

## Insurance Coverage for Landfill Liability

By Nancer Ballard, Esq.<sup>1</sup>

### Introduction

Recent court decisions in New England and elsewhere confirm that owners and operators of landfills, manufacturing plants, and other properties that have been found to be contaminated may obtain protection against some or all of their environmental liability from their insurance policies. Property owners that face potential environmental exposure can take a number of steps to maximum their insurance protection.

### Old Policies Are Valuable

Comprehensive general liability policies cover "occurrences" during the policy period. Standard form policies define an "occurrence" to include unexpected and unintended bodily injury or property damage. Courts in Massachusetts, New Hampshire, New Jersey, and elsewhere have ruled that coverage may be available under policies in effect at the time the hazardous substances are released into or migrate through the environment (i.e. land, groundwater or surface water). For instance, in July of 1993, the Massachusetts Supreme Judicial Court, in Trustees of Tufts v. Commercial Union, No. 6114 (Mass. July 1993), rejected an insurers' argument that only policies in effect when contamination is discovered or "manifest" are obligated to provide coverage. The court stated that any policy in effect when

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property damage occurred may provide protection even if the property damage was not known at the time.

Ironically, the older the policy the more valuable it may be for environmental liability. Most liability policies issued before 1972 have no limitation on pollution coverage. Policies issued between 1973 and 1985 are likely to have some limitation on pollution coverage but can still provide substantial protection in many cases.

### Locating Old Policies

Property owners who believe they may face environmental exposure now or in the future, should collect from company archives and their brokers all available copies of old insurance policies.

Because many environmental coverage claims involve policies covering several decades, it is often difficult to locate copies of all policies that could cover a loss. However, the inability to locate a policy does not preclude coverage if an insured can provide the policy's existence and terms. Many types of evidence can be used to show that a policy existed and to prove its contents. For instance, the broker who issued a policy may have records such as memoranda of insurance, blank policy forms, premium computations, loss run records, and correspondence regarding coverage limits or exclusions. Risk management files may contain summaries of the company's insurance coverage. Legal department records may refer to coverage in correspondence on non-environmental claims that have been asserted against the policyholder in the past. Companies with whom the policyholder has done business or has entered contracts may have insurance information in their files. Auditors often

have information on policy limits and premiums paid, and financial institutions may have required policy information in connection with making loans.

### Recovering Under Old Policies

Insurance companies have well-organized legal and environmental claims departments that have a great deal of experience in attempting to minimize the insurer's environmental exposure. Insurers typically issue lengthy "reservation of rights" letters or disclaimers of coverage to claims for environmental coverage that raise a dozen or more coverage "defenses." Despite these letters, substantial protection may be available to the persistent and informed property owner.

Experienced insurance counsel should be consulted as soon as environmental contamination is discovered. The law interpreting insurers' obligations for environmental liability is in a rapid state of development and different states interpret the same policy language differently. Knowledgeable counsel can help a property owner coordinate liability and insurance interests, and prevent a property owner from losing valuable coverage because it does not understand its obligations to insurers.

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