractor shall also require subcontractors to comply with all the appropriate terms of this contract including and specifically Parts VII, XXIV, XXXI, XXXII, XXXIII, XL, XLI, and XLVIII.

XXXI. HEALTH AND SAFETY. The Contractor shall ensure that all personnel of the Contractor and subcontractors under this contract have received health and safety training appropriate to the tasks the personnel are engaged in under this contract. The Contractor shall be solely responsible for the health and safety of its employees in connection with the work performed under this contract. The subcontractor shall be solely responsible for the health and safety of its employees in connection with work performed under this contract.

XXXII. WASTE REMOVAL. All wastes resulting from the site investigation including, but not limited to, drill cuttings, spent cleaning fluids, samples, and protective clothing shall appropriately be disposed of by the Contractor on behalf of the State. All hazardous wastes shall be managed according to State and Federal laws and regulations. All manifests for off-site transport of wastes will be signed by the State's Authorized Agent using the State's EPA generator numbers. By entering into and performing the requirements of this contract, the State does not intend to "assume control over any release or threatened release" as that phrase is used in Minn. Stat. § 115B.04, subd. 8 (1984) and in Minn. Stat. 115B.05, subd. 7 (1984). Further, nothing in this contract is intended to be construed as a waiver of the Torts Claims Act, Minn. Stat. § 3.736 (1984) or any other law, legislative or judicial, limiting governmental liability.

XXXIII. LIABILITY. Contractor agrees to defend, indemnify, save and hold the State, its agents and employees harmless from any and all claims or causes of action arising from willful, reckless or negligent acts or omissions in the performance of this contract by Contractor or Contractor's agents or employees. This clause shall not be construed to bar any legal remedies Contractor may have for the State's failure to fulfill its obligations pursuant to this contract. The defenses provided under sections 115B.04 and 115B.05 of the Environmental Compensation and Liability Act, in effect on the date of execution of this contract, are a material condition of this contract and shall be available to the Contractor and the State as defenses to liability arising from the Contractor's performance of its duties under this contract. The services provided by the Contractor in the performance of its duties under this contract are acts taken or omitted in preparation for, or in the course of rendering care, assistance, or advice to the State pursuant to section 115B.17 of the Environmental Response and Liability Act or in accordance with the national hazardous substance response plan pursuant to the Federal Superfund Act, under 42 United States Code section 9605, or at the direction of an on-scene coordinator appointed under that plan, with respect to any release or threatened release of a hazardous substance. Nothing in this contract is intended to be construed as a waiver of the Torts Claims Act, Minn. Stat. § 3.736 (1984) or any other law, legislative or judicial, limiting governmental liability.

XXXIV. STATE AUDITS. The books, records, documents, and accounting procedures and practices of Contractor relevant to this contract shall be subject to examination by the State, the Legislative Auditor, and EPA for a period to 3 years following expiration or cancellation of this contract.

XXXV. OWNERSHIP OF DOCUMENTS. All drawings, specifications, data, photos, and other work products prepared by the Contractor in the performance of its obligations under this contract shall be exclusive property of the State and shall be remitted to the State upon the expiration or cancellation of this contract. The Contractor shall not use, willingly allow, or cause to have such materials used for any purpose other than performance of the Contractor's obligations under this contract without the prior written consent of the State. However, the Contractor may retain any document which contains proprietary information not developed under this contract. The State shall be allowed to review any documents retained by the Contractor. Plans and specifications or designs of proprietary Remedial Actions not developed under this contract but used pursuant to this contract shall not be used for any other project by the State without written permission from the Contractor. The Contractor may retain a file copy of all documents produced under this contract.

XXXVI. AFFIRMATIVE ACTION. In accordance with Minnesota Statutes, 1984, Section 363.073, Contractor certifies that it has not had more than 20 full time employees in the State of Minnesota at any time over the past 12 months or that it has a current certification of compliance issued by the Commissioner of Human Rights pursuant to Minnesota Statutes Section 363.073.

XXXVII. WORKER'S COMPENSATION. In accordance with the provisions of Minnesota Statutes, 1984, Section 176.182, State affirms that Contractor has provided acceptable evidence of compliance with the worker's compensation insurance coverage requirement of Minnesota Statutes, 1984, Section 176.181, Subdivision 2.

New Jersey Section, American Society of Civil Engineers

A People-Serving Profession

PLEASE REPLY TO:

William H. Fleming, Jr., P.E.
NJ Section President - ASCE
c/o Speitel Associates
302 Evesham Commons
Route 73 and Evesham Road
Marlton, NJ 08053

My name is William H. Fleming, Jr., P.E., and I am President of the New Jersey Section of the American Society of Civil Engineers. We include 3,000 members in New Jersey and over 100,000 nationwide. I live in Woodbury, Gloucester County and work in Marlton, Burlington County as senior vice-president of Speitel Associates.

Civil engineering covers a broad field of professional expertise. We are working in government at all levels (federal, state, county and local) not just as government employees but also as private practice engineering contractors to your towns and counties; we are in education, in industry, in construction and finally in trouble.

In the early 1970's, America, with an increased environmental conscience, became aware of what civil engineers have been doing for centuries: stopping pollution and to the best of our abilities maintaining our environment. Water and wastewater facilities, air pollution control devices, municipal and industrial solid and hazardous waste facilities all fall within the purvey of our profession. Our work includes the wastewater treatment plant in your community that lets you flush the toilet without polluting your water supply, it includes the scrubbers or precipitators on PSE&G's power plant that allow you

turn on a light and still breath fresh air, and the waste disposal facilities that allow you to safely change and dispose of the oil from your car. We are also the profession frequently called upon to engineer the clean-up and resolve pollution problems that plague our environment.

There are a few corollaries that go along with the practice of civil engineering:

1. We do not now know and likely will never know all that there is to know. So improvements will have to be made in the future.
2. We are not perfect, only human, and mistakes are going to be made.
3. Our work is tied very closely to the social and economic values established by society and mandated and funded by society through our elected leaders.

Essentially, it takes three elements: Law, Money and Civil Engineering all working together in order to assure a quality environment now and in the future. We must all work in concert or suffer the consequences. The population of this country and planet for that matter, has grown too large to turn back to simpler times. Burying one's head in the sand or walking away will not solve the problems, they will only worsen and become more costly in their environmental impacts and financial need.

A complex series of financial and legal actions now threaten our environmental protection efforts. Because of the poor performance of market investments over the past year or more, liability insurance companies have apparently been losing money. Their reaction has been to raise rates and reduce risks. One risk they have decided to cut is pollution. Liability insurance

carriers are proposing to exclude from coverage any project that involves the "actual, alleged or threatened discharge, dispersal, release or escape of pollutants".

"Pollutants" is defined as any solid, liquid, gaseous or thermal irritant or contaminant including smoke, vapor, soot, fumes, acids, alkalies, chemicals and waste.

The reason that pollution has been picked on is that the insurance and reinsurance industry are uncomfortable with the broad liability definitions and interpretations established by the three branches of government regarding pollution. According to the insurance industry very stiff and strict laws, regulations and court decisions have resulted in undeterminable risks stemming from unreasonable third party liability.

We are faced with a difficult problem in the near future, civil engineers, industries, contractors, municipalities, counties, the state, and the federal government will be without pollution insurance unless steps are taken. The environmental efforts and initiatives necessary for our population to survive may come to a screeching halt. Certainly, civil engineering can not afford to bear the uninsured risks associated with work in the pollution field. Furthermore, without insurance, third party litigants who should reasonably be compensated will receive no benefits. The current situation is self-defeating and unacceptable to all of us playing responsible roles in pollution abatement and protection of our environment.

Earlier I spoke about a concerted effort of the law, money and civil engineers being essential. There is much still to be done by us. I believe the

civil engineering profession is willing to perform its legitimate role. We ask that you, as legislators responsible for the continued well being of our state and its environment, review this impending crisis and consider steps to avoid a halt to responsible environmental pollution control action.

New Jersey Conservation Foundation

300 Mendham Road, Morristown, N. J. 07960 *201-539-7540*

STATEMENT TO THE

ENVIRONMENTAL IMPAIRMENT LIABILITY INSURANCE COMMISSION

OCTOBER 2, 1985, Trenton, N. J.

by David F. Moore, Executive Director

Chairman Dalton:

My name is David F. Moore, and I am executive director of the New Jersey Conservation Foundation, a private, nonprofit, state-wide membership organization concerned with open space acquisition and environmental quality throughout the state.

As a non-profit land trust group, we rely on commercial liability insurance. We have been concerned over the years about problems associated with toxic dumping, since we have not been able to obtain insurance to cover clean up costs should we acquire lands contaminated by toxics unknown to us. Now it seems we won't be covered for third party suits after next January, in any form.

At the moment, coverage is applied to us for third party damages so long as a toxics incident is a current event. As I understand it, that same coverage may be continued for future renewal terms for a much higher price. We are not covered now for problems associated with slow or gradual pollution problems, where the incident occurred some time past, nor where we had knowledge a problem existed. Renewal coverage for sudden occurances will apparently only be available on a claims made basis, if it is available at all.

The New Jersey Conservation Board of Trustees has determined that we can no longer acquire lands for open space purposes by gift or by purchase if we do not have an affidavit from the donor or seller stipulating that he has no knowledge of any dumping or toxics incidents. After next January, it would appear that we will be unable to accept donations of open space land, or acquire land in advance of public agencies, or continue to hold land acquired in past years. As a nonprofit charitable organization, we can not afford to be uninsured, and the way it looks now, we won't be able to afford what limited coverage may be available.

We are not insurance experts, we just know we and other land trust organizations need some help. It would appear that other commercial land owners will too.

New Jersey Environmental Lobby

46 Bayard Street, Suite 320
New Brunswick, N.J. 08901
(201) 246-6832

STATEMENT OF THE

NEW JERSEY ENVIRONMENTAL LOBBY

BEFORE THE

ENVIRONMENTAL IMPAIRMENT LIABILITY INSURANCE STUDY COMMISSION

OCTOBER 2, 1985

The New Jersey Environmental Lobby (NJEL) welcomes the opportunity to present its views on environmental impairment liability insurance to the Study Commission. We understand the Commission's mandate is "to review all the economic, environmental, and legal issues related to the environmental liability insurance problem and propose solutions." We hope our comments will assist you in your difficult mission.

NJEL is vitally concerned about two aspects of waste generation and disposal which may effect community residents throughout New Jersey:

1. prevention of human exposure to these wastes, and

2. compensation for victims who have been injured as a result of exposure.

GOVERNMENTAL LIABILITY ISSUES

NJEL recognizes the difficulty public entities have had obtaining environmental impairment liability insurance at affordable rates. Although we believe that solutions need to be found, we are concerned that some solutions have been proposed which may create other, more serious problems.

Specifically, several bills have been introduced which would severely limit the liability of public entities and public employees. NJEL has very strong reservations about these bills, S-2545 (Lynch) and A-3073 (Foy), and have communicated our concerns to the sponsors and appropriate committee chairpersons. We are pleased to report that they have agreed to wait until they have analyzed the Study Commission's reports before moving their bills. (We have attached the relevant correspondence on the bills' substance for the Commission's consideration.) While we do share the sponsors' concerns about the high cost of environmental impairment liability insurance, we do not agree that the solution should be one which could result in municipalities operating waste facilities with any lesser standard of care than which is currently mandated. We also do not agree that the solution should be one to increase the burden of proof which citizens must satisfy to be compensated for injuries related to non-sudden pollutant releases.

It has been argued that municipally-run solid waste disposal facilities serve an important public need and that pollutant discharges from these facilities are an unwelcome but inevitable consequence. Government officials make an interesting case when they argue that since these facilities are a public necessity (at least for the short term until comprehensive recycling programs are implemented), and since the associated risks are not voluntarily assumed, limits on municipal liability may be appropriate. NJEL agrees that part of the answer may be to limit municipal liability for non-sudden pollutant releases. We firmly believe, though, that insurance liability provisions for sudden, accidental releases should not be changed.

The solution to the municipalities' problems must be constructed, however, so that it does NOT sacrifice the commitment to pollution prevention or victims' compensation measures we all share. Specifically, the following provisions are essential components of any reform package to limit the liability of public entities and employees. If they are fully implemented NJEL confidently predicts lower environmental impairment liability insurance premiums for governmental entities, lower and more easily defined risk for insurance companies, better pollution control at solid waste facilities, fewer lawsuits and an overall safer and healthier New Jersey.

I. POLLUTION PREVENTION MEASURES WILL PROTECT PUBLIC HEALTH

NJEL recommends several pollution prevention measures to guard against unnecessary exposure to toxic chemicals. Citizen participation in all aspects of siting, construction, operation, maintenance and closure of municipally owned or operated waste facilities will reduce the likelihood of human exposure to harmful substances.

A. The citizens need the right to inspect.

Enabling legislation to require the creation of local citizen task forces on municipal solid waste facilities should be enacted. This legislation would provide for frequent--and unannounced--site visits (i.e., tours of the landfill, incinerator, etc.) by the citizen's group. The presence of a citizen watchdog agency will, in and of itself, help to guarantee less risk to public health and safety.

B. The citizens need the right to hire experts.

The above-referenced enabling legislation would also provide that the citizens task force would have the right to hire experts at the government's expense who would participate in the site visits. With the assistance of these experts, local citizens will be able to fully participate in key decisions concerning the facility. This will also reduce human exposure to toxic substances which may be released from these waste facilities.

C. The citizens need the right to sue.

Citizens currently have fairly broad rights to sue under the Environmental Rights Act. Several additional provisions are essential to guarantee a meaningful right to sue: attorney and expert witness fees can not be limited. Legislation is currently moving through the Legislature which would make this necessary change; the Commission should keep a watchful eye on this bill (S-2876 Russo) to insure that it does indeed become law. The Environmental Rights Act should be analysed to determine whether lawsuits can be filed against both the state for failure to enforce a facility's permits and against the facility owner and/or operator for failure to comply with permit requirements.

D. An enforcement program should be developed to encourage citizen involvement.

A bounty system should be implemented which would pay to citizen "enforcers" part of the fines or penalties levied against an owner or operator of a facility which has violated its permit requirements. Such a system will encourage citizen involvement in the overall operation of the facility. And it will make the enforcement role of government officials more effective.

E. Gross violators should be subject to criminal penalties and imprisonment.

A very effective way to guarantee compliance with permit conditions is to establish criminal sanctions for severe violations. The operators of a facility will be less inclined to conduct themselves in a criminal manner if they believe that their actions could result in imprisonment or fines. New legislation is necessary to fully define criminal behavior in regard to the operation of a waste facility.

II. PUBLIC HEALTH DAMAGES MUST BE QUCIKLY AND FAIRLY COMPENSATED

Limits on municipal liability for non-sudden pollutant releases necessitates the development of another system from which victims will be able to seek compensation for injuries related to these pollutant releases from the waste facility. The system, the "Victims Compensation Fund," has to be accessible to potential claimants, not too expensive and should not have an excessively demanding burden of proof which victims have to meet.

A. The Victims Compensation Fund will be capitalized by a tipping fee on solid waste disposal.

By capitalizing the Victims Compensation Fund from a tipping fee on solid waste disposal, adequate resources will be available to pay eligible claims submitted to the Fund. Even with this additional tipping fee, rate payers will still be better off. Limitations on governmental liability for non-sudden pollutant releases (as a part of this package anticipates) will result in

reduced insurance rates for local governments--which in turn reduces local property rates. Accordingly the additional tipping fee will be offset by reduced property rates.

B. Eligibility for relief will depend on the nature of the illness.

Any person or group who suffers from a medically verifiable chronic or progressive illnesss, condition, or disability (such as cancer, genetic mutations, behavioral abnormalities, physiological malfunctions or death) that is alleged to be the result of exposure to a non-sudden pollutant release from a waste facility may file a claim to receive compensation from the Fund.

C. Claims must be filed in a timely manner.

Claims must be filed within two years of the time the harmed individual or qualified dependent discovers or should reasonably have discovered that the disease may be associated with the exposure casued by the waste facility.

D. Awards should fully compensate a victim.

Awards should include payments for loss of income, loss of profit, full medical expenses, and relocation expenses. Supplementary awards should be available for later discovered illnesses or damages related to the same exposure which were

unknown when the initial claim was filed. Emergency relief should also be awarded if the claimant will suffer undue hardship during the pendency of a claim proceeding.

E. The victim's burden of proof will be less than in traditional tort proceedings.

The claimant may recover if there is evidence that 1) the victim suffers from a qualified disease, and 2) there is a reasonable likelihood that the facility caused or was a significant factor in causing the disease, and 3) the victim was in fact exposed to non-sudden pollutant releases from the facility.

F. The Victims Compensation Fund will be managed by an independent board.

The Fund will be governed by an autonomous board appointed by the Governor with the advice and consent of the Senate.

* * * * * * *

NJEL does not profess to be tort liability experts or insurance experts. We do offer the following comments on other potential solutions to the environmental impairment liability insurance dilemma. Of course, our positions on several of the following matters would change if the recommendations discussed

above were implemented.

1. We do not recommend a legislated limitation on liability. If the limitation is too high, the status quo will remain unchanged: insurance companies will still charge high premiums and the insured will still have difficulty obtaining adequate policies. If the limit is too low, owners or operators of waste-related activities would have little incentive to do the best possible job of containing their pollution.

2. We do not recommend new legislative definitions of insurance policy terms. The result would be no insurance protections for non-sudden pollutant releases.

3. We do not recommend the creation of an administrative claims procedure to review cases and avoid protracted litigation until questions like the following are answered: How would liability be determined? Who would pay? What representation would be available to citizens? Where would they obtain their experts? What would guarantee lower insurance rates? What would guarantee that insurance companies would continue to write policies in our state?

5. We do not recommend limiting punitive damage awards since their purpose is to encourage others to comply with the applicable laws and regulations.

6. We do not recommend capping the risk exposure since selecting a meaningful cap would be difficult, if not impossible. Furthermore, capping risk exposure may limit legitimate recoveries for innocent victims.

7. We do not recommend changing from strict liability to negligence or limiting individual liability. See the attached documents.

8. We do not recommend the restoration of contributory negligence as a defense to tort claims. Comparative negligence is a much more equitable system and guarantees that injured parties are compensated. Contributory negligence could preclude unwitting citizens from obtaining the appropriate relief.

9. We do not recommend the creation of an assigned risk pool. It doesn't seem to have worked very well with automobile insurance policies. In addition, there still would be no guarantee that insurance companies would choose to write environmental impairment liability insurance policies in our state.

10. We do not recommend retroactive liability limitations on policies since there still are no incentives created for insurance companies to write policies in the future.

* * * * * * *

NJEL would like to offer one final comment. We recognize the difficulty hazardous waste site clean-up contractors are having obtaining the necessary liability insurance for their work. We also recognize the need for some solutions to this problem. NJEL is currently studying federal efforts concerning similar issues as they relate to the Superfund reauthorization. We would be happy to provide the Commission with more information on this as the Congress develops its position; we also recommend the Commission staff to analyze the federal efforts.

NJEL recommends the following articles and reports cited therein for further consideration:

1. "Insurance Against Pollution is Cut," The New York Times, March 11, 1985.

2. "Risky Business: Insurers are Shunning Coverage of Chemical and Other Pollution," The Wall Street Journal, March 19, 1985.

3. "Wary Insurers Peril Pollution Cleanup," The Star Ledger, April 29, 1985.

4. "Where High-Risk Companies Run for Coverage," Business Week, July 22, 1985.

New Jersey Environmental Lobby

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(201) 246-6832

June 24, 1985

Hon. Martin Herman, Esq.
Chair, Assembly Judiciary Committee
State House Annex--Room 446
Trenton, New Jersey 08625

RE: S-2545 (Lynch)
"Pollution Liability of Public Entities and Employees"

Dear Assemblyman Herman,

Senate Bill 2545 (Lynch) has been scheduled for your Committee's consideration today. The implications of S-2545 are so severe that we urge you to hold the bill until an extensive review and analysis can be conducted by your Committee and the groups which the New Jersey Environmental Lobby represent.

The legislative history of the bill is as follows: It was introduced on December 7, 1984 and referred to the Senate Judiciary Committee. On January 28, 1985 it was reported to the full Senate with committee amendments. It was then amended on the Senate floor (on February 28th) and passed the Senate on March 7th with a vote of 32-5. The bill was then referred to your Committee.

Unfortunately, the New Jersey Environmental Lobby (NJEL) and its member groups only learned of the bill after it had been passed by the Senate. Accordingly we were not able to provide input on the bill before now. NJEL pledges to work closely with you to resolve any outstanding questions about this bill so that it can be amended and released in the near future. Our specific comments follow.

The Senate Judiciary Statement on the bill (dated January 28, 1985) is a good description of the bill; I have attached it for your easy reference. The Statement does not, however, describe the bill's implications.

Generally speaking the bill addresses the pollution liability of public entities and public employees. It would very substantially increase the burden of proof necessary for a citizen to meet before succeeding in an action for

pollution-caused damages. Specifically, the bill eliminates the strict liability provisions currently contained the the "Spill Compensation and Control Act" and the "Sanitary Landfill Closure and Contingency Fund Act." Strict liability is also the standard toward which New Jersey's common law is moving. In place of strict liability, a person harmed by pollution caused by a public entity (or by a public employee) would basically have no recourse against a governmental entity since he would have to rely on the standards set forth in the New Jersey Tort Claims Act. The New Jersey Tort Claims Act severely limits the liability of a governmental entity to negligently administered ministerial acts. Negligently administered discretionary acts, which cause most pollution-related problems, do not subject the government to any liability. The bill also eliminates joint liability of governmental entities.

By eliminating strict liability of governmental entities in complex pollution cases, the legislature would be placing an extremely heavy burden on our state's citizens. In fact citizens in most pollution cases would now have to identify other sources of pollution which are NOT the government. For example, under S-2545, when pollution damage has been caused by a landfill owned by a government agency, the citizen would now have to sue the waste haulers--but could not sue the government itself if the pollution was the result of a discretionary act. This is an especially unfortunate result since it is the government which has all the essential records and documentation which are needed for a successful action against polluters. Public policy considerations strongly dictate against such an intolerable situation being permitted to arise. Furthermore, the elimination of joint liability for governmental agencies may prevent an injured citizen from seeking compensation (in the rare situation when a case could be brought against a governmental entity; i.e., a negligently administered ministerial act) from the only party that does have the resources to adequately compensate him.

The purpose of the strict liability provisions in the Spill Fund and the Landfill Closure Act is to prevent such inequitable situations from arising. Innocent victims of government-related pollution should be able to seek compensation from that governmental entity in a meaningful way. It must be left up to the government--which does have the necessary resources--to seek redress from other sources of the pollution; this responsibility clearly should not be placed on our citizens. If enacted, S-2545 would do just that: it would shift the burden from the government to the public. To put it succinctly, when one asks who should pay for the damages caused by a "pollution incident"

and the choice is between an innocent citizen and a governmental entity (which was to some extent involved in causing the pollution) public policy demands that the government pay the bill.

NJEL recognizes the difficulty which local and county governments and private businesses are having in obtaining affordable environmental liability insurance. We are also very aware of the implications of the court decision involving Jackson Township. We know that the liability issue is one of the most critical ones which must be addressed by the Legislature. One important step has just recently been taken. Senate Concurrent Resolution 141 (Dalton) has just been released from the Assembly Energy and Natural Resources Committee (on June 17) and should be acted upon by the full Assembly and sent to the Governor very soon. SCR-141, which is attached, creates a legislative study commission which would review all the economic, environmental, and legal issues related to the environmental liability insurance problem and would recommend solutions to those problems. The study commission, to be appointed by the Senate President and Assembly Speaker, is to report back to the legislature no later than September 15, 1985. Accordingly, we urge you to hold S-2545 until after the study commission presents its findings and recommendations.

Thank you very much for your consideration. We hope to have the opportunity to address this matter before your Committee today if S-2545 is called.

Very truly yours,

Jim Lanard

James S. Lanard
Legislative Agent

c: Members of Assembly Judiciary Committee
Senator John Lynch
Professor William Goldfarb, Esq.

GENE A. LUCERO, DIRECTOR
OFFICE OF WASTE PROGRAMS ENFORCEMENT
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE
SUBCOMMITTEE ON WATER RESOURCES
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
U.S. HOUSE OF REPRESENTATIVES
JULY 24, 1985

Thank you for this opportunity to discuss pollution liability insurance issues related to the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund). Today, I will summarize why sufficient availability of hazardous waste management insurance is important to EPA, what we perceive as the causes of insurance market problems in this area, and what EPA's ongoing efforts are to determine the major aspects of RCRA and CERCLA insurance issues and potential approaches to resolve the issues.

I will begin by stating that sufficient availability of commercial RCRA/CERCLA insurance is important to EPA for several reasons. Insurance supports our regulatory program to improve environmental management practices of insured parties. Further, by offsetting a degree of activity related risk, insurance fosters broad participation in hazardous waste management, including, for example, contractor assistance in expediting CERCLA response cleanups. Consequently, EPA is concerned about the growing shortage of available RCRA/CERCLA insurance and is taking steps to determine why the shortage has occurred and what can be done about it.

Before discussing where our efforts have led us to date, I will provide a brief description of the pertinent relationships between RCRA and CERCLA and the insurance community. Both RCRA and CERCLA were created in response to public concern over hazardous waste management practices in the United States.

RCRA regulates current and future hazardous waste management practices. CERCLA provides funds and enforcement authority to cleanup past inadequate hazardous waste management practices. CERCLA also contains liability provisions that seek to improve future hazardous waste management practices.

Specific insurance requirements are in effect under RCRA. RCRA regulations require that facility owners/operators demonstrate financial responsibility for sudden and nonsudden events through several means, including self or commercial insurance. Commercial insurance for sudden events must provide minimum coverage of $1 million per occurrence, $2 million aggregate. Commercial insurance for nonsudden events must provide minimum coverage of $3 million per occurrence, $6 million aggregate. Approximately 4800 facilities are subject to sudden liability requirements and approximately 1000 facilities are subject to nonsudden liability requirements. The RCRA requirements for nonsudden liability have been phased in over time on the basis of owner/operator size. The smallest owners/operators, those with sales or revenues of less than five million dollars, were required to obtain insurance by January 15, 1985. In addition, recent RCRA amendments require that owners/operators certify their compliance with financial responsibility requirements by November 8, 1985 or lose interim status.

In response to hazardous waste management insurance requirements, insurer offered coverage to date has been the standard form Comprehensive General Liability (CGL) policy and more recent Environmental Impairment Liability (EIL) policy. Both of these policies were developed to meet other insurance needs and were simply adapted by the insurance industry in an attempt to accomodate the RCRA/ CERCLA market.

Since the early 1970's, CGL policies have included protection against sudden and accidental releases of materials that cause injury to others on an occurrence basis. Occurrence based insurance provides perpetual coverage so long as injuries were sustained while the policy was in force. Claims may be filed for injury sustained while the policy was in force even after the policy is terminated and premiums are no longer being collected.

Until recently, CGL policies contained a pollution exclusion clause which can be the basis for denying coverage if the insurer can show that the occurrence could be expected or intended and that it therefore was not sudden and accidental. The significance of this exclusion will be addressed later.

EIL insurance is specifically designed to cover problems resulting from gradual contamination. EIL insurance provides coverage for bodily injury and property damage resulting from gradual contamination. EIL policies generally do not provide for performing remedial work, although they often will support cleanup of existing pollution in order to avoid future third party claims and minimize existing claims.

EIL coverage is provided on a claims made basis. Claims made insurance provides coverage, generally with specified retroactive limitations, for any claims made during the term of the policy regardless of when the event upon which the claims are made took place. Policies typically require that the insured be in compliance with applicable regulatory standards. Liability can be excluded if the damage results from a knowing failure to comply with applicable regulations.

In theory, a major component of EIL coverage is an independent risk assessment of insurance applicant facilities. The risk assessment utilizes engineering and scientific techniques to assess the potential for both sudden and nonsudden environmental damage arising from the operations of the insured.

Although a market for hazardous waste management insurance and applicable insurance policies exists, insurance industry willingness to provide both sudden and nonsudden coverage is virtually nonexistent, especially for firms in the chemical industry. According to our most current information, there are only two insurers for nonsudden liability remaining for Fortune 500 firms, and 3 insurers for small to medium firms. In addition, while insurance availability is diminishing, rates have increased by 50%-200%.

The implications of the insurance withdrawal are that sufficient insurance may not be available for: owners/operators subject to RCRA financial responsibility provisions; potentially responsible parties; and parties involved in CERCLA site response subject to potential third party damage claims. In addition, owners/ operators

subject to and unable to comply with the January 15, 1985 deadline are currently in violation. RCRA owners/operators unable to obtain sufficient insurance may not be able to meet the November 8, 1985 financial responsibility certification requirements. These facilities could lose interim status and be forced to close. Finally, cleanup contractors have expressed concern that insufficient insurance could lead to their reducing participation in CERCLA cleanups.

The Agency has proposed a Federal Register notice to take comments on the availability of insurance and may make modifications based on the comments received. Any modifications, however, would affect only the six States where EPA implements the program.

In order to develop potential solutions to this problem, EPA believes that it is important to fully understand the conditions which have led to the unavailability of RCRA/CERCLA insurance. To date, our research indicates that there are several important reasons for the current reduction in availability of RCRA/CERCLA insurance. I will discuss these reasons in detail.

One reason is that the insurance industry has departed from its traditional business practices. Traditionally, the insurance industry obtained its profits from underwriting income. However, with interest rates remaining high in recent years, the insurance industry embarked on a strategy to obtain profits from investment income. As a result, the insurance

industry was willing to write policies at a loss in order to obtain money that could then be invested for a net profit. Consequently, a highly competitive insurance industry often accepted premiums that did not adequately reflect policy risks. Now, declining interest rates have reduced investment income and insurers are no longer able to offset policy losses.

It is important to note that insurance industry profits, like the stock market, are subject to changing economic conditions that are often cyclical. During periods when economic conditions result in large insurance industry losses, the insurance industry may respond by curtailing their riskiest policies. This response is due in part to the insurance industry need to maintain a sufficient ratio of premiums to reserves. At present, hazardous waste management insurance are among the curtailed policies.

Litigation costs and court rulings over coverage of hazardous waste related claims are, at present, the two factors of apparent greatest concern to the insurance industry. In part, this concern is based on recent court rulings that address coverage of hazardous waste related claims. To date, litigation and court rulings have concerned the CGL policy form. Insurers have raised the standard "pollution exclusion" to deny coverage of pollution claims, while insureds and other claimants have sought to establish coverage through the exception to the pollution exclusion for "sudden and accidental" waste discharges.

In several cases over the past five years, courts have interpreted the nonsudden and gradual exclusionary language narrowly, following the judicial precept of interpreting ambiguities in contracts against the drafter.

Thus, insurance industry losses may be attributed to the insurance business practices I mentioned previously and also to ambiguous insurance contracts that created high potential exposure to insurers. This latter contention is supported by insurance industry comments during the early 1970s when the pollution exclusion was inserted into the CGL policy. These comments assert that the pollution exclusion language did not clarify coverage, but rather only confused the definition of occurrence warranting coverage. In addition, hazardous waste management was not a high profile public issue during the early 1970s. Therefore, it is probable that the insurance industry inserted the pollution exclusion clause into the CGL policy aware of its ambiguity but unaware of its potential implications.

This contention is further suppored by current insurance industry efforts to eliminate policy ambiguities. More restrictive CGL policies are being drafted. These policies will eliminate sudden pollution coverage but will, in general, allow firms to buy back coverage on a claims made basis. In addition, pollution coverage for both sudden and nonsudden events will be offered through EIL policies. However,

it may be some time before the insurance industry has recovered from its current economic condition and is willing to provide sufficient EIL coverage.

While the remaining firms that offer non-sudden environmental impairment liability insurance have followed sound underwriting practices, required risk assessments, and carefully limited policy coverage, from EPA's perspective, the problems will not be solved until private insurance is available that: provides premiums that adequately reflect risks; limits insurer liability to an acceptable degree of risk; fosters participation by qualified parties in the hazardous waste management industry; offers a stable source of defined compensation to pollution victims; and serves as an effective market force mechanism to help regulate and reduce environmental damage by demanding responsible environmental management as a condition and cost for insurance.

To date, many approaches have been proposed to address the pollution liability insurance shortage. EPA believes that no one approach, but rather a combination of several approaches, will be able to solve the shortage. In summary, approaches that EPA believes merit further consideration include: a return to careful underwriting practices through use of environmental audits, premiums that reflect risks, and contracts that address policy limits in unambiguous terms. Establishment of captives by various segments of the industry is another positive approach.

To elaborate, EPA could work with the insurance and hazardous waste management industries to create an environment where insurers are willing to offer adequate policy coverage. Policies could be developed to more carefully define insurers' limits of liability and lessen the risk of more expansive interpretation of the risks than the insurers intended. For RCRA facilities, the most effective mechanism could involve conducting insured specific environmental audits based on existing scientific, engineering, and medical data. For CERCLA cleanup contractors the most effective mechanism could involve both varying the coverage and premiums based on the risks of specific contractor activities and requiring contractors to adhere to stringent operating procedures. Examples of contractor activities with differing risks include contractors who investigate a site as opposed to contractors who actually cleanup a site. CERCLA already requires contractors to adhere to stringent operating procedures for all activities such as site safety and site investigation.

EPA could facilitate this approach by providing insurers with comprehensive RCRA/CERCLA technical data compiled over the past decade. This data may serve as an actuarial basis from which to calculate premiums related to policy coverage. EPA could also provide technical assistance as appropriate.

This option would provide several benefits. First, the insurance industry could enter the market having determined limits of liability to their satisfaction. Second, a source of defined compensation to pollution victims would be available

through the private sector, minimizing Federal intrusion. Third, such insurance would provide an effective market force mechanism to help regulate and reduce the risk of environmental damage by an insured facility or organization by demanding responsible environmental management as a condition for insurance. Improved operations could result from the incentive of lower premiums and insurer oversight. Fourth, this option would consider environmental risk as a condition of financial responsibility. This consideration should lead, for example, to RCRA permitting of environmentally sound and financially responsible facilities of varying size.

Given the cyclical nature of the insurance industry, EPA is concerned that the insurance industry, as currently structured, may not be able to provide viable coverage that sufficiently demonstrates financial responsibility for insureds. A key response to this problem would be development of an approach that provides stable long-term insurance coverage. For example, the hazardous waste management industry could form a company, known as a captive, to insure their own risks that are common to the group, with insurance companies retaining some portion of the risk.

Another proposal that EPA supports is clarification of the liability of contractors conducting hazardous waste site cleanups under CERCLA. A standard of negligence for cleanup contractors would allow insurers to provide coverage based on a traditional standard of performance without sacrificing the objectives

of CERCLA liability provisions related to the actions of the remainder of the hazardous waste management industry. A standard of negligence should encourage qualified contractors to participate in hazardous waste site cleanups and insurers to provide adequate, affordable, and stable insurance.

At this point, I would like to comment on options which EPA does not now consider viable. The first option is to eliminate, as members of the insurance industry have proposed, strict, joint, and several liability provisions under CERCLA.

Our success in promoting private party cleanup is the product of several factors:

- o Effective use of Superfund's powerful liability provisions;
- o Aggressive pursuit of enforcement remedies wherever feasible;
- o Willingness to employ the Superfund as needed to protect human health and the environment from hazardous waste sites; and
- o Implementation of a settlement policy which promotes private-party cleanup.

Negotiated private party cleanups, then, are essential to the success of our national Superfund strategy. We want those companies responsible for contamination in the first place to take remedial steps. Where protection of human health and the environment require it, we do not hesitate to use the Fund for cleanup work. If necessary, we will use litigation to force private cleanup or recover our costs.

Aggressive enforcement of the law, including the use of strict, joint and several liability, has been instrumental in our success in promoting private party cleanups.

Congress considered its approach carefully when it debated Superfund in 1979 and 1980. It decided that only a statute with tough enforcement tools could succeed in dealing with a problem of such magnitude. Our experience has proven that Congress was right.

We are concerned that Congress is now considering amendments which could weaken Superfund's liability provisions by requiring the agency to apportion cleanup costs among responsible parties, and thus adversely affect EPA's ability to carry out its responsibilities under the Act.

I cannot stress enough that the purpose of Superfund is to clean up the nation's worst hazardous waste dumps. Using the law's enforcement tools, that is what we are doing.

During the next five years, EPA plans to begin cleanup work at approximately 1,000 national priority sites. We anticipate that responsible parties will undertake the work at some 350 of those sites. It is only through effective use of strict, joint, and several liability that we will be able to accomplish this level of private party involvement in our priority cleanup program.

The Superfund enforcement program is one of the most efficient and effective in the Federal government. We are seeing real progress in getting sites cleaned up, and in recovering the costs we have incurred in doing the cleanups ourselves.

During the past several years, the Department of Justice has filed 75 civil actions seeking injunctive relief for site cleanup by responsible parties. An additional 49 cases have been filed where the government is seeking to recover its costs for Federally financed cleanup under Superfund. EPA has issued administrative orders requiring responsible parties to undertake cleanup at well over 200 sites.

While these statistics are indicators of an aggressive program, it is the actual results of our enforcement actions which demonstrate effectiveness. That translates to dollars and actual cleanup. Through fiscal year 1984, the Superfund enforcement program obtained private party settlements for cleanup worth $329.5 million. So far this year, that cumulative total has grown by more than $100 million. More is expected as the pace of both the enforcement and cleanup programs accelerates.

The liability standards established under Superfund have contributed to EPA's success in obtaining substantial private party cleanup at hazardous waste sites. The courts have established as a matter of Federal common law that the liability of potentially responsible parties at Superfund sites is strict, joint and several, unless the responsible parties can demonstrate that the harm is divisible.

Joint and several liability provides that, where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm. Where the harm is divisible, so is the liability.

Knowledge that they can be held jointly and severally liable for full cleanup gives responsible parties the impetus to negotiate settlements for cleanup when the harm at a site is indivisible. Without this powerful tool, incentives for delay while parties quibble over the particulars of individual contribution at the site may outweigh the real priority -- getting on with the job of cleanup.

In addition to being a powerful tool, joint and several liability is also a very practical mechanism in achieving site cleanup by private parties. Most Superfund sites constitute environmental harm that is truly indivisible. Wastes are frequently intermixed. Even if they were originally segregated, they have become intermingled with the soil, groundwater, and surface water.

Site records are frequently deficient. It is often difficult to determine with any certainty who sent wastes to the site, what the wastes were and in what quantities, and where they were placed. Dozens and even hundreds of parties may have been involved.

Critics of joint and several liability under Superfund contend that, in theory, the government could sue the generator of a single drum of waste found at a massive site for the entire cleanup of that site. In practice, however, this does not happen. First of all, we negotiate with all interested responsible parties, regardless of their size or contribution to the site. In practice, this means we are negotiating settlements with anywhere from 1 or 2 parties to over 250 parties at some sites.

When negotiations fail, the government will sue a substantial group of responsible parties. In the majority of cases filed, the named defendants include owners and operators and contributors of about 65-100% of the waste at the site. Selection of defendants is based on contribution of waste at a site (both type and volume), strength of evidence, and the financial viability of a party.

Unless government employs joint and several liability in a rational and consistent fashion, the courts may be unwilling to apply it in Superfund cleanup cases. Responsible parties also have an opportunity to show that their contribution to the problem at the site <u>is</u> divisible and therefore not subject to the joint and several liability standard.

In addition, Section 106 of the Superfund law specifies that courts should grant such relief as the public interest and the equities of the case may require. In assessing settlement proposals, EPA considers aggravating and mitigating circumstances and other appropriate equity factors.

It is important to remember that a strong enforcement program and substantial involvement of responsible parties in site cleanup are critical elements in the Administration's Superfund reauthorization proposal. Continued expansion of this effort will supplement the $5.3 billion fund-financed cleanup we have put forward.

EPA's enforcement program has worked effectively in recent years. To make it work even better, EPA and the Justice Department have developed a settlement policy for dealing with parties willing to take on their part of the cleanup burden. The policy facilitates settlements with private parties and addresses many of the concerns raised with Superfund's liability scheme. I want to highlight four particular aspects of the policy:

- o opportunity for settlement;
- o settlements for less than 100% and mixed funding;
- o settlements with de minimis parties; and
- o releases from liability.

The prospect of litigation or Fund-financed cleanup is essential to provide responsible parties with incentives to negotiate for cleanup. The Agency also provides responsible parties with opportunities to settle before litigation and pretrial costs are incurred.

Our settlement policy identifies a number of stages in the CERCLA Cleanup process that give responsible parties an opportunity to take over or pay for CERCLA cleanup before litigation begins.

- o The Agency identifies and notifies responsible parties of their potential liability under CERCLA;
- o The Agency provides responsible parties with information on the identity of other responsible parties and the volume and nature of wastes disposed at the site;
- o The Agency offers responsible parties an opportunity to perform or participate in the studies leading up to the choice of remedy; and
- o Once the proposed remedy for the site has been identified, the Agency gives responsible parties a formal opportunity to make offers for cleanup action, before enforcement or Fund-financed cleanup would begin. In considering these offers, EPA makes a pragmatic assessment of whether acceptance of the settlement offer would expedite cleanup.

Upon settling with cooperative parties, the government will vigorously seek all remaining relief from the parties whose recalcitrance made a complete settlement impossible. The government will select parties for litigation to involve the largest manageable number of parties from the site.

The settlement policy provides flexibility for assessing responsible party proposals for cleanup. It explicitly states that the agency will consider offers for less than 100% of cleanup or the costs of cleanup. In addition, we anticipate that both the Fund and private resources may be used at the same site in some circumstances. Where the agency settles for less than 100% of cleanup costs, it can use the Fund to assure that site cleanup proceeds expeditiously

and then sue to recover these costs from non-settling responsible parties. If the Federal government accepts less than 100% of cleanup costs and no financially viable responsible parties remain, Superfund monies may be used to make up the difference.

This approach is fully consistent with joint and several liability. The government is making a pragmatic assessment of whether settlement for less than 100% will expedite cleanup, regardless of liability. The settlement policy sets out a number of criteria to be used in considering an offer for less than 100% of cleanup. They include the nature and volume of wastes at the site, ability of parties to pay, the nature of the evidence available, the need for expedited cleanup, the nature of the case remaining against non-settling parties, and inequities and aggravating factors. If the government determines on the basis of such criteria to accept an offer for less than 100% of cleanup costs, it can then make a determination of whether mixed funding is useful to expedite cleanup. Mixed funding will involve reimbursement from the Fund, rather than advance payment to responsible parties.

The agency will not apportion costs among responsible parties. Such a system would delay cleanup, be complex to administer, and increase the chance of litigation without resolving any questions of fairness among responsible parties.

Small contributor parties have argued that they cannot settle their liability with the Agency without becoming involved in extensive negotiations with other responsible parties. In such situations, their legal costs may be disproportionately large in comparison with their contribution to the problems at a site. Whether or not they are targeted for litigation by the Federal government, they may be brought into a case by other responsible parties as third party defendants. In this setting they are also likely to incur disproportionate legal costs.

The settlement policy authorizes negotiations and settlements with small contributors, even when offers from these parties do not constitute a substantial portion of the costs of cleanup. The policy provides that, in negotiating with small contributors, the Agency should limit its efforts to low volume, low toxicity disposers who would not normally pay a significant portion of the costs of cleanup.

The contribution protection amendment in the Administration's proposal and in H.R. 2817 would also benefit small contributors. If they are parties to a good faith, judicially approved settlement, they would not be subject to contribution actions by other responsible parties sued by the Agency.

Responsible parties who offer to clean up sites generally want to negotiate a release from liability as part of the settlement. Responsible parties frequently want some certainty in return for assuming the costs of cleanup, and we recognize that releases will provide some certainty and be a valuable

incentive for private party cleanup. On the other hand, we also recognize the current state of scientific uncertainty concerning the impacts of hazardous substances, our ability to detect them, and the effectiveness of different types of remedies at hazardous waste sites. It is possible that remedial measures will prove inadequate at some sites because of limitations on our current scientific understanding, unknown conditions, or failures in the design and construction of the remedy.

Our settlement policy provides for releases from liability under the general principle, "the better the remedy, the better the release." The language does not include any specific hierarchy of approved remedies. Instead, it provides the flexibility to reflect changes and improvements in our scientific understanding of hazardous waste management.

Requests for releases are assessed on a site-specific basis, in light of the alternatives considered for the cleanup. Releases are more likely to be appropriate where the chosen remedy is the most environmentally protective alternative that is economically feasible at the site. The policy therefore does not indicate whether parties disposing wastes off-site at RCRA-permitted or regulated facilities will automatically be granted releases. In some cases, off-site disposal may be the most environmentally protective alternative that is economically feasible; in others, alternatives such as treatment or destruction may be feasible.

At present, this settlement policy provides guidance on implementation of the enforcement program on the matters that I have just discussed. I believe that the policy provides flexibility and fairness in the application of joint and several liability. I will work with you to incorporate appropriate provisions of the settlement policy into the statute to maintain an aggressive and successful program, based on the current liability standard, that can be applied consistently and fairly across the country.

As I indicated earlier, we are opposed to the mandatory apportionment schemes that have been suggested thus far as substitutes for the liability standards established under CERCLA. Apportionment of costs should be conducted by responsible parties in developing proposals for cleanup, or by courts after the liability of responsible parties has been determined. Mandatory apportionment schemes that would require the Agency to identify each responsible party's share of the cost of cleanup before it could negotiate with or litigate against these parties could impair the effectiveness of the CERCLA enforcement program.

Substituting an apportionment scheme for the strict, joint and several liability scheme established by the courts under the existing statute could delay cleanups and increase the costs involved in reaching settlements and taking enforcement actions.

The specific drawbacks of such a scheme are:

- <u>It would reduce incentives for negotiation and increase the chance of litigation</u>.

- It would be complex to administer.
- It would not adequately address the question of fairness among responsible parties.

Under joint and several liability as interpreted by the courts, responsible parties can apportion costs among themselves, or attempt to demonstrate to the court's satisfaction that the costs are divisible. Courts may also apportion costs following an adjudication of liability and a determination that parties are jointly and severally liable. A mandatory apportionment scheme would instead require the Federal government to apportion the cost of cleanup among parties, or between responsible parties and the Fund, before the Agency could commence enforcement action.

EPA would have to determine the appropriate share of cleanup costs for each responsible party at a site before it could negotiate with responsible parties or litigate for cleanup. The government would then have to negotiate with each party individually. Fund cleanups would also be costlier and slower because of the need to obtain the additional evidence for cost recovery actions.

Apportionment discourages cooperation among responsible parties. Under joint and several liability, the government negotiates with potentially responsible parties as a group. The incentive to reach collective settlement would be virtually destroyed if each party could not be held liable for more than a specific predetermined share.

Rather than assuming the responsibility for cleanup and negotiating the costs among themselves, responsible parties would instead litigate with the government concerning the general fairness of the apportionment scheme and the specific facts concerning its application to them.

If the maximum potential liability of the responsible parties is established by the government through an apportionment scheme, then responsible parties will have little incentive to settle and a lot of incentive to litigate. There is little reason to accept a percentage of costs in settlement negotiations, if the worst possible outcome after litigation is that the same percentage of costs would be imposed by the courts. Under joint and several liability, responsible parties have an incentive to settle, because courts may impose a greater proportion of costs as a result of litigation.

No single factor is likely to be adequate for apportioning costs among responsible parties. Apportionment schemes suggested for CERCLA have generally involved a mix of factors, such as volume of waste, degree of toxicity, costs for cleanup of particular wastes, and a number of other possibilities.

Development of apportionment criteria for assessing such factors as the degree of toxicity or hazardousness of waste are likely to be the subject of intense criticism by responsible parties.

The government would be required to make a number of additional factual showings. For example, it would be under a much more difficult burden to show who put what substances where, whether

particular substances migrated, and where they migrated to, the cost of cleaning up particular substances, and the toxicities of particular substances, both alone and in conjunction with other substances at the site.

EPA resources would be diverted from identifying the appropriate remedy and overseeing cleanup, and would be instead devoted to performing economic allocations among responsible parties and to carrying out investigations designed for litigation needs.

Our experience with responsible parties apportioning costs among themselves at sites is that they initially disagree among themselves as to what methods are fair. Eventually, they negotiate a consensus among themselves. It is not likely that they will view an apportionment scheme imposed by the government as more fair than one which they develop themselves.

Determinations of fairness are highly subjective, and no single apportionment scheme is likely to be acceptable to all parties. For example, contributors of low-volume, high-toxicity waste are likely to favor a volumetric approach, while contributors of high volumes of comparatively innocuous wastes are more likely to object to it.

In short, we believe that the existing CERCLA liability scheme, which allows responsible parties to negotiate apportionment questions among themselves, is much more fair and efficient than a mandatory apportionment scheme that encourages complex litigation to resolve these questions.

In addition, joint and several liability, is a powerful incentive for effective management of hazardous substances. Joint and several liability means that financially sound generators cannot limit their risk of liability by transferring wastes to transporters or disposers who may lack the financial capability or willingness to dispose the wastes properly. The generators remain responsible for the wastes, so they have a strong incentive to arrange for proper disposal and to limit the wastes that they generate. If joint and several liability is abolished under Superfund, then generators will lose this incentive and assuring compliance with the Resource Conservation and Recovery Act will become more difficult. In addition, generators will lose this incentive for developing innovative and alternative methods for limiting wastes generated, and for disposing of wastes.

To summarize, I believe that private party cleanup under Superfund can be accomplished effectively under the existing liability scheme and enforcement process, with the refinements that I have discussed today. We are concerned that a change in the liability standards and process would lead to massive delays and costs that would disrupt the pace of cleanup that we have established.

In closing, EPA has met, and will continue to meet, with a broad group of organizations that are affected by the insurance shortage. These organizations represent the insurance, reinsurance, legal, contractor, and environmental communities. The purpose of these meetings is to fully understand all implications of this issue in order to develop interim and

permanent cooperative solutions that satisfy EPA, the private sector, and the general public.

This concludes my formal statement, Mr. Chairman. I appreciate the opportunity to appear before you today, and I will be happy to answer any further questions you may have.

AEC

The Alliance For Environmental Concerns

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Ms. Denise Drace
N.J. Office of Legislative Service
State House Annex
Room 305
Trenton, N.J. 08625

October 4, 1985

Dear Ms. Drace:

The Alliance for Environmental Concerns, Inc. appreciates the opportunity to submit comments to the Environmental Impairment Liability Insurance Study Commission.

The Alliance for Environmental Concerns is a non-profit New Jersey corporation that provides a coordinated voice for those involved in pesticide application: farmers, lawn care operators, structural pest control operators, arborists, landscapers, mosquito contol commissions, County Boards of Agriculture, dealers, formulators and manufacturers of pesticides. The Alliance represents over 4000 pesticide users through individual and trade organization membership.

The pollution insurance issue has been a difficult business challenge to many of our members. For instance, the structural pest control operators are required by law to have general liability insurance under the Department of Environmental Protection regulations. Many operators are finding it impossible to obtain or cover the skyrocketing costs of this insurance. Lawn care operators are having similar difficulties. Many recently published articles speak more directly to this problem. I have enclosed copies of these for the record.

The Alliance urges the commission to review these and give consideration to: 1.limiting liability, 2.increasing the burden of proof for compensation in pollution lawsuits.

The use of pesticides is overwhelmingly in the public interest. They serve in the control of public health pests, facilitate agricultural production, insure a more aesthetic environment, preserve buildings and even keep our hospitals free of disease vectors. Without insurance these benefits would be unavailable to the people of New Jersey.

We would welcome the opportunity to discuss or present further testimony on this issue at the commission's convenience. Thank you for giving this your consideration.

Sincerely,

Ilona F. Gray

Ilona F. Gray
Executive Director

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RICHARD K. ROSENBERG
OF COUNSEL

October 7, 1985

New Jersey State Legislature
Office of Legislative Services
Division of Legislative Information
and Research
Room 206, State House Annex
CN-042
Trenton, New Jersey 08625

ATTN: Denise Drace
Commission Aide

RE: Environmental Impairment Liability Insurance Study Commission

Dear Ms. Drace:

Enclosed herewith please find a letter to the Commission which I would appreciate your including in the public record. I am sorry that I was unable to remain at the public hearing on October 2 so as to provide this information by way of testimony before the Commission. Thank you for your cooperation and courtesy.

Very truly yours,

ROBERT S. PECKAR

RSP/da

Enclosure

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RICHARD K. ROSENBERG
OF COUNSEL

October 7, 1985

The Environmental Impairment
Liability Study Commission
New Jersey State Legislature
State House
Trenton, New Jersey 08625

ATTN: Senator Raymond Lesniak
Chairman

Dear Senator Lesniak
and Members of the Commission:

I am writing to you as General Counsel to the Building Contractors Association of New Jersey. Most of New Jersey's significant building contractors are members of this Association.

I attended your Commission hearing on October 2, 1985, but was unable to remain after 1:00 p.m. due to a pre-existing commitment. Accordingly, I would very much appreciate your accepting these written comments in lieu of the testimony that I would have offered to you.

Having heard hours of testimony from members of the construction industry, state representatives and other interested parties, it should be apparent that the issue confronting your Commission is not an issue which is unique to New Jersey. Indeed, the dilemma is one of national proportion involving matters as grand as the Super-Fund to matters as mundane as the inability of a small contractor to obtain reasonable insurance to conduct his business. The problem is considerably greater than the inability to obtain insurance for such clearly identifiable hazardous waste projects. Rather, as you have heard, the insurance industry has "changed the rules" so substantially as to quite literally create a major threat to the continued existence of many contractors within the State of New Jersey and elsewhere.

This problem is magnified by the fact that the solution is not merely an increase in insurance premiums. The insurance industry has essentially advised the American construction community that its foreign reinsurers have made the decision that the American system of justice no longer provides a level of predictability which permits the underwriting of comprehensive general liability, special liability and other policies which had been available traditionally over the past decades. Therefore, the solution to this problem will never be an easy one and your job, as members of this Commission, is an awesome one. The Building Contractors Association of New Jersey encourages you to find the solutions which will enable New Jersey's construction community to continue in business and for the benefit of the overall economy and environment of our State. However, it is clear that we must all be realistic about the fact that the insurance industry, as a whole, is looking for major changes in the national scene as well as in the individual states.

The nature of the insurance industry's position regarding to the types of policies and coverages that they are willing to offer is helpful in understanding what your Commission may recommend which will result in the issuance of insurance policies at costs that are appropriate and reasonable. For example:

1. General liability coverage has traditionally been available to contractors upon an "occurrence" basis. This type of coverage meant that a contractor who bought insurance to cover his activities within a particular year would have the benefit of coverage even if a claim is made many years after that covered period has expired. So then, the contractor who had an accident during 1975 with an occurrence policy which covers 1975 will find that he has coverage in 1985 if a claim is made against him at that time.

2. The insurance industry has advised the construction community that all general liability coverage will now be on a "claims-made" basis. This change signifies the fact that contractors will now be purchasing insurance to cover the risk of a claim being made within a particular year without regard for when the events giving rise to the claim occurred.

3. General liability coverage for hazardous waste work is not at all available.

4. General liability coverage for other environmentally risky ventures, including the removal of asbestos from our schools, is likewise unavailable.

5. All risks arising out of the discharge of all hazardous substances (whether in liquid, solid or gaseous form) are now wholly excluded from coverage.

Members of the insurance industry have advised me that these changes have resulted primarily from the adverse reaction of the foreign reinsurers to what they characterize as the "lottery" system of justice in America. Presumably they are referring to multimillion dollar jury verdicts in favor of people whose injuries do not appear to many to justify such large awards. These individuals have also advised me that the underwriters have been concerned about the lack of limits on liability and the lack of limitations on the time period of exposure to liability. They are also concerned about the imposition of automatic liability on their insureds under doctrines of law applied by our courts.

From a contractor's perspective, the result of this dilemma creates a totally unacceptable and untenable situation. In particular,

1. The contractor no longer has an ability to insure risks which have been traditionally insured.

2. The contractor no longer has the ability to insure risk at reasonable cost.

3. The contractor no longer may operate upon the assurance that today's liability will be insured due to the fact that "claims-made" coverage may be offered with yet further exclusions in years to come when the claims for today's occurrences are most likely to occur.

From the public's perspective, this dilemma is severe as well as:

1. The lack of adequate financial coverage through insurance to pay a proper claim may leave injured parties without any reasonable redress, as most construction companies do not have capital in a value nearly approaching the amount of coverage which was able to be obtained for reasonable premiums.

2. As companies withdraw from competition on work which involves the excluded risks, there will be a lack of competition and the public will pay the price.

3. The high cost of insurance will be passed through to the public as a direct reimbursement on work performed where the State is the owner and indirectly as the cost of building increases and those increases express themselves in rental and purchase price increases.

4. Obviously, the lack of the availability of good contractors to clean up the toxic legacy of past abuse may well leave New Jersey citizens with the frustration of having the problem, knowing the solution and being unable to do anything about it.

5. The public should well be concerned that the response to this emergency does not fall prey to the temptation to satisfy the insurers at any cost to regain their insurance.

As you well know, there are no easy solutions. However, there are solutions to these problems. Insurers want to sell insurance. Contractors want to continue to contract and undertake the challenges of toxic cleanups and other environmental work. The public wants those contractors to engage in such works to obtain the benefits of competition. The public wants insurance to be made available to contractors to assure reasonable compensation upon an injury.

During the portion of the hearing that I was able to attend, I heard various suggestions made both from the Commission members and from the speaker's table. I would like to offer some thoughts to the Commission about some specific matters that might assist in the solution to this problem. However, I would urge that the Commission negotiate with the insurance industry so that the Commission has a firm commitment that if proposed recommendations are adopted, then the insurance industry will respond favorably. In order, therefore, to properly evaluate what measures may cause the insurance carriers to offer insurance as in the past, it is first important to identify what are the goals of this entire effort. In that regard, I offer you the goals that the Building Contractors Association of New Jersey would urge to you:

1. That the insurance industry offer comprehensive general liability coverage to New Jersey's contractors on an "occurrence" basis.

2. In the alternative (to (1) above), that the insurance carriers guarantee that they will offer "claims-made" coverage to their insureds without the right to withdraw that coverage or cancel that coverage in future years. (The concern here is that a

contractor could obtain "claims-made" coverage for seven years without a claim being made and then the insurance carrier may change its policy and refuse to issue insurance again during which following year the only claim may in fact be made.)

3. That the carriers insure the contractors against negligent acts in the performance of all construction in New Jersey, whether in the manner of toxic waste cleanup, asbestos removal or any other construction activity.

Having stated these goals, I offer the following recommendations to you as to specific steps which could be part of the solution:

1. There must be a limitation on the time period within which an injured party can sue. The courts have expanded that time period to almost be without any limits whatsoever upon the application of the "discovery doctrine", which is a judicially created doctrine. I recommend that N.J.S.A. 2A:44-1.1 be modified to clearly indicate that no actions for an injury of any type, whether arising out of a hazardous waste cleanup, an asbestos removal job or any other construction may be maintained against a contractor, engineer or architect, or the owner of the property, more than ten years after the completion of the work. The foregoing establishes the basic concept. I would be very happy and willing to work with the Commission in the formulation of very specific language which would accomplish these changes in a way that would not be subject to judicial modification.

2. By statute, absolute liability for the discharge of any environmentally hazardous substance must be eliminated, and the standard of responsibility and liability must be changed to that of negligence, measured against the standard of care applicable at the time of discharge.

3. As a reasonable trade-off for the public's security by the provision of insurance in hazardous waste cleanup and other environmental work of that nature, personal liability should be statutorily limited to damages for the cost of any and all medical care indicated by the injury without a stated limitation for "pain and suffering." By such a legislative provision, the "lottery" type awards may be avoided.

LAW OFFICES
PECKAR & ABRAMSON
A PROFESSIONAL CORPORATION

4. Government should accept a portion of the responsibility for the liabilities created by the performance of environmentally sensitive work where the State or other governmental agency in New Jersey is the party contracting for the performance of that work. It is not the fault of the contractor that an environmental time bomb was placed beneath the earth decades ago, and it is not reasonable for the public interest to expect that the full risk of an accidental discharge should be borne by the contractor. There are any number of ways in which the acceptance of a partial responsibility by the State could be effectuated, including hold harmless agreements.

The Building Contractors Association of New Jersey earnestly appreciates the Commission's consideration of these suggestions and offers to do whatever it can to assist you in your very important and difficult undertaking.

Very truly yours,

ROBERT S. PECKAR

RSP/da

cc: Lawrence Simpson
Joseph Muscarelle
Members of the Board of Trustees
Edward A. Burke

Township of Randolph

MUNICIPAL BUILDING
502 MILLBROOK AVENUE
RANDOLPH, N.J. 07869

Telephone (201) 361-8200

October 2, 1985

Legislative Environmental Impairment
Liability Study Commission
Room 438
State House Annex
Trenton, New Jersey 08618

Ladies and Gentlemen:

The Randolph Township Council has been advised of a meeting to be held on October 2 to consider current difficulties in providing adequate insurance coverage for municipalities.

Unfortunately, other commitments have prevented any representatives of the Township from attending your meeting.

However, the Township Council would urge action by the Commission to recommend revisions in the law to assure proper liability coverage for public agencies. Earlier in 1985, the Township's liability carrier unilaterally cancelled the Township's "Pollution" coverage and also discontinued Police Professional Liability. This action was taken despite an outstanding experience record of the Township in which no previous claims have been submitted. The cancellations were also made despite the continuation of an existing bid for liability insurance that was in effect at the time of the cancellations.

We would urge the Commission to consider actions of this type and recommend legislation to correct this situation. Since we are not able to appear at your meeting, we would ask that this letter be included as part of the official record of the hearing.

Sincerely yours,

George J. Szatkowski, Jr.
Mayor

GJS:esp
cc. Township Council

TOWNSHIP OF CHATHAM

Township Hall
24 Southern Boulevard
Chatham, New Jersey 07928
635-4600

Please reply to:
Office of the Mayor

September 30, 1985

Legislative Environmental Impairment
Liability Study Commission
Room 438
State House Annex
Trenton, NJ 08618

Dear Commission Members:

For your information, the Township of Chatham would like to report that environmental impairment coverage has been specifically excluded from our liability package for the insurance year 11/4/84 to 11/4/85. Prior to that time, it had been included on a "sudden and accidental occurence" basis.

Representatives from both The Frankel Agency of Parsippany and The Maben Agency of Summit have told me that it would be highly unlikely that they would be able to obtain this coverage for the Township for the upcoming 85-86 policy period. Renewals for all other forms of coverage are anticipated.

Very truly yours,

Jeffrey S. Taylor/ms

Jeffrey S. Taylor
Mayor

JST:MB

Copy: Mr. William G. Dressel, Jr.
New Jersey State League of
Municipalities
407 West State Street
Trenton, NJ 08618

NEW JERSEY PEST CONTROL ASSOCIATION, INC.
A NON-PROFIT ORGANIZATION OF MEMBERS OF THE INDUSTRY

529 RICHFIELD AVEN
KENILWORTH, N.J. 070

October 10, 1985

Ms. Denise Drace
NJ Office of Legislative Services
State House Annex
Room 305
Trenton, NJ 08625

RE: Liability Insurance for the
Structural Pest Control Industry

Dear Ms. Drace:

Thank you for the opportunity to submit the following input on the liability insurance market for the Structural Pest Control Industry.

1. Prior to the Governor's emergency order on September 17, 1985, the reinsurance market was in such a turmoil, that a number of firms found it difficult and in some cases, almost impossible to purchase Umbrella Insurance.

2. Since September 17, 1985, both the primary and excess markets have been closed to us. No new policies are being written, and other policies are not being renewed because of the premium restrictions.

3. The NJPCA clearly understands and appreciates the reasons for the Governor's emergency order, but unfortunately it has made a difficult situation worse.

4. Our insurance brokers have informed us that starting January 1, 1986, the polution contamination insurance will no longer be available to our industry. For example, if a vehicle carrying pesticide is involved in an accident resulting in a spill, the pest control firm would not be covered.

If you or your staff would like additional specific details, please feel free to give me a call at (201) 731-8006.

Sincerely,

NEW JERSEY PEST CONTROL ASSOCIATION, I

Richard E. Sameth

Richard E. Sameth
Insurance Committee
118X

LEVENSON, VOGDES, NATHANSON AND COHEN
ATTORNEYS AT LAW
TWO GREENTREE CENTRE
SUITE 122
P. O. BOX 269
MARLTON, NEW JERSEY 08053

DONALD S. LEVENSON
JAMES M. VOGDES, III
ARTHUR J. COHEN*
CHARLES I. NATHANSON
ROBERT H. OBRINGER*
*MEMBER OF N.J. & PA. BAR

(609) 983-1600
OUR FILE #

October 2, 1985

Honorable Raymond Lesniak
Chairman, Legislative Environment
Impairment Liability Study Commission
651 Westfield Avenue
Elizabeth, New Jersey 07208

RE: Municipal Insurance Crisis

Dear Mr. Lesniak:

I am writing to you in my capacity as Solicitor for the Borough of Medford Lakes.

I am writing to you, in lieu of providing formal testimony at the hearings that I understand are taking place on October 2, 1985. Borough Council of the Borough of Medford Lakes desires that this letter be made a part of the record being created in this matter. The Borough wishes to relate to you its experiences regarding municipal insurance coverage.

Effective January 1, 1985, the New Hampshire Insurance Company issued a renewal package insurance policy of property owners insurance (commercial package policy) to the Borough of Medford Lakes for a one year term, commencing January 1, 1985 and terminating December 31, 1985. The Company also issued renewals of automobile and workers compensation policies. The Borough's deposit premiums were $54,574.00 for all such coverage for the year 1985, $10,950.00 of which was for the policy subsequently cancelled. These policies were renewals of the same policies obtained and paid for, for the calendar years 1983 and 1984.

On or about April 30, 1985, the New Hampshire Insurance Company advised the insurance agent for the Borough that "due to unforeseen changes in our underwriting guidelines, the New Hampshire Insurance Group has requested that it be relieved of all general liability coverages relative to the above policy

(POP 20-04-86) no later than May 31, 1985". The Borough declined to voluntarily surrender its insurance, and subsequently, on or about June 11, 1985, the Borough received a "Notice of Cancellation or Non-Renewal" from the Company, purportedly in accordance with the terms and conditions of its policy of insurance. The Notice provided that the cancellation or termination would take effect on July 16, 1985 at 12:01 A.M. The automobile and workers compensation policies were not so affected. Appeals to the Company, the Department of Insurance and the Governor's office were uneventful.

Paragraph 16 of the insurance policy provides for cancellation by either party, which provision is amended by an "amendatory endorsement", which provides for cancellation for non-payment of premium. Said amendatory endorsement also provides as follows:

> "B. Cancellation for a reason other than non-payment of premium: This policy may be cancelled by this Company for any reason other than non-payment of premium, only by mailing to the insured at the last mailing address known by the Company, and to any mortgagee shown in this policy, written notice of cancellation at least 30 days prior to the effective date of cancellation."

The Borough thereupon instituted a suit in the Superior Court of New Jersey, Chancery Division, Burlington County, in the form of a Verified Complaint and Order to Show Cause, initially requesting the court to restrain the proposed cancellation of the insurance on July 16, 1985. A Verified Complaint, Affidavit and Order to Show Cause was presented to Judge Wells in Burlington County, and the Order to Show Cause was signed. The thrust of our complaint was broad in the sense that the Borough alleged both breach of contract, and challenged the enforceability of the cancellation clause on the grounds that said clause, in today's municipal insurance crisis, is contrary to public policy and should not be enforced. The Borough alleged immediate and irreparable harm in the sense that its municipal budget had already been established, and funding was not immediately available to pay for securing replacement coverage. The experience of our insurance agent was that it was very difficult to obtain coverage at all, and the only coverage that could be obtained was less qualitative in the sense that pollution coverage was simply not available. Our argument thus was a monetary argument, in addition to a claim that the Borough was damaged in that it was losing its pollution coverage. Our supporting Brief stressed the fact that there are no "just cause" provisions by statute or regulation for cancellation or non-renewal for this type of insurance, although there are for other types of insurance, such as automobile insurance policies. We also noted that the legislature of this

State at one time apparently recognized a crisis in the municipal insurance market place, in that in 1968, a statute, N.J.S.A. 17:29C-5 provided for a moratorium on cancellation. This statute contains a self-expiration provision.

Judge Wells, on July 11, 1985, signed the Order to Show Cause, enjoined the proposed cancellation on July 16, 1985, and set the return day of the Order to Show Cause for July 26, 1985. Briefs were filed by both the Borough, and the insurance company, and on the 26th of July, Judge Wells rendered a decision, dissolving the restraints, and giving the Borough until July 29, 1985 to obtain replacement coverage. A telephone application to Judge Wells to stay his own order, pending appeal, was denied. The Court, in its oral opinion, stated, among other things, that it did not feel that the appropriate standards had been met with regard to demonstrating "immediate and irreparable injury", and demonstrating "the likelihood of success on the merits". The litigation could continue, but in the interim, it was of course necessary to secure replacement coverage. Thus, even if the Court was to later decide in our favor, it would be a Pyrrhic victory, as the immediate issues had been decided against the Borough, and replacement coverage had to be immediately secured. It has to be recognized that our complaint was not based upon any established right of action (the insurance policy itself, the State statute, and the State regulations all apparently permitting cancellation without "just cause"). Judge Wells did note in his opinion that he thought that such issues might well be the province of the legislature or administrative agency.

As a result thereof, the Borough was required to obtain an emergency appropriation in the sum of $18,000.00, to cover the costs of obtaining replacement coverage. This coverage does not provide for pollution coverage. One of the most distressing aspects of this matter is the fact that in 2-1/2 years of coverage, the Borough had but four minor claims for property damage, the total sum of payment to claimants being $1,277.50, and it is believed that there are no pending personal injury claims. The Borough paid $10,950.00 for this policy for the year 1985, and similar, although lesser amounts were paid for the years 1983 and 1984.

In conclusion, the Borough of Medford Lakes has indeed suffered from the lack of legislative remedy regarding mid-term cancellation of property and casualty liability insurance policies. Accordingly, the Borough of Medford Lakes urges your support in remedying this situation by statute or administrative regulation. I have reviewed the adopted Emergency New Rules and Concurrent Proposal, issued by the Commissioner of Insurance. One concern which the Borough of Medford Lakes has, of course, would be whether or not there can be any consideration for those

municipalities or insureds who in the past have suffered damage, as the result of mid-term cancellations, but who now apparently cannot take advantage of the emergency Rules, and proposed rule changes.

On behalf of the Borough Council of the Borough of Medford Lakes, I wish to thank you for your consideration.

Very truly yours,

LEVENSON, VOGDES, NATHANSON & COHEN

BY _____
JAMES M. VOGDES, III
BOROUGH SOLICITOR
BOROUGH OF MEDFORD LAKES

JMV:maa
cc: Council, Borough of
Medford Lakes
New Jersey League of Municipalities
ATT: William Dressel
Mr. Joseph Morrissey
Mr. John A. Weaver, Jr.

TY OF VINELAND

LINDA DE MATTE
BUSINESS ADMINISTRATOR
EXT. 458

VINELAND, NEW JERSEY 08360 • TELEPHONE: (609) 691-3000

October 7, 1985

Senator Raymond Lesniak, Chairman
Legislative Environmental Impairment
Liability Study Commission
651 Westfield Avenue
Elizabeth, New Jersey 07208

Dear Senator Lesniak:

I attended the meeting of the Legislative Environmental Impairment Liability Study Commission on October 2, 1985, in order that I could present on behalf of the City of Vineland our concerns relative to the current liability insurance crisis. Due to time constraints, an opportunity for testimony on Vineland's behalf was not possible. Therefore, I am addressing my comments to you through this written statement.

The City of Vineland is a community of over 57,000 residents with a current budget of over $47 millon dollars, including our municipal Electric and Water-Sewer Utilities. The City currently pays over 3/4 of a million dollars for insurance.

The City of Vineland was recently notified by our insurance broker of record that we will be renewed by Aetna for General Liability coverage. However, we had been notified in August that we would not be renewed. We are not sure how the Governor's emergency moratotrium affected this determination. A copy of the notice from Aetna of non-renewal, dated August 6, 1985, is attached. Please note Aetna's position was that we did not have to be notified until November - an example of the very callous attitude that Aetna, our insurance carrier for over 50 years, had toward Vineland. We are grateful for the change in favor of renewal on their part, but we are still not sure of the premium or the status of our Umbrella coverage.

Municipalities cannot be without insurance. We are also concerned with the marketability of municipal insurance. Our search for an alternate market proved futile. It almost appears that there is an anti-trust movement by the insurance industry to close-out and lock-up the market. We feel that Ralph Nader's attack on insurance firms claiming them "unethical" and charging that the companies are provoking a false crisis "to extort excessive rates from the public" is on point.

The emergency moratorium on insurance approved by the Governor is not clear as to how it will affect us because it is a limited moratorium. What happens if we are offered renewals and then in 6 months to a year we are again faced with the question of whether or not the insurance will be renewed. Further, there is no indication at this point what we are going to be paying for insurance.

We cannot sit back and allow the taxpayer to pick-up the bill because we are at the mercy of the carriers in a closed market. We have written to our legislators concerning this matter and pointed out to them that, even though there is pending legislation, there is no guarantee that it would be a "cure-all". We have also written to Hazel Gluck suggesting that there be a state-wide insurance pool. A copy of these letters is attached.

The risk, underwriting and insurance administration expenses should be evaluated. We do not believe pooling on a limited basis is broad enough to spread the risk and the underwriting. Thus, a state-wide, state-controlled and state-administered insurance pool would be a better remedy. Pending legislation to cap the risk would be helpful, but also leaves us vulnerable on a case-by-case basis.

While we in local government negotiate daily within and without our organizational units, insurance is one area where we do not want to compromise.

Thank you for your attention.

Very truly yours,

Linda DeMatte

Mrs. Linda DeMatte
Business Administrator

LD/dm
Encls.
cc: Governor Thomas Kean
William Dressel, State League of Municipalities

(Same letter sent to Assemblyman Guy Muziani and Assemblyman Joseph Chinnici)

JOSEPH E. ROMANO
MAYOR
VINELAND, NEW JERSEY 08360
1(609) 691-3000 EXT. 470

August 20, 1985

Senator James R. Hurley
P. O. Box 809
Millville, New Jersey 08332

Dear Senator Hurley:

The City of Vineland supports Senate 2545, sponsored by Senator John A. Lynch, which would limit the liability of public entities and employees to negligence and relieve them from such "concepts" as strict liability. This legislation would require plaintiffs in pollution law suit cases against municipalities to prove negligence on the part of the municipality before collecting damages. Current statutes do not require any finding of fault. Recently, landfill cases involving the Townships of Jackson (Ocean County) and Gloucester (Camden County) point out the need for this kind of legislation.

The City of Vineland's Insurance Broker of Record concurs with this position of support for Senate Bill 2545. However, we point out to you that this legislation is not a cure- all. There is currently an insurance crisis in New Jersey. We respectfully ask that a complete review of the position of insurance companies with respect to services provided for municipalities in New Jersey be reviewed in their entirety. A recent article in Journal of Commerce points out that over 249 municipalities in New York State have been left without insurance or have faced extremely high renewal premiums in view of the country-wide problem of insuring municipalities. This situation in New York is predicted to repeat itself in New Jersey. We have been put on notice by our Insurance Broker of Record that he is seriously concerned with our ability to secure general liability insurance coverage in 1986. In addition, there is a crisis with respect to coverage for our fleet of vehicles. It appears that the article written by Ralph Nader attacking insurance firms as unethnical, is on point. The position of the insurance industry in increasing policy premiums or refusing to provide coverage for some groups, including municipalities, is effectively against public policy and the public good to be served.

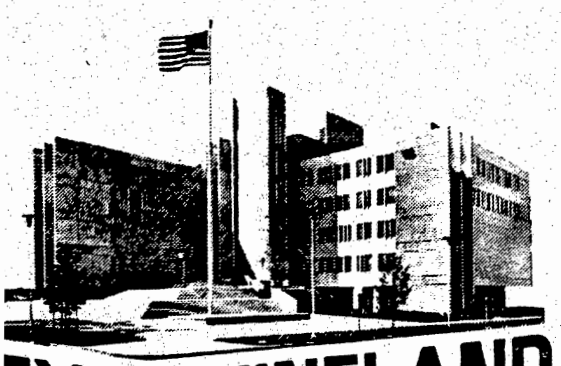
Any steps which can be taken to protect the rights of municipal government in this insurance crisis with respect to reasonable premium rates and availability of coverage will be sincerely appreciated.

Thank you for your attention to this request.

Very truly yours,

Joseph E. Romano
Mayor

JER/pad



TY OF VINELAND

LINDA DE MATTE
BUSINESS ADMINISTRATOR
EXT. 458

VINELAND, NEW JERSEY 08360 • TELEPHONE: (609) 691-3000

September 17, 1985

Ms. Hazel Gluck, Commissioner
New Jersey Department of Insurance
CN-325
Trenton, New Jersey 08625

Dear Ms. Gluck:

The City of Vineland has received notification that our insurance coverage will not be renewed for our General Liability policy and our $5 million Umbrella policy. A copy of the notice from our carrier is attached.

We recognize that Vineland is not the only municipality in the State facing the problem of being left without insurance coverage. We also recognize that New Jersey is not the only state currently experiencing an insurance crisis with respect to General Liability coverage. This is an epidemic of nation-wide proportion.

We have addressed our concerns with the insurance market to our legislators. However, this is not the primary purpose of my addressing this communication to you. We in Vineland are concerned as to whether or not the State Department of Insurance will be initiating a captive carrier insurance program designed to handle only municipal coverage. It appears that we are in an apparent anti-trust conspiracy by the insurance industry to boycott municipalities. They realize that as a municipality we cannot be without insurance, and they anticipate our inflicting their increased rates back to the taxpayer. This should not be the case.

We further address to you our concern as to whether or not the State Department of Insurance will be initiating legislation to amend tort liability. We are extremely frustrated and feel that there should be some type of general insurance fund on a state-wide basis. Underwriting procedures are not broad enough to join a few municipalities in a self-insured exposed risk, but rather there could be a state pool.

Your position and that of the State Department will be invaluable to us in this insurance crisis. We ask that you lend us some advice as to the actions which we can take. We are currently working with our insurance broker of record to attempt to re-market Vineland for General Liability and Umbrella insurance coverage. However, we are not even sure that there is a market at this point.

Thank you for your attention to this request. We shall anxiously await your response in this matter.

Very truly yours,

Linda DeMatte

Mrs. Linda DeMatte
Business Administrator

LD/dm
Encl.

GEORGE F. LAWLEY, INC.
Insurance

615 ELMER STREET
POST OFFICE BOX 882
VINELAND, NEW JERSEY 08360
Phone 609 - 691-0404

OBERT V. COCCHI

August 27, 1985

City of Vineland
7th & Wood Sts.
Vineland, N. J. 08360

Attn: Linda DeMatte

Dear Linda:

In connection with our discussion of yesterday involving the position of the Aetna concerning the City of Vineland General Liability and Umbrella Liability coverages, please note the attached letter which was received by me today, August 27th, 1985.

The Aetna has indicated that they would continue to provide renewals for all coverages except the General Liability and Umbrella.

As you know, I am seeking other markets and will keep you informed as this developes.

Yours very truly,

Robert V. Cocchi

OUR Independent Insurance AGENT SERVES YOU FIRST

RVC:fk
Enc.

129X

Ætna
LIFE & CASUALTY

INTEROFFICE COMMUNICATION

TO MIKE ROSSI, ALLIED INSURANCE SERVICE #3151

FROM P. C. RAYMOND, CID UNDERWRITING MGR. PHILA.

DATE AUGUST 6, 1985

SUBJECT CITY OF VINELAND

DEAR MIKE:

I'M FOLLOWING UP MY LETTER OF APRIL 2 REGARDING THE RENEWAL.

THERE HAS BEEN NO CHANGE IN OUR POSITION ON MUNICIPALITIES OR THE EXPOSURE FROM A POLLUTION LIABILITY STANDPOINT.

YOU SHOULD BEGIN LOOKING FOR ANOTHER CARRIER TO PICK UP THE COVERAGES EFFECTIVE JAN. 1, 1986. WE CAN CONTINUE ON THE EXCESS WORKERS COMPENSATION BUT YOU MAY NEED THAT TO "SWEETEN THE POT".

WE ARE REQUIRED BY NEW JERSEY LAW TO SEND NOTICE OF NON-RENEWAL. IF YOU WISH, WE CAN HOLD UP ON THESE NOTICES UNTIL MID NOVEMBER. IF YOU FIND ANOTHER COMPANY TO WRITE THE COVERAGE, NO NOTICE NEED BE SENT.

I KNOW THIS IS NOT WHAT YOU HOPED. THANKS FOR YOUR UNDERSTANDING OF OUR POSITION.

REGARDS,

PETE

RECEIVED
AUG 26 1985
BRAN
ALLIED INSURANCE SERVICES

CC: MICHAEL MICKINAK, CLAIM MGR PHILA.
THOMAS LYNSKEY, ENGINEERING MGR PHILA.

130X

Law Offices
McCrink, Nelson & Kehler
SUITE #1
230 ROUTE 73
WEST BERLIN, NEW JERSEY 08091
(609) 768-0033

MATTHEW R. McCRINK
PETER H. NELSON
DANIEL R. KEHLER
GEORGE F. GEIST

WRIGHTSTOWN OFFICE
WRIGHTSTOWN SHOPPING CENTER
WRIGHTSTOWN, NEW JERSEY 08562
(609) 723-7300

OUR FILE # _____

October 7, 1985

Senator Raymond Lesniak
60 Prince Street
Elizabeth, NJ 07208

Re: Environmental Impairment Liability Study Commission

Dear Senator Lesniak:

On October 2, 1985 Counselwoman Orpha White from the Borough of Fieldsboro, Burlington County, New Jersey and myself attended the initial meeting of the Environmental Impairment Liability Study Commission, of which you are Chairman. Due to the large amount of participation from the municipalities, we were not reached with respect to testimony we anticipated giving to your Commission. We are coordinating through Mr. William Dressel of the League of Municipalities in order to attempt to be allowed to testify at a future meeting of the Commission, and anticipate doing so, but in the interim, we wish to forward to you for enclosure in the record of the Commission a copy of a letter recently directed to Governor Kean as well as Insurance Commissioner Gluck with regard to the insurance situation as it effects our Borough. I would appreciate your reviewing the letter and forwarding it for enclosure in the record of the Commission. The situation is one of great complexity and we certainly hope that the labor of the Commission will bring about a solution which is fair and just to all parties concerned.

Respectfully submitted,

PETER H. NELSON
Solicitor of Fieldsboro

PHN:mad
Enc.
cc: Mayor and Council

131X

Law Offices
McCrink, Nelson & Kehler
SUITE #1
230 ROUTE 73
WEST BERLIN, NEW JERSEY 08091
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MATTHEW R. McCRINK
PETER H. NELSON
DANIEL R. KEHLER
GEORGE F. GEIST

WRIGHTSTOWN OFFICE
WRIGHTSTOWN SHOPPING CENTER
WRIGHTSTOWN, NEW JERSEY 08562
(609) 723-7300

September 30, 1985

OUR FILE # _____

Governor Thomas Kean
State House
Trenton, New Jersey

Dear Governor Kean:

I have been directed by the Borough Council of the Borough of Fieldsboro, Burlington County, New Jersey, to forward this letter to you with respect to recent developments in the area of municipal insurance coverages and recent arbitrary actions on the part of the insurance companies which insure the Borough of Fieldsboro. I believe the actions taken by our insurer against the Borough are by no means isolated in the area of municipal insurance, and therefore Council has directed me to forward this letter to you and to the Commissioner of Insurance in order to apprise you of these developments.

For the last several years, the Borough of Fieldsboro has carried sufficient general liability insurance to cover it in the event of any culpable act or omissions on the part of its Borough Council, agents, servants or employees. This general liability insurance also covered the operation of a small sewerage treatment plant which is exclusively used to treat sewerage generated within the Borough. The liability policy as well as associated coverages were all scheduled to expire in February of 1986. In August of this year, following on the heels of th recent award in the Jackson Township case, our insurer Penn National Insurance Company presented an ultimatum to our insurance agent: that w that we either purchase a pollution liability policy over and above the limits of our regular liability policies or face cancellation of all ou coverages afforded the Borough of Fieldsboro. We were given thirty (30 days in which to react. After investigation by our insurance agent, it was determined that we faced the dilema of either purchasing the additi liability coverage or having to operate without insurance since there w no other companies willing to pick-up our general liability insurance. The additional premium for this policy was approximately $7,200, which not be a large sum to the State of New Jersey, but to the Borough of Fieldsboro, comprised of some 600 persons, and very few ratables, it wa an imense number which necessitated the restructuring of our financial situation for the year and an application to the Department of Communit Affairs for an emergency appropriation since this additional premium wa not foreseeable at the time of preparing our annual budget.

132X

We recently received and reviewed the emergency order directing that no cancellations issue with regard to existing coverage without the review and approval of the Department of Insurance. We feel, however, that this Order is at best a "band-aid" approach to a problem far more extensive and serious. The order in fact, contains within it areas subject to interpretation which could be used by the companies in order to avoid renewing our insurance or outright cancellation of existing coverages in the event we do not continue with this pollution coverage policy. I specifically refer to the "moral hazard" exceptions as well as the "substantial change in the risk assumed" language which in the light of the Jackson Township case I believe still ultimately leaves the companies with an "out" with regard to the cancellation of insurance policies for municipalities.

We believe that immediate, substantial action must be taken with regard to the immediate problem facing the municipalities with regard to the cancellation of their insurances, or the increase of their premiu to such an extent that municipal foresight and planning is rendered impotent in the face of drastic premium increases.

The Borough Council of the Borough of Fieldsboro urges that you react with regard to this situation which threatens not only our Borough but every municipality within the State of New Jersey, in order to formulate a policy which would afford the municipalities and ultimately the Taxpayers of the State of New Jersey the protection without which local government ceases to function effectively.

Respectfully submitted,

PETER H. NELSON
Solicitor-Borough of Fieldsboro

PHN/ele
cc: Mayor, Borough of Fieldsboro
Council, Borough of Fieldsboro
Andrew G. Sefrensky, Auditor, Borough of Fieldsboro
Hazel Gluck, Commissioner, Department of Insurance
James Saxton, U.S. Congress
Thomas P. Foy, Assemblyman 7th District